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POMEROY'S

EQUITY JURISPRUDENCE

AND

EQUITABLE REMEDIES

SIX VOLUMES.

POMEROY'S

EQUITY JURISPRUDENCE,

IN FOUR VOLUMES.

By JOHN NORTON POMEROY, LL D.

THIRD EDITION, ANNOTATED AND MUCH ENLARGED,

AND SUPPLEMENTED BY

A TREATISE ON EQUITABLE REMEDIES,

IN TWO VOLUMES.

By JOHN NORTON POMEROY, Jr.

SAN FRANCISCO:
BANCROFT-WHITNEY COMPANY.
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1905.

A TREATISE

ON

EQUITY JURISPRUDENCE,

AS ADMINISTERED IN

THE UNITED STATES OF AMERICA;

ADAPTED FOR ALL THE STATES,

AND

TO THE UNION OF LEGAL AND EQUITABLE REMEDIES

UNDER THE REFORMED PROCEDURE.

By JOHN NORTON POMEROY, LL.D.

THIRD EDITION,

BY

JOHN NORTON POMEROY, Jr., A.M., LL.B.

IN FOUR VOLUMES.

VOL. II.

SAN FRANCISCO:
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A TREATISE

ON

EQUITY JURISPRUDENCE.

TREATISE

ON

EQUITY JURISPRUDENCE.

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§§ 566, 567. Differences between the gifts which do not and which do defeat the presumption.
§ 568. Election by the beneficiary.
§§ 569–577. V. Admissibility and effect of extrinsic evidence.
§ 570. General principles discussed and explained.
§§ 571–575. When the subsequent benefit is given by a writing.
§ 572. The writing expressly states the donor's intention.
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§ 574. The writing silent as to donor's intention, but a presumption of satisfaction arises from it.
§ 575. Cases to which the foregoing rules apply.
§ 576. When the subsequent benefit is given verbally.
§ 577. Amount of evidence.

§ 520. Questions Stated.— In the first paragraph of the preceding section, it was stated that the equitable doctrine of election, considered in its broadest sense, originates in inconsistent or alternative gifts, with the intention, either expressed or implied, that one shall be substituted for the other. Two distinct cases were described, differing in their circumstances, but depending ultimately upon the same principle. Of these two, the first has been treated of under the name "election," while the second is usually known by the title "satisfaction." The most general condition of circumstances under which this second case arises was described as follows: If the person to whom, by an instrument of donation, a benefit is given, possesses at the same time a previous claim against the donor, and an intention appears that he shall not both enjoy the benefit and enforce the claim, then the gift being designed as a satisfaction of the claim, he cannot accept the former without renouncing the latter. The underlying *principle* which controls this case is the same as that which governs election; under many circumstances the donee is required to actually elect between his original and his substituted rights; while under others

the satisfaction is complete and the substitution is effected without the exercise by him of any actual choice.[1]

§ 521. **Definition.**— Satisfaction may be defined, in a general manner, to be the donation of a thing, with the intention, either expressed or implied, that it is to be taken either wholly or in part in extinguishment, by way of substitution, of some prior claim in favor of the donee.[1] The equitable doctrine of satisfaction, considered in all its aspects, arises in four general classes of cases, namely: Satisfaction of debts by legacies; satisfaction of legacies by subsequent legacies; satisfaction of portions by legacies; and satisfaction of legacies by portions or advancements.

§ 522. **Various Conditions of Fact.**— Before proceeding with the discussion of the particular rules applicable to each of these four classes, it is very important to obtain a clear and accurate notion of the various questions involved in the subject, of the different conditions of facts and circumstances from which these questions may arise, and of the technical terms employed by the courts in stating and defining the rules themselves. No little confusion and uncertainty have resulted from a neglect on the part of text-writers and judges sometimes to distinguish between these questions and circumstances, and from their improper use of these terms. The question concerning the satisfaction of portions by legacies, or of legacies by portions, has ordinarily arisen in England, where there has been a formal settlement whereby a parent has covenanted to pay specified sums as portions for the benefit of his children, preceded or followed by a will bequeathing property to the same bene-

§ 520, [1] See *ante*, § 461.

§ 521, [1] Note of English editor in 2 Lead. Cas. Eq., 4th Am. ed., 754, approved in Lord Chichester v. Coventry, L. R. 2 H. L. 71, 95. In Goldsmith v. Goldsmith, 1 Swanst. 211, the notion of "satisfaction" was thus explained: "An important distinction exists between satisfaction and performance. Satisfaction supposes intention; it is something different from the subject of the covenant, and substituted for it; and the question always arises, Was the thing done *intended* as a substitute for the thing covenanted to be done? — a question entirely of intent. But with reference to performance the question is, Has the identical act which the party contracted to do been done?"

ficiaries. While such formal settlements are not unknown, they are certainly infrequent in the United States; and the analogous questions have ordinarily arisen in this country, where, after a will conferring bequests, the testator has, during his own lifetime, either formally by means of a written instrument, or informally by means of delivery or payment accompanied only by verbal declarations, bestowed property upon the beneficiaries provided for in his will.

§ 523. **Rationale of the Doctrine.**— In considering the most important branch of the subject,— namely, the satisfaction of portions by legacies, and of legacies by portions or advancements,— two entirely distinct states of fact may exist, which are governed by entirely different rules. In the one case there is a settlement covenanting to pay a portion, followed by a will simply giving property to the same beneficiary; or there is a will bequeathing property, followed by a settlement covenanting to pay a portion, or by an actual payment, to the same beneficiary; but in neither instance does the donor, in express terms, declare that the second gift is a substitute for or a satisfaction of the former one, or impose, in the written instrument of donation, any such restriction or condition upon the receipt or acceptance of his bounty. In such a condition of facts the equitable doctrine concerning satisfaction is based wholly upon a *presumption;* the intent of the donor that his second gift should be a substitute for the first is inferred *as a presumption* from the situation of the parties, and from the nature of the donations themselves. It will be seen that the presumption only arises, and the doctrine based upon it only applies, when the donor is the parent of, or stands *in loco parentis* to, the beneficiary. All the subordinate rules connected with this condition of fact, and especially those which regulate the admission of extrinsic evidence, flow immediately and solely from the presumption which lies at the foundation of this particular branch of the general doctrine. In the second case there is likewise a settlement covenanting to pay a portion, followed by a will giving prop-

erty to the same beneficiary; or there is a will bequeathing property, followed by a settlement covenanting to pay a portion; or by an actual payment to the same beneficiary; but in each instance the donor, in terms sufficiently express to show his intent, declares that the second gift is made as a substitute for or in lieu of the former one, or imposes in the written instrument of donation such a restriction or condition upon the receipt and acceptance of his bounty; or else the donee expressly accepts the second gift as a substitute, and agrees to receive it in lieu of the former benefit. In this condition of fact the equitable doctrine concerning satisfaction is entirely unconnected with any presumption; the intent of the donor that his second gift shall be a substitute for the first does not depend upon and is not aided by any presumption; it is inferred, if at all, wholly from the language, either written or spoken, accompanying the donation, and indicating its character and purpose; the question is one simply of construction. It will be seen that in such a state of facts the doctrine of satisfaction will be applied without any reference to the relations existing between the donor and his beneficiaries,— alike when the donor is a parent, or *in loco parentis,* or a stranger. The great importance of the distinction which thus exists between these two states of fact will more fully appear in the subsequent discussion.[1] There are, therefore, two kinds of

[1] It cannot be denied that this fundamental distinction has been lost sight of in several of the American decisions, and has not been made sufficiently prominent in some of the English ones, and rules which are really clear and simple have thus been involved in unnecessary confusion. The distinction which I have explained in the text was very clearly stated by Lord Romilly, M. R., in the recent case of Cooper v. Cooper, L. R. 8 Ch. 813, 819, note: "In considering these cases, it is important to notice, in the first instance, whether the donor of the benefit which is claimed to be satisfied by subsequent benefits stands in the place of a parent or in the place of a stranger. If he stands *in loco parentis,* the presumption of equity being against double portions, the *presumption* of satisfaction arises at once. . . . In the case of a stranger, the presumption against double portions does not arise at all. It is wholly a question of construction, and no evidence is admissible either to sustain or rebut any presumption, for the reason that none arises. In this latter case the question of satisfaction never arises except upon the express

satisfaction embraced within the general doctrine,— one which equity *presumes* to arise from double donations to the same beneficiary, where the instruments of donation or the language used by the donor are completely silent with respect to any such intention; the other, which arises from the very language of the donor, or from the very terms of the donation, in which the intent to substitute the second gift in place of the former one is sufficiently expressed.

§ 524. Ademption and Satisfaction.— Another matter connected with the general subject, concerning which it is extremely important to form accurate notions, is the meaning and use of the terms "satisfaction" and "ademption." In many judicial opinions, and by several text-writers, the words "satisfaction" and "ademption" are regarded as absolutely synonymous, and are used interchangeably, the rules with respect to each being stated in exactly identical terms. There is, however, a plain and necessary distinction between the two,— a distinction which is recognized by cases of the highest authority, and has been expressly pointed out and explained by some of the ablest judges. The exact legal conceptions involved in the two terms "satisfaction" and "ademption" are most clearly defined by the opinions delivered in a recent case of great import-

words of the donor; and whether the gifts said to be given in satisfaction are given by a father or a stranger is wholly immaterial, and it is solely a question whether the original benefactor intended that his benefit should be diminished or satisfied by benefits derived from any other source, and if so, what other source. This may be shown pointedly in a case where the gifts supposed to be a satisfaction of the original gifts are gifts of land. In the case of a parent or person *in loco parentis*, land would be no satisfaction for a covenant to pay money. The presumption against double portions does not arise in such case. But if the original gift was to a stranger, the doctrine of satisfaction becomes applicable according to the words of the original donor. Then the question is, whether the words he has used, fairly interpreted, meant the gifts of land as satisfaction of the benefits he has bequeathed or previously conveyed. It is therefore of paramount importance to consider, in all cases, whether the doctrine of presumption against double portions, or the doctrine of construction of instruments, is that which applies to the case." The decision made by the court of appeals was also based upon the same view of the doctrine.

ance decided by the house of lords, and by a still later decision by the high court of appeal in England. Extracts from these opinions will be found in the foot-note.[1] The

[1] Lord Chichester v. Coventry, L. R. 2 H. L. 71, 82, 86, 90, 91. Mr. Beaven, on the marriage of his daughter, covenanted, by a settlement, to pay to the trustees, three months after demand, ten thousand pounds for the uses declared in the settlement, with interest until payment. The principal sum was never demanded during his lifetime, but the interest was paid. He afterwards made a will, which took effect at his subsequent death, by which he gave his property to trustees, "in the first place, to pay his debts and legacies," etc., and then to divide the residue into equal moieties, and to transfer the same to his daughters. The trusts created by the will were very different from those created by the settlement. The question for decision was, whether the covenant in the prior settlement to pay the ten thousand pounds for the benefit of the married daughter was satisfied by the gift of a moiety of the residue contained in the will. The court held that, from a view of the great difference between the provisions of the will and the trusts of the settlement, the presumption that the second gift was intended as a satisfaction of the former did not arise. Lord Romilly used the following language (p. 90): "It is to be remembered that this is a case of *satisfaction*, not of *ademption*. I think that a full view of the cases and a consideration of the doctrine on this subject do not justify the observation that there exists no distinction between ademption and satisfaction. I venture to think that the distinction is marked, and that it is recognized in all the decided cases on the subject. It appears to me to be accurately expressed by the legal terms 'ademption' and 'satisfaction.' The general question was, I think, well expressed by Lord Cranworth during the argument, when he said that in cases where it arises, the second instrument must be read as if the maker of that instrument had expressed in it that he intended the benefit thereby given to be taken in substitution for the benefit given by the former instrument. In truth, in both cases the second gift is given in substitution for the former benefit. The distinction between ademption and satisfaction lies in this: in ademption the former benefit is given by a will, which is a revocable instrument, and which the testator can alter as he pleases, and consequently when he gives benefits by a deed subsequently to the will, he may, either by express words or by implication of law, substitute a second gift for the former, *which he has the power of altering at his pleasure.* Consequently in that case the law uses the word 'ademption,' because the bequest or devise contained in the will is thereby adeemed or taken out of the will. But when a father on the marriage of a child enters into a covenant to settle either land or money, he is unable to adeem or alter that covenant, and if he gives benefits by his will to the same object, and states that this is to be in satisfaction of the covenant, he necessarily gives the objects of the covenant the right to elect whether they will take under the covenant, or whether they will take under the will. Therefore this distinction is manifest. In cases of satisfaction the persons intended to be benefited by the covenant, and the persons intended to be benefited by the bequest or devise, must be the same. In cases of ademption they may be, and frequently are, different. The cases of Lord Durham v. Wharton, 3 Clark

term "ademption" is confined to the cases in which a benefit has been given by a prior will, and this benefit is subsequently taken away or annulled by the testator's own act in conferring some other gift during his lifetime. Whether the ademption takes place, or in other words, whether the prior testamentary gift is anticipated and discharged, depends solely upon the testator's own intention, wholly without reference to any consent or other act of the donee; an ademption operates, if at all, entirely independently of the

& F. 146, and Lady Thynne v. Lord Glengall, 2 H. L. Cas. 131, afford striking and leading instances of each of these two cases. Lord Durham v. Wharton, 3 Clark & F. 146, was a case of ademption." Lord Chancellor Chelmsford said (p. 82): "The question whether a gift in a will is to be considered as a satisfaction of a portion given by a settlement, or a portion given by settlement is to be taken as an ademption of a gift by will, is one of intention. It is certainly easier to arrive at a conclusion as to that intention when the will precedes the settlement than when the settlement is first and the will follows. In the case when the revocable instrument is first, and a portion is given by it, if the event of marriage or any other occasion for advancing a child should afterwards occur, it may very reasonably be supposed that the parent has anticipated the benefit provided by the will, and has intended to substitute for it the new provision, either entirely or *pro tanto*. But when an irrevocable settlement is followed by a will, it is not so easy to infer that an additional benefit was not intended by the testator, except when he expressly declares his intention to be otherwise, or when the gift in the will and the portion in the settlement so closely resemble each other as to lead to a reasonable intendment that the one was meant to be substituted for the other. In determining in any particular case whether a gift by a parent, or a person *in loco parentis*, is intended to be in addition to or in satisfaction for a prior gift by the same person, it must always be borne in mind that there is a presumption, or, as Lord Eldon expressed it in Ex parte Pye, 18 Ves. 140, 'a sort of feeling upon what is called a leaning against double portions.' 'This presumption,' as Sir John Leach said in Weall v. Rice, 2 Russ. & M. 267, 'may be repelled or fortified by intrinsic evidence derived from the nature of the two provisions.'" Lord Cranworth also said (p. 86): "Neither party disputed the rule, acted on in courts of equity, that there is a presumption against double portions. It is, however, but a presumption, and is therefore liable to be met by counter-presumptions showing that in any particular case it ought not to prevail. It is a rule much easier of application when the first provision is made by will and the second by deed, than when the first provision is by settlement and the will follows. In the former case the provision by will is under the absolute control of the person making it up to the time of his death; and when, therefore, after the date of the will, he makes a settlement for the benefit of the person provided for by the will, the only question is, whether he intends the latter to supersede the former pro-

donee's assent, and even against his will. The testator's intent to discharge the prior bequest in this manner, by substituting another donation, may be inferred, in some cases, by means of a presumption, from the very act itself, or may be inferred in other cases from the express terms which he uses accompanying and describing the act; but in all cases the ademption depends upon the testator's own intention to deal with a testamentary gift which is revocable and under his own control. In the sense in which the terms are

vision. If that is his intention, he has unlimited power to carry it into effect; he is under no obligation to obtain the consent of the person for whom he intended to provide by his will. But where a parent provides for a daughter by settlement on her marriage, binding himself to secure at his death a stipulated sum for the benefit either of her absolutely, or of her and her husband and their issue, and afterwards makes provision for her or them by his will, it is obvious that without the consent of those entitled under the settlement he cannot substitute the benefits he may have chosen to confer by his will for those which he had already secured by deed. In such a case he can only make the testamentary gift a substitute for what he was by deed bound to provide, in case those entitled under the settlement see fit so to accept it. The application of the rule is thus made more difficult; still there is no doubt that the rule itself is held to be applicable in the latter as well as in the former case. But the rule, as I have already noticed, is but a rule of presumption, and there is much less difficulty in supposing that it was not intended to prevail where the person to whose disposition it is to be applied had not the power to enforce it without the consent of others, than in a case where the whole was under his absolute control. When the will precedes the settlement, it is only necessary to read the settlement as if the person making the provision had said, 'I mean this to be in lieu of what I have given by my will.' But if the settlement precedes the will, the testator must be understood as saying, 'I give this in lieu of what I am already bound to give, if those to whom I am so bound will accept it.' It requires much less to rebut the latter than the former presumption." Also, in the very recent case In re Tussaud's Estate, L. R. 9 Ch. Div. 363, 380, Cotton, L. J., delivering the opinion of the court of appeal, said: "It must be remembered that the case is one, not of ademption, but of satisfaction, and the two classes of cases are pointedly distinguished in Lord Chichester v. Coventry, L. R. 2 H. L. 71. In a case of ademption, where the will is first, that is a revocable instrument, and the testator has an absolute power of revoking or altering any gift thereby made. But where the obligation is earlier in date than the will, the testator, when he makes his will, is under a liability which he cannot revoke or avoid. He can only put an end to it by payment, or by making a gift with the condition, expressed or implied, that the legatees shall take the gift made by the will in satisfaction of their claim under the previous obligation. It is therefore easier to assume an intention to adeem than an intention to give a legacy in lieu or in satisfaction of an existing obligation."

now used, every ademption of a prior gift is a satisfaction, but every satisfaction is not an ademption. It necessarily follows that ademption cannot be correctly applied to any cases in which a party, being already under some prior legal obligation,— as, for example, any indebtedness, or an agreement to pay a portion contained in a prior settlement, — makes a subsequent gift by will to the person in whose favor the obligation exists, with the intent, either expressed or presumed, that the same shall be substituted for and in satisfaction of the prior obligation, since in all such cases the substitution and satisfaction cannot result from the donor's intent alone, but require the concurrence and assent of the donee. For the same reason, the term " ademption " cannot be correctly applied to any case where the substitution for and satisfaction of a prior testamentary benefit, by means of a subsequent gift from the testator, depend upon an agreement with or assent of the beneficiary, and not solely upon the intent of the testator himself.

§ 525. Extrinsic Evidence.— There is still another matter connected with the general doctrine of satisfaction which requires care and accuracy in distinguishing between different conditions and relations, but concerning which there is unfortunately no little confusion in some judicial opinions, resulting from a failure to observe these necessary distinctions. I refer to the admission of extrinsic evidence upon the question whether a subsequent gift is or is not in satisfaction of a prior one. In all those cases where, from the relations between the parties and the nature of the two gifts, the intention of the donor to give the second in place and satisfaction of the first is *presumed* in accordance with a settled rule of equity, it is plain that the question of a satisfaction or not cannot *primarily* depend upon any extrinsic evidence of the donor's intention, because, in the absence of all evidence except that furnished by the nature of the gifts and the relations of the parties, the intention is presumed. Extrinsic evidence can, from the necessities of

the case, only be used for the purpose either of rebutting or of aiding the presumption. The only possible questions are, whether *any* extrinsic evidence, either written or oral, can thus be admitted to rebut or sustain the presumption; and if so, what force and effect shall be given to any particular evidence which has been admitted. In the other class of cases, where there is no presumption, and where the satisfaction results solely from the express terms employed by the donor accompanying his second gift and showing his intention in making it, or upon the terms of the agreement between the donor and the beneficiary, with respect to the making and acceptance of the second gift, it is plain that the whole question of a satisfaction or not must *primarily* depend upon the evidence disclosing the intent of the donor, or disclosing the terms of the agreement between himself and the beneficiary, or disclosing the consent of the beneficiary to accept the second gift in substitution and satisfaction of the prior gift or obligation. In cases of this class some evidence is, of course, necessary; the important questions are as to the kind and nature of the evidence admissible, whether written or oral, and especially, when the second gift is contained or declared in a written instrument, whether the donor's intention must be discovered from the terms of such instrument alone, or whether it may be shown by evidence, either written or verbal, outside of and collateral to the instrument of donation. It is plain that the questions concerning the admissibility and effect of extrinsic evidence in these two classes of cases are quite different, and depend for their solution upon different reasons and rules.

§ 526. **Divisions of the Subject.**— Having thus explained the important matters connected with the general doctrine of satisfaction, I shall proceed at once to their examination. Adopting the order in which the more simple questions precede those which are more complicated and difficult, I shall treat the whole subject under the following heads: 1. Satis-

faction of debts by legacies; 2. Of legacies by subsequent legacies; 3. Of legacies by portions and advancements; 4. Of portions by legacies; and 5. Extrinsic evidence, its admissibility and effect.

§ 527. I. Satisfaction of Debts by Legacies — Legacy by a Debtor to his Creditor.— The general rule as stated by Sir J. Trevor, M. R., in the leading case of Talbot v. Duke of Shrewsbury,[1] is as follows: "If one, being indebted to another in a sum of money, does by his will give him a sum of money as great as or greater than the debt, without taking any notice at all of the debt, this shall nevertheless be in satisfaction of the debt, so that he shall not have both the debt and the legacy." Wherever this rule operates, and the presumption of satisfaction arises, the creditor-legatee is of course put to his election: if he claims the legacy, he cannot enforce the debt; if he enforces the debt, he cannot obtain the legacy. It is also proper to remark that a debtor-testator can always thus put his creditor to an election, by accompanying his testamentary gift, whatever be its nature or amount, with words sufficiently indicating his intention that it is made and must be received in lieu and satisfaction of the debt.[2 a] This general rule, being based upon artificial

1 Prec. Ch. 394; 2 Lead. Cas. Eq., 4th Am. ed., 751. To this statement of the general rule it was added: "But if such a legacy were given upon a contingency, which, if it should not happen, the legacy would not take place, in that case, though the contingency does actually happen, and the legacy thereby became due, yet it shall not go in satisfaction of the debt; because a debt which is certain shall not be merged by an uncertain and contingent recompense. For whatever is to be a satisfaction of a debt *ought to be so in its creation* and at the very time it is given, which such contingent provision is not."

2 Brown v. Dawson, Prec. Ch. 240; Fowler v. Fowler, 3 P. Wms. 353; Richardson v. Greese, 3 Atk. 68; Gaynon v. Wood, 1 Dick. 331; Bensusan v. Nehemias, 4 De Gex & S. 381; Shadbolt v. Vanderplank, 29 Beav. 405; Tolson v. Collins, 4 Ves. 483; Dey v. Williams, 2 Dev. & B. Eq. 66; Perry v. Maxwell, 2 Dev. Eq. 488, 499; Ward v. Coffield, 1 Dev. Eq. 108; Byrne v. Byrne, 3 Serg. & R. 54; 8 Am. Dec. 641; Wesco's Appeal, 52 Pa. St. 195; Horner's Ex'r v. McGaughy, 62 Pa. St. 189; Van Riper v. Van Riper, 2 N. J. Eq. 1; Strong v. Williams, 12 Mass. 389; 7 Am. Dec. 81; Parker v. Coburn, 10 Allen, 82;

(a) See, also, In re Fletcher, L. R. 38 Ch. Div. 373 (legacy of exact amount of debt); Atkinson v. Littlewood, L. R. 18 Eq. 595.

reasoning, has been distinctly condemned by able judges. It is not favored by courts of equity; on the contrary, they lean strongly against the presumption, will apply it only in cases which fall exactly within the rule, and will never enlarge its operation.[3]

§ 528. **What Prevents the Presumption.**—In consequence of this strong leaning against the presumption, it is well settled that courts of equity will take hold of very slight circumstances connected with any particular case, and will regard them as sufficient to remove the case from the operation of the general rule, and to prevent the presumption of a satisfaction from arising.[1] In fact, the discussion of the general doctrine chiefly consists in the statement and de-

Allen v. Merwin, 121 Mass. 378; Eaton v. Benton, 2 Hill, 576; Harris v. Rhode Island etc. Co., 10 R. I. 313; Crouch v. Davis, 23 Gratt. 62; Gilliam v. Chancellor, 43 Miss. 437; Gilliam v. Brown, 43 Miss. 641; 2 Roper on Legacies, 1025–1052; 2 Redfield on Wills, c. 1, sec. 10.

[3] See Richardson v. Greese, 3 Atk. 65; Fowler v. Fowler, 3 P. Wms. 353; Mathews v. Mathews, 2 Ves. Sr. 636; Stocken v. Stocken, 4 Sim. 152; Lady Thynne v. Earl of Glengall, 2 H. L. Cas. 153; and the American cases cited in the last preceding note.

With reference to the operation of this general doctrine, Mr. Snell sums up the following propositions as the conclusions resulting from the decided cases: "1. Words ordinarily employed to grant a legacy show an intention of favor rather than an intention to fulfill an obligation,— i. e., 'a legacy imports bounty'; 2. If the debtor bequeaths exactly the same sum, *simpliciter*, as the debt, it will be taken as satisfaction: Haynes v. Mico, 1 Brown Ch. 130; 3. If the legacy be less than the debt, it was never held to go in satisfaction, not even *pro tanto:* Eastwood v. Vincke, 2 P. Wms. 617; 4. The legacy of a sum, *simpliciter*, greater than a debt, will be taken as satisfaction of the debt, and only imports a bounty as to the excess of the legacy over the debt: Talbot v. Shrewsbury, Prec. Ch. 394; 5. The presumption will not be raised where the debt of the testator was contracted subsequently to the making of the will; for he could have no intention of making any satisfaction for what was not in existence: Cranmer's Case, 2 Salk. 508; 6. Equity will lay hold of slight circumstances to indicate an intention that the legacy shall not go as a satisfaction."

[1] Richardson v. Greese, 3 Atk. 65; Fowler v. Fowler, 3 P. Wms. 353; Mathews v. Mathews, 2 Ves. Sr. 636; Stocken v. Stocken, 4 Sim. 152; Lady Thynne v. Earl of Glengall, 2 H. L. Cas. 153; Strong v. Williams, 12 Mass. 389; 7 Am. Dec. 81; Eaton v. Benton, 2 Hill, 576; Van Riper v. Van Riper, 2 N. J. Eq. 1; Byrne v. Byrne, 3 Serg. & R. 54; 8 Am. Dec. 641; Horner v. McGaughy, 62 Pa. St. 191; Smith v. Smith, 1 Allen, 129; Edelen v. Dent, 2 Gill & J. 185; Gilliam v. Brown, 43 Miss. 641; Crouch v. Davis, 23 Gratt. 62.

scription of these facts and circumstances which prevent its application. The following are the important instances, as settled by the decisions, in which the presumption of a satisfaction is thus overcome.

§ 529. **Legacy Less than the Debt.**— A legacy less in amount than the debt does not operate, under the general rule, as a satisfaction, even *pro tanto;* no presumption arises in favor of a satisfaction; on the contrary, the presumption is, that the legacy was not intended to be in lieu of the debt.[1] Where, however, a smaller legacy is given in pursuance of a previous arrangement between the testator and his creditor that it should be a part payment, it will operate as a satisfaction *pro tanto.*[2]

§ 530. **Legacy Payable at a Different Time from the Debt.**— A legacy payable at a different time from the debt will not be a satisfaction thereof, even though it may be equal in amount to or greater than the debt.[1] If, therefore, the debt was due and payable at the testator's death, and a legacy was made payable at any specified time after his death, there would be no satisfaction.[2]

§ 529, [1] Eastwood v. Vincke, 2 P. Wms. 613, 617; Graham v. Graham, 1 Ves. Sr. 263; Atkinson v. Webb, 2 Vern. 478; Cranmer's Case, 2 Salk. 508; Strong v. Williams, 12 Mass. 389; 7 Am. Dec. 81; Eaton v. Benton, 2 Hill, 576.

§ 529, [2] Hammond v. Smith, 33 Beav. 452. It should be remembered that the testator may show an intention in express terms that his gift is to be in full or partial satisfaction of any obligation, and such intention would prevail by putting the beneficiary to an election. The rules of the text apply only when legacies are given *simpliciter,* or without the accompanying expression of any special intent by the testator.

§ 530, [1] Haynes v. Mico, 1 Brown Ch. 129; Clark v. Sewell, 3 Atk. 96; Jeacock v. Falkener, 1 Brown Ch. 295; 1 Cox, 37; Atkinson v. Webb, Prec. Ch. 236; Nicholls v. Judson, 2 Atk. 300; Hales v. Darell, 3 Beav. 324, 332; Charlton v. West, 30 Beav. 124, 127; Byrne v. Byrne, 3 Serg. & R. 54; 8 Am. Dec. 641; Eaton v. Benton, 2 Hill, 576; Van Riper v. Van Riper, 2 N. J. Eq. 1; Edelen v. Dent, 2 Gill & J. 185; Perry v. Maxwell, 2 Dev. Eq. 488.[a]

§ 530, [2] Clark v. Sewell, 3 Atk. 96, in which the legacy was made payable *one month* after testator's death: Cole v. Willard, 25 Beav. 568; but see Wathen v. Smith, 4 Madd. 325.

(a) See, also, In re Horlock, [1895] 1 Ch. 516 (debt payable within three months of death, and no time fixed for payment of legacy); In re Dowse, 50 L. J. (Ch.) 285, 286.

§ 531. **Legacy Contingent or Uncertain.**— A legacy which is contingent,— that is, where the gift itself depends upon a contingency,[1]— or one which is of an uncertain amount,— as, for example, a residue, although it subsequently turns out to be larger than the debt,— will not be regarded as a satisfaction.[2]

§ 532. **Legacy of a Different Nature or for a Different Interest.**— The general presumption of a satisfaction does not arise where the legacy is given for a different interest, or is of a different nature from the debt,— as where the debt is a specific sum, and the bequest is of an annuity. For this reason a devise of lands or bequest of specific chattels or securities will not be a satisfaction of a pecuniary liability.[1]

§ 533. **Motive for the Gift Stated.**— Where the testator states in his will some particular motive or reason for making the gift, the legacy under these circumstances is not presumed to be a satisfaction of an existing debt;[1] unless the very motive or reason stated is that the debt should thereby be discharged.

§ 534. **The Debt Contingent or Uncertain.**— The general presumption of a satisfaction will not arise where the debt itself owing by the testator is contingent or uncertain; as,

§ 531, [1] Mathews v. Mathews, 2 Ves. Sr. 635; Nicholls v. Judson, 2 Atk. 300; Crompton v. Sale, 2 P. Wms. 552; Byrne v. Byrne, 3 Serg. & R. 54; 8 Am. Dec. 641; Eaton v. Benton, 2 Hill, 576; Van Riper v. Van Riper, 2 N. J. Eq. 1.

§ 531, [2] Devese v. Pontet, 1 Cox, 188; Lady Thynne v. Earl of Glengall, 2 H. L. Cas. 154; Barret v. Beckford, 1 Ves. Sr. 519; Byrne v. Byrne, 3 Serg. & R. 54; 8 Am. Dec. 641.

§ 532, [1] Eastwood v. Vincke, 2 P. Wms. 614; Forsight v. Grant, 1 Ves. 298; Cole v. Willard, 25 Beav. 568; Bartlett v. Gillard, 3 Russ. 149; Fourdrin v. Gowdey, 3 Mylne & K. 409; Rowe v. Rowe, 2 De Gex & S. 294; Edmunds v. Low, 3 Kay & J. 318; Richardson v. Elphinstone, 2 Ves. 463; Byde v. Byde, 1 Cox, 49; Edelen v. Dent, 2 Gill & J. 185; Partridge's Adm'r v. Partridge, 2 Har. & J. 63; Cloud v. Clinkinbeard, 8 B. Mon. 397; 48 Am. Dec. 397; Caldwell v. Richard, 1 B. Mon. 228; Smith v. Marshall, 1 Root, 159. Where the bequest is of an interest different from the debt; as, for example, a bequest of the residue of real and personal estate for life was held not to be a satisfaction of an obligation to lay out a sum of money in lands and convey them to the person in fee: Alleyn v. Alleyn, 2 Ves. Sr. 37.

§ 533, [1] Mathews v. Mathews, 2 Ves. Sr. 635; Charlton v. West, 30 Beav. 124, 127.

for example, where it is upon a running account, or is upon a negotiable instrument which is legally transferable to another holder.[1] But this exception does not apply, so as to prevent the general presumption of a satisfaction from operating, where a debt certainly exists, but the *amount* of it is not precisely known.[2]

§ 535. **The Debt Subsequently Contracted.**— Nor can a legacy, whatever be its amount, be regarded as a satisfaction of a debt contracted by the testator subsequently to the execution of the will. As the general presumption is based upon a supposed intention of the testator when he gives the legacy, the very foundation of the doctrine is wholly wanting in such a case.[1]

§ 536. **Different Interests or Rights in the Debt and Legacy.** — In order that the presumption of satisfaction may apply, it may be stated as a general proposition that the same estate or interest must be given in the legacy which subsists in the debt; and the legacy must be given to the legatee in and by the same right as that in and by which he is entitled to the debt.[1]

§ 537. **Direction in Will to Pay Debts.**— Where a testator, by a clause in his will, expressly directs that *debts and legacies* shall be paid, such a direction, it is abundantly settled, shows an intention on his part that *both* should be paid, and overcomes any presumption of satisfaction which might otherwise arise; a legacy, therefore, in such cases will not

§ 534, [1] Rawlins v. Powel, 1 P. Wms. 297; Carr v. Eastabrooke, 3 Ves. 561; Strong v. Williams, 12 Mass. 389; 7 Am. Dec. 81, per Putnam, J.; Horner v. McGaughy, 62 Pa. St. 189; Gilliam v. Brown, 43 Miss. 641.

§ 534, [2] As where it consists of a deposit of money subject to be drawn upon from time to time, and thus lessened: Edmunds v. Low, 3 Kay & J. 318; Smith v. Smith, 3 Giff. 263.

§ 535, [1] Thomas v. Bennet, 2 P. Wms. 343; Cranmer's Case, 2 Salk. 508; Plunkett v. Lewis, 3 Hare, 330; Strong v. Williams, 12 Mass. 389; 7 Am. Dec. 81; Horner v. McGaughy, 62 Pa. St. 189.

§ 536, [1] Bartlett v. Gillard, 3 Russ. 149; Fourdrin v. Gowdey, 3 Mylne & K. 409; Rowe v. Rowe, 2 De Gex & S. 294; Smith v. Smith, 3 Giff. 263; Hall v. Hall, 1 Dru. & War. 94; Pinchin v. Simms, 30 Beav. 119. But a debt due to a single woman may be satisfied by a legacy to her after her subsequent marriage: Edmunds v. Low, 3 Kay & J. 318.

be a satisfaction of a debt.[1] A majority of the English cases also hold that a direction in the will to pay debts alone will have the same effect as a direction to pay debts and legacies.[2]

§ 538. **Legacy in Pursuance of Agreement or in Express Payment.**— The general doctrine as to a presumption of satisfaction, and the limitations upon it, described in the foregoing paragraphs, are based upon the bare facts of a debt and a legacy, upon their respective natures, and upon the relative situation of the testator and the creditor-legatee; and they assume that there is no express language in the will, accompanying the legacy, and declaring its object and effect, or no previous arrangement between the parties stamping a special character upon the testamentary gift. It is therefore well settled that if one person renders any services to another upon an understanding or arrangement that he is to be remunerated therefor by a testamentary benefit, and the party receiving the services afterwards makes a bequest or devise in his will in favor of the other,

1 Chancey's Case, 1 P. Wms. 408, 410; Richardson v. Greese, 3 Atk. 64, 68; Jefferies v. Michell, 20 Beav. 15; Hales v. Darell, 3 Beav. 324, 332; Hassell v. Hawkins, 4 Drew. 468; Lord Chichester v. Coventry, L. R. 2 H. L. 71.

2 Hales v. Darell, 3 Beav. 324, 332; Jefferies v. Michell, 20 Beav. 15; Cole v. Willard, 25 Beav. 568, 573; Charlton v. West, 30 Beav. 124; Glover v. Hartcup, 34 Beav. 74; Pinchin v. Simms, 30 Beav. 119; Lord Chichester v. Coventry, L. R. 2 H. L. 71; Dawson v. Dawson, L. R. 4 Eq. 504. The decisions are, however, not unanimous on this point. In Edmunds v. Low, 3 Kay & J. 318, 321, a direction to pay debts alone was held by Page Wood, V. C., not of itself sufficient to rebut the general presumption of a satisfaction; but in Rowe v. Rowe, 2 De Gex & S. 297, 298, Knight Bruce, V. C., held that such a direction, though not sufficient as a matter of law absolutely to overcome the presumption, was to be regarded as a circumstance of great weight, tending to show such an intention on the testator's part.[a] The effect of a direction in the will to pay debts and legacies, as stated in the text, is also recognized by the American courts: Strong v. Williams, 12 Mass. 389, per Putnam, J.; and see other American cases cited in previous notes.

(a) In Bradshaw v. Huish, L. R. 43 Ch. Div. 262, this subject was again examined, and the decisions were reviewed, as the result of which it was held that a direction to pay debts is sufficient, without a further direction to pay legacies, to exclude the presumption that a legacy equal to or exceeding the debt is a satisfaction of the debt.

which is in its amount and value a reasonably sufficient compensation, such testamentary provision is a satisfaction, and the creditor party cannot enforce his demand as a debt by an action against the estate.[1] It would seem that, under these circumstances, the creditor party would not even have an election, since he had agreed to look to the testamentary benefit alone for compensation. This result, however, must evidently depend upon the terms of the original agreement, in pursuance of which the services were rendered. Wherever, also, there being an existing indebtedness, it is agreed between the parties, either expressly or impliedly, that it shall be paid by some benefit bestowed in the debtor's will, and a testamentary provision is subsequently made in favor of the creditor, which he accepts, his demand will thereby be satisfied; he cannot both take the bequest and enforce his debt as a subsisting claim against the estate. In this case, however, the creditor clearly has an election either to accept the bequest in satisfaction of his pre-existing demand, or to renounce the gift and enforce the demand.[2]

§ 539. Debt Owing to a Child or Wife.— Where a father, or person standing *in loco parentis,* owes an *ordinary* debt, arising in any manner, to his child, or to the one occupying the position of child, and while the debt is subsisting gives a legacy to such child, or to the one so treated as a child, the case is governed in every respect, both with regard to the general presumption of a satisfaction and the facts which rebut the presumption, by the same rules which apply to a debtor and creditor who are strangers to each other.[1] The

§ 538, [1] Eaton v. Benton, 2 Hill, 576, 578; Williams v. Crary, 4 Wend. 443, 450; Patterson v. Patterson, 13 Johns. 379; Jacobson v. Legrange, 3 Johns. 199; Morris v. Morris, 3 Houst. 568.

§ 538, [2] Williams v. Crary, 5 Cow. 368; 8 Cow. 246; 4 Wend. 443. See also Eaton v. Benton, 2 Hill, 576; Clark v. Bogardus, 12 Wend. 67; Van Riper v. Van Riper, 2 N. J. Eq. 1; Morris v. Morris, 3 Houst. 568.

§ 539, [1] As, for example, where a father and son had been in partnership, and a debt was due from the former to the latter as the result of the firm transactions, a legacy by the father to the creditor son would be governed by exactly the same rules as if the parties were not related to each other. And

same is true of a legacy given by a husband to his wife when he is indebted to her by any ordinary species of indebtedness.[2] It should be carefully observed that the foregoing proposition only applies when the liability resting upon the father is that of an ordinary indebtedness. If the liability arises from an antecedent executory settlement or a covenant to settle property as a portion upon the child, and the father gives a subsequent legacy, a presumption of satisfaction thence arises which is favored by courts of equity, and is not overcome by slight features of difference between the portion and the testamentary benefit.[3]

§ 540. **Debt to Child Satisfied by Advancement.**— In immediate connection with the satisfaction of indebtedness to a child by a legacy, it is proper to present the contrasting doctrine concerning the satisfaction of debts to a child by a subsequent advancement during the parent's lifetime. It is settled by the uniform current of decisions in England, that where a father, or other person *in loco parentis*, being a debtor to his child by any kind of ordinary indebtedness, makes an advancement to the child upon marriage, or upon any other occasion, that advancement is presumed to be a

where a father owed his daughter two hundred pounds, as executor of the will of a third person, and gave her five hundred pounds by his own will, to be paid to her when she arrived at the age of twenty-one, but not otherwise, it was held that she could claim both the debt and the legacy, since there was no satisfaction: Tolson v. Collins, 4 Ves. 482; Stocken v. Stocken, 4 Sim. 152; Fairer v. Park, L. R. 3 Ch. Div. 309. See Bryant v. Hunter, 3 Wash. C. C. 48; Gilliam v. Chancellor, 43 Miss. 437; 5 Am. Rep. 498; Guignard v. Mayrant, 4 Desaus. Eq. 614; Kelly v. Kelly's Ex'rs, 6 Rand. 176; 18 Am. Dec. 710.

2 Fowler v. Fowler, 3 P. Wms. 353; Cole v. Willard, 25 Beav. 568; Gilliam v. Chancellor, 43 Miss. 437; 5 Am. Rep. 498; Bryant v. Hunter, 3 Wash. C. C. 48; Guignard v. Mayrant, 4 Desaus. Eq. 614.[a]

3 See *post*, §§ 565–568, where this particular doctrine is discussed.

(a) Thus in Gillings v. Fletcher, L. R. 38 Ch. Div. 373, where a testator bequeathed to his wife a legacy of £625, that being the exact amount he then owed her, and subsequently paid off the debt, it was held that the legacy was satisfied, although the purpose for which it was given was not stated in the will.

satisfaction, or a satisfaction *pro tanto,* of the debt.[1] In order that the provision may operate as a satisfaction, it is not necessary that it should be made on the marriage of a child, or should be expressly in the nature of a portion. The rule applies wherever the gift by the parent is in the nature of an advancement, or where he becomes personally liable for a child's debt, from which the latter is thereby discharged. It seems difficult to reconcile some of these decisions and the rule which they maintain with any sound principle. It is certainly difficult to perceive why an advancement made by a father during his lifetime should be so strongly presumed a satisfaction of a debt due to the child, while a legacy given by the same parent to the same child would not be presumed a satisfaction. The marked distinction between the two cases does not rest upon any solid and sufficient reasons.

§ 541. **Legacy by a Creditor to his Debtor.**— A testamentary gift from a creditor to a debtor stands upon an entirely different footing from one by a debtor to his creditor, which was examined in the preceding paragraphs. A legacy from a creditor to his debtor, unaccompanied by language in the will or exterior to it expressly showing the special intent, whether equal to, greater or less than, the debt, raises no presumption whatever, either of law or of fact, that the

[1] In fact, the presumption of satisfaction is the same as that which arises where there is a prior covenant by a parent to give or settle a portion, and a subsequent legacy. The rule as stated in the text is applied even though the money be advanced on the occasion of a daughter's marriage, in consideration of a settlement made by the intended husband, and even though the intended husband is ignorant of the daughter's rights as a creditor against her father. The whole doctrine is ably discussed and the decisions fully reviewed in Plunkett v. Lewis, 3 Hare, 316, per Wigram, V. C.; and see also Mackdowell v. Halfpenny, 2 Vern. 484; Wood v. Briant, 2 Atk. 521; Seed v. Bradford, 1 Ves. Sr. 501; Chave v. Farrant, 18 Ves. 8; Hardingham v. Thomas, 2 Drew. 353; Hayes v. Garvey, 2 Jones & L. 268.[a] But the presumption of a satisfaction does not arise where there is no debt at the time of the advance, but it accrues afterwards: Plunkett v. Lewis, 3 Hare, 316, 330.

(a) See, also, In re Lawes, L. R. 20 Ch. Div. 81.

testator intended thereby to excuse, release, or discharge the debt, so that the legatee would be entitled to claim and receive the whole amount bequeathed, but would be freed from all liability to pay the debt. In fact, such a legacy produces no effect upon the indebtedness.[1 a] The only effect which such a legacy given *simpliciter* can have is to create the right to an equitable set-off. The legatee might not be forced, by means of a legal action, to pay the debt to the executors, when he could in turn recover back from them the same amount, or a part thereof, by virtue of his legacy. A court of equity, in order to prevent this circuity of action, may permit the executors to set off the debt against the demand made on them for the legacy; and if the estate is solvent, so that the debtor will be entitled to receive payment of his legacy, the court may compel the executors to give him credit for the amount of the legacy, when they are seeking to enforce the claim of the estate upon him for the debt.[2 b]

§ 542. Declarations by a creditor-testator, made outside of his will, and not based upon any valuable consideration, whether oral or written, cannot, of course, operate as a discharge at law of a debt due to him, except when in writing and under seal, so as to be a technical release. Such declarations, when standing alone without any accompanying testa-

1 Wilmot v. Woodhouse, 4 Brown Ch. 227; Clark v. Bogardus, 2 Edw. Ch. 387; 12 Wend. 67; Stagg v. Beekman, 2 Edw. Ch. 89; Hayes v. Hayes, 2 Del. Ch. 191; 73 Am. Dec. 709; Brokaw v. Hudson, 27 N. J. Eq. 135; Blackler v. Boott, 114 Mass. 24; Huston v. Huston, 37 Iowa, 668; Zeigler v. Eckert, 6 Pa. St. 13, 18; 47 Am. Dec. 428. It may be remarked that in one or two of the recent American cases above cited the language used by the court seems to intimate that the same rule prevails as in the case of a legacy by a debtor-testator to his creditor; that the legacy is, in general, presumed to be a satisfaction; but that such presumption is overcome by very slight grounds of difference between the gift and the debt. Of course this view, so far as it may have been held or intimated, is entirely erroneous.

2 See cases cited in the last note.

(a) See, also, Sharp v. Wightman, 205 Pa. St. 285, 54 Atl. 888.

(b) The text is quoted and followed in Irvine v. Palmer, 91 Tenn. 463, 30 Am. St. Rep. 893, 19 S. W. 326.

mentary provision, also furnish no ground for the interference of a court of equity, in order to restrain an enforcement of the demand by the executors.[1] The only exception would arise where the declaration was made under such circumstances that the testator thereby imposed a constructive trust upon the property given by his will, so that the beneficiary would not be equitably entitled to the gift without at the same time carrying out the trust and discharging the debt.[2] If, however, a creditor-testator bequeaths a legacy to his debtor, and accompanies the testamentary gift by written declarations made at or after the execution of the will, and according to some authorities even by similar verbal declarations expressing an intention to forgive or discharge the debt,— these two facts in combination may amount to an equitable satisfaction, or in other words, may constitute sufficient grounds for the interposition of equity to restrain the executors from suing at law to enforce payment of the debt.[3]

§ 543. **Satisfaction of Debt, how Enforced.**—It should be observed, in conclusion, that whenever a legacy is given by a debtor-testator in satisfaction of the debt which he owes, either by operation of the general presumption or by virtue of express language of the will, such satisfaction is purely a creation of equity, and cannot be set up as a defense at law, except so far as equitable defenses are allowed in legal actions by modern legislation. In the absence of such permissive legislation, any affirmative relief to compel an election or satisfaction by the creditor-legatee must be obtained in equity.[1] For the same reason, a clause in a will expressly forgiving a debt due to the testator from a certain person,

§ 542, [1] Byrn v. Godfrey, 4 Ves. 6; Kidder v. Kidder, 33 Pa. St. 268.

§ 542, [2] Weskett v. Raby, 2 Brown Parl. C. 386; Byrn v. Godfrey, 4 Ves. 6.

§ 542, [3] Eden v. Smith, 5 Ves. 341; Aston v. Pye, 5 Ves. 350, 354; Pole v. Lord Somers, 6 Ves. 309, 323; Zeigler v. Eckert, 6 Pa. St. 13, 18; 47 Am. Dec. 428.

§ 543, [1] Clark v. Bogardus, 2 Edw. Ch. 387; 12 Wend. 67; Stagg v. Beekman, 2 Edw. Ch. 89; Crary v. Williams, 5 Cow. 368; Molony v. Scanlan, 53 Ill. 122.[a]

(a) See, also, Sharp v. Wightman, 205 Pa. St. 285, 54 Atl. 888.

or directing that it shall not be enforced (which virtually amounts to a bequest of the debt), or a clause directly bequeathing the debt to the debtor himself, does not constitute any *legal* defense to an action brought by the executors to recover the debt. One sufficient reason, among others, is, that the clause, in whatever form, being in reality a legacy of the debt itself, cannot be operative unless there are assets sufficient to pay all the creditors of the estate in full; and this is a question which cannot be determined in such a legal action. A bequest of a debt to the debtor, like all other legacies, is nugatory unless the estate is solvent, and there are assets sufficient remaining after paying all the liabilities of the estate. Such a testamentary provision can only furnish ground for a court of equity to interfere and restrain the action at law brought to recover the debt, or constitute an *equitable* defense to the action, whenever equitable defenses are permitted by the statutory procedure.[2]

§ 544. **II. Satisfaction of Legacies by Subsequent Legacies.**— The presumption of a satisfaction arising from the second legacy depends upon or is affected by the following external circumstances: Whether the legacies themselves are specific or pecuniary; whether they are both given *simpliciter*, or are accompanied by a statement of the testator's reasons, motives, or other explanatory language.[1] The doctrine on

If the creditor brings an action at law against the executors to recover the debt, it would be no *legal* defense for them to plead that the testator had bequeathed a legacy in satisfaction of the debt. But if they should pay the debt, and the creditor should subsequently sue to recover his legacy, the question might then be raised, by way of defense in such second action, whether the legatee was not bound to elect, and had elected in favor of his debt, and so had renounced the bequest. Equity would have jurisdiction to decide all the questions in one suit brought for that purpose; and without doubt, in some of the states, the executors might set up the satisfaction as an *equitable* defense in the legal action brought against them to recover the debt.

2 Hobart v. Stone, 10 Pick. 215; Stagg v. Beekman, 2 Edw. Ch. 89; Clark v. Bogardus, 2 Edw. Ch. 387; 12 Wend. 67.

1 The entire doctrine on this subject was stated by Mr. Justice Aston in the leading case of Hooley v. Hatton, 1 Brown Ch. 390, note, 2 Lead. Cas. Eq., 4th Am. ed., 721, 722, as follows: "There are four cases of double legacies: 1. Where the same specific thing is given twice, it can take place but once;

this subject seems to have been directly borrowed by the English chancellors from the Roman law. Four principal rules have been well settled, corresponding to four different conditions of fact. It should be carefully observed that whenever the second legacy is regarded as substitutionary, and not as cumulative, the satisfaction of the prior legacy is absolute; the former legacy creating no *right* in the legatee, there is no claim for an election between the two on his part; the former gift is completely *adeemed* by the testator's own act. The following are the four rules:—

§ 545. Rule First. Specific Legacies.— A second gift of the *same specific* thing, whether by the same instrument or by different instruments, and whether given *simpliciter* or accompanied by a statement of the motive, is always sub-

2. Where the like quantity is given twice [by different instruments], the legatee is entitled to both; 3. As to a less sum in the latter deed, as one hundred pounds by will and fifty pounds by a codicil, the legatee shall take both; 4. As to a larger sum after a less, where they are in the same instrument, the two sums are not blended, but the legatee has two legacies. The law seems to be, and the authorities only go to prove the legacy not to be double, where it is given for the same cause in the same act, and *totidem verbis*, or only with small difference; but where in different writings there is a bequest of equal, greater, or less sums, it is an augmentation." A more clear statement of the doctrine was given by Sir John Leach in Hurst v. Beach, 5 Madd. 351, 358: "Where a testator leaves two testamentary instruments, and in both has given a legacy *simpliciter* to the same person, the court — considering that he who has twice given must, *prima facie*, be intended to mean two gifts — awards to the legatee both legacies, and it is indifferent whether the second legacy is of the same amount, or less or greater than the first. But if in such two instruments the legacies are not given *simpliciter*, but the motive of the gift is expressed, and in both instruments the same motive is expressed, and the same sum is given, the court considers these two coincidences as raising a presumption that the testator did not, by the second instrument, mean a second gift, but meant only a repetition of the former gift. The court raises this presumption only where the double coincidence occurs of the same motive and the same sum in both instruments; it will not raise it if in either instrument there be no motive or a different motive expressed, although the sums be the same, nor will it raise it if the same motive be expressed in both instruments, and the sums be different." See also, as to the general doctrine, Johnstone v. Earl of Harrowby, 1 De Gex, F. & J. 183, and cases cited; Wilson v. O'Leary, L. R. 12 Eq. 527; L. R. 7 Ch. 448; De Witt v. Yates, 10 Johns. 156; 6 Am. Dec. 326; Jones v. Creveling's Ex'rs, 19 N. J. L. 127; 21 N. J. L. 573; Edwards v. Rainier's Ex'rs, 17 Ohio St. 597.

stitutionary and in satisfaction of the prior gift. Such double legacies must, from the necessities of the case, constitute only one legacy, and can never be cumulative, since it is impossible that the same identical *corpus* or specific thing itself can be given twice.[1] This case is very plain. The only questions arise with respect to legacies of *quantity;* that is, of so much money, of so many shares of stock, and the like; and these legacies must necessarily be "general" or "pecuniary," and not "specific." The three remaining rules deal with such legacies of quantity.

§ 546. **Rule Second. Legacies of Quantity by Different Instruments.**— It is well settled that where a testator by different instruments gives a legacy of quantity *simpliciter,* and also a second legacy of quantity to the same legatee, in the absence of language showing a different intent the second legacy is regarded and treated as cumulative, and not as substitutionary or in satisfaction of the prior one. The testator's intention is presumed to be that the beneficiary should receive both the gifts; and it makes no difference whether the second is exactly equal to or is greater or less than the first.[1]

§ 545, [1] Duke of St. Albans v. Beauclerk, 2 Atk. 638; Suisse v. Lowther, 2 Hare, 424, 432, per Wigram, V. C. Legacies are given, within the meaning of the rules stated in the text by the *same* instrument, when both gifts are contained in the body of the same will or in the same codicil; by *different* instruments, when one is contained in the body of one will and the second in that of another will, both being admitted to probate; or when one is contained in the body of a will and the other in a codicil thereto; or when one is contained in a codicil and the other in a second or different codicil. In other words, the will and each codicil are regarded as different instruments for the operation of these rules.

§ 546, [1] The two legacies equal: Wallop v. Hewett, 2 Ch. Rep. 70; Newport v. Kynaston, Cas. t. Finch, 294; Baillie v. Butterfield, 1 Cox, 392; Forbes v. Lawrence, 1 Coll. 495; Radburn v. Jervis, 3 Beav. 450; Lee v. Pain, 4 Hare, 201, 216; Roch v. Callen, 6 Hare, 531; Russell v. Dickson, 4 H. L. Cas. 304. Second legacy greater than the first: Hooley v. Hatton, 1 Brown Ch. 390, note; Suisse v. Lowther, 2 Hare, 424; Hertford v. Lowther, 7 Beav. 107; Lyon v. Colville, 1 Coll. 449; Johnstone v. Lord Harrowby, 1 De Gex, F. & J. 183; 1 Johns. 425; Cresswell v. Cresswell, L. R. 6 Eq. 69, 76; Wilson v. O'Leary, L. R. 12 Eq. 525; 7 Ch. 448. Second legacy less than the first: Pitt v. Pidgeon,

§ 547. There is one important exception to this rule. If the first instrument gives a certain sum or quantity, and expresses the motive for the gift, and the second instrument gives exactly the same sum or quantity, and expresses the same motive, in this case the concurrence of two coincidences — the amount and the motive — is regarded as raising a presumption that the testator intended a mere repetition of his former gift, and not a double benefit. The second legacy is therefore held to be substitutionary, or in satisfaction of the first one, and the legatee is not entitled to both.[1] It should be observed, however, that this presumption of a substitution or satisfaction does not arise unless there is the double coincidence of the same motive and the same amount expressed in both instruments.[2]

1 Ch. Cas. 301; Hurst v. Beade, 5 Madd. 358; Townshend v. Mostyn, 26 Beav. 72; Wilson v. O'Leary, L. R. 12 Eq. 525; 7 Ch. 448. The rule is fully accepted in De Witt v. Yates, 10 Johns. 156; 6 Am. Dec. 326; Jones v. Creveling's Ex'rs, 19 N. J. L. 127; 21 N. J. L. 573; Edwards v. Rainier's Ex'rs, 17 Ohio St. 597; Cunningham v. Spickler, 4 Gill, 280; Rice v. Boston etc. Aid Soc., 56 N. H. 191. While the presumption of a double benefit thus arises where two legacies of quantity merely are given by different instruments, such presumption is, of course, strengthened, and the rule operates even more stringently, where there is any material variation between the two legacies, as in their modes and times of payment, in their bearing interest, in their ultimate disposition, in the trusts or other purposes on which they are given, in the capacities in which the legatee takes, as where one legacy is given to a married woman to her separate use, and the other is given to her not for her separate use, or in the kind and nature of the legacies themselves, as where one is a sum of money in bulk, and the other is an annuity. See Watson v. Reid, 5 Sim. 431; Strong v. Ingram, 6 Sim. 197; Attorney-General v. George, 8 Sim. 138; Robley v. Robley, 2 Beav. 95; Lee v. Pain, 4 Hare, 201, 223; Mackensie v. Mackensie, 2 Russ. 262; Bartlett v. Gillard, 2 Russ. 149; Wray v. Field, 2 Russ. 257; 6 Madd. 300; Guy v. Sharp, 1 Mylne & K. 589; Hodges v. Peacock, 3 Ves. 735; Sawrey v. Rumney, 5 De Gex & S. 698; Spire v. Smith, 1 Beav. 419; Masters v. Masters, 1 P. Wms. 421, 423.

1 Hurst v. Beach, 5 Madd. 352, 358; Benyon v. Benyon, 17 Ves. 34.

2 It does not, therefore, arise, although the amounts given are exactly the same, where there is no motive at all expressed in either of the instruments, nor where the motive stated in one is different from or additional to that expressed in the other: Roch v. Callen, 6 Hare, 531; Ridges v. Morrison, 1 Brown Ch. 388; Mackinnon v. Peach, 2 Keen, 555. Nor does the presumption arise, although exactly the same motive is stated in both instruments, if the amounts given are different: Hurst v. Beach, 5 Madd. 352; Lord v. Sutcliffe, 2 Sim. 273.

§ 548. **Presumption Overcome by Language of Testator.**— The rule and its exception stated in the preceding paragraphs are both based upon a *presumption* of the testator's intent arising from the form and manner of his bequests,— in the one instance two legacies given *simpliciter* by different instruments, in the other the same legacy twice given in different instruments accompanied by a statement of exactly the same motive. While these rules are thus based upon a presumption, there is another class of cases which are not governed by any presumption, but depend entirely upon a construction of the language used by the testator, in order to arrive at his real intent. It would perhaps be more accurate to say that any presumption which might otherwise have arisen from the fact of two legacies to the same person given by different instruments has been overcome or destroyed by the special language which the testator has used in connection with the gifts, or even in other parts of the will. It is important that this class of cases should not be confounded with those which fall under the general rule and exception stated in the two preceding paragraphs. Although two bequests may be made to the same person by different instruments, and although these gifts may differ in their amounts, incidents, and forms, and although even different motives may be assigned for each separate bequest, still the special language used by the testator in making the second gift, or the language found in other parts of the will, may sufficiently show his intention to give the second legacy in substitution for or satisfaction of the prior one; and thus any presumption otherwise arising from such double provision will be wholly overcome. It is impossible to lay down any general rule governing such cases; each case must stand upon its own circumstances. The question is, then, simply one of interpretation, in order to ascertain the real intent of the testator; but in arriving at this intent, the court will, if necessary, look at all parts of the

will.[1] [a] The court may also be called upon to interpret the testamentary language, rather than to apply any rule of presumption, when the second instrument — e. g., the codicil — expressly refers to the former one. The terms of the second instrument, perhaps codicil, may be such, when all are taken together, as to show an intent that the second gift was to be in substitution or in satisfaction, and not cumulative.[2] [b] The same result may follow when the language of the codicil shows that the testator is merely adopting that mode of revising, explaining, or qualifying his original will, rather than using it to make additional and distinct bequests. In such a case, therefore, the intent will appear to give the second legacies as substitutionary, and not as cumulative.[3] The same intent may also appear when, from all its terms

1 Rice v. Boston etc. Aid Society, 56 N. H. 191. Thus, for example, where a testator has in his will given legacies to several persons, A, B, C, and D, and in a codicil gives second legacies, either of equal or different amounts, to the same individuals, and in express words describes such second legacy to some of the beneficiaries — e. g., A and B — as "additional" or "in addition" to what was given in the will itself, but omits to make any such designation with respect to the second legacies given to the others,— e. g., C and D,— this, it is held, "is not an insignificant circumstance, but still not decisive," in aiding the court to discover the testator's intent. It is of some weight, but not conclusive,— a mere argument,— tending to show that the second legacies given to C and D were to be in lieu of the former ones to the same persons,— in satisfaction, and not cumulative. The same is true of other words having the same general import. See Suisse v. Lord Lowther, 2 Hare, 424, 429–438, per Wigram, V. C.; Allen v. Callow, 3 Ves. 289, per Lord Alvanley; Russell v. Dickson, 2 Dru. & War. 133, per Sugden, L. C.; 4 H. L. Cas. 293; Lee v. Pain, 4 Hare, 201, 221, 233, per Wigram, V. C.; Moggridge v. Thackwell, 1 Ves. 464; Barclay v. Wainwright, 3 Ves. 466; Mackensie v. Mackensie, 2 Russ. 273; Townshend v. Mostyn, 26 Beav. 72. With respect to the effect of similar language concerning legacies given to two different persons, each of whom was a debtor to the testator, see Blackler v. Boott, 114 Mass. 24; and see Mason v. M. E. Church, 27 N. J. Eq. 47, as to the effect of analogous language.

2 Martin v. Drinkwater, 2 Beav. 215; Bristow v. Bristow, 5 Beav. 289; Currie v. Pye, 17 Ves. 462; Mayor of London v. Russell, Cas. t. Finch, 290.

3 Fraser v. Byng, 1 Russ. & M. 90; Moggridge v. Thackwell, 1 Ves. 464; 3 Brown Ch. 517.

(a) The text is quoted in Estate of Zeile, 74 Cal. 127, 137, 15 Pac. 455.

(b) The text is quoted in Estate of Zeile, 74 Cal. 127, 137, 15 Pac. 455, where the legacies were held to be cumulative.

taken together, the codicil or other second testamentary instrument is plainly a mere copy of the former one, or even a mere copy so far as the bequests are dealt with.[4] Finally, where bequests have been given to the same individuals by different testamentary instruments, the intent that the second gift should be substitutionary, and not cumulative, may be inferred from the fact that between the times when the two instruments were executed changes have taken place among the beneficiaries themselves, in their positions, in their families, in their relations to the testator, and the like.[5]

§ 549. **Rule Third. Legacies of Quantity by the Same Instrument, of Equal Amount.**— If by the same instrument, either by a will or a codicil, legacies of the same amount are given *simpliciter* to the same individual, the second is held to be substitutional, or in lieu or satisfaction of the first, and the legatee is entitled to but one legacy. This presumption is not overcome by small differences in the modes by which the gifts are bestowed, or in their external forms.[1] The somewhat fanciful reason originally given for this rule was, that the second legacy must, under the circumstances, be regarded as the result of the testator's inadvertence or forgetfulness.

§ 550. **Rule Fourth. Legacies of Quantity by the Same Instrument, of Unequal Amounts.**— If by the same instrument,

[4] Coote v. Boyd, 2 Brown Ch. 521, Belt's ed., per Lord Thurlow; Campbell v. Lord Radnor, 1 Brown Ch. 271; Barclay v. Wainwright, 3 Ves. 462; Gillespie v. Alexander, 2 Sim. & St. 145; Hemming v. Gurrey, 2 Sim. & St. 311; 1 Bligh, N. S., 479; Att'y-Gen. v. Harley, 4 Madd. 263; Hincheliffe v. Hinchcliffe, 2 Drew. & S. 96; Tuckey v. Henderson, 33 Beav. 174.

[5] Here especially each case must be governed by its particular circumstances: Allen v. Callow, 3 Ves. 289, per Lord Alvanley; Osborn v. Duke of Leeds, 5 Ves. 369; and see Lee v. Pain, 4 Hare, 201, 242, 243, per Wigram, V. C.

[1] Greenwood v. Greenwood, 1 Brown Ch. 31, note; Garth v. Meyrick, 1 Brown Ch. 30; Holford v. Wood, 4 Ves. 76; Manning v. Thesiger, 3 Mylne & K. 29; Brine v. Ferrier, 7 Sim. 549; Early v. Benbow, 2 Coll. 342; Early v. Middleton, 14 Beav. 453; De Witt v. Yates, 10 Johns. 156; 6 Am. Dec. 326; Jones v. Creveling's Ex'rs, 19 N. J. L. 127; 21 N. J. L. 573; Edwards v. Rainier's Ex'rs, 17 Ohio St. 597.[a]

(a) See, also, Thompson v. Betts, 74 Conn. 576, 51 Atl. 564, 92 Am. St. Rep. 235.

either will or codicil, legacies of unequal amounts are given *simpliciter* to the same person, the second legacy is held to be additional or cumulative, and it is immaterial whether it be greater or less than the first,— in either case the legatee is entitled to both the gifts.[1]

§ 551. In each of the two preceding rules the presumption arises when the legacies are given *simpliciter;* and the presumption will in either case be overcome by language of the testator sufficiently showing a contrary intent. The intention, as indicated by the whole will, governs where two gifts are made by the same instrument, as well as where they are made by different instruments. If, therefore, the testator gives exactly the same amount by a second clause, which he had already given by a prior clause of the same instrument, the intention may appear from all his language that the beneficiary is to have both the sums; or, on the other hand, if the testator gives, by a second clause, an amount greater or less than that which he had already given by a prior clause of the same instrument, his intention may appear from all his language that the second legacy is to be substitutionary, and that the beneficiary shall be entitled to it alone. In either of these cases the intent will control.[1] It may be added that a tendency on the part of the courts is very strongly shown in the more modern decisions to escape all difficulties of construction and of applying the rules of presumption, by holding second legacies to be cumulative, rather than substitutionary.[2]

§ 552. Extrinsic Evidence.— With respect to the admissibility of parol evidence showing the testator's intention

§ 550, [1] Curry v. Pile, 2 Brown Ch. 225; Windham v. Windham, Cas. t. Finch, 267; Yockney v. Hansard, 3 Hare, 622; Baylee v. Quinn, 2 Dru. & War. 116; Adnam v. Cole, 6 Beav. 353; Hartley v. Ostler, 22 Beav. 449; Brennan v. Moran, 6 Ir. Ch. 126; De Witt v. Yates, 10 Johns. 156; 6 Am. Dec. 326; Jones v. Creveling's Ex'rs, 19 N. J. L. 127; 21 N. J. L. 573.

§ 551, [1] Yockney v. Hansard, 3 Hare, 620; Lobley v. Stocks, 19 Beav. 392; Russell v. Dickson, 4 H. L. Cas. 293; and see many of the cases cited in the preceding notes.

§ 551, [2] See Russell v. Dickson, 2 Dru. & War. 137, per Sugden, L. C.; Lee v. Pain, 4 Hare, 201, 218, 236, per Wigram, V. C.

concerning the effect of double legacies given by him, the following conclusions are sustained by the decisions: Wherever, in pursuance of a rule above stated, a presumption arises against double legacies, contrary to the literal terms of a will,— as, for example, where two legacies of equal amount are given by the same instrument,— parol evidence is admissible to show an intention, on the part of the testator, that the legatee was to have both, and thus to rebut the presumption; for such evidence really supports, rather than contradicts, the literal terms of the will. But wherever, in pursuance of the rules above stated, no such presumption arises,— as, for example, where legacies are given *simpliciter* by different instruments,— parol evidence is not admissible to show an intention on the part of the testator that the legatee should have but one gift; for such evidence would directly contradict the literal terms of the will.[1]

§ 553. III. Satisfaction of Legacies by Portions and Advancements.— It is proper to state, by way of preliminary explanation, that in the great majority of English cases involving this kind of satisfaction, and especially in those depending upon the equitable *presumption* of a satisfaction, a legacy has first been given to a child by way of a *portion*, and subsequently, but before the will becomes operative, the testator, by means of some formal instrument in the nature of a settlement, either pays or covenants to pay to the same child a sum of money also by way of a portion. The testator afterwards dying, and leaving the will unrevoked and unaltered, the question arises whether the child is entitled to the legacy, as well as to the sum paid or agreed to be paid by the settlement.[a] In its primary and strictest sense, the

[1] Hurst v. Beach, 5 Madd. 351, per Sir John Leach; Lee v. Pain, 4 Hare, 201, 216, per Wigram, V. C.; Hall v. Hill, 1 Dru. & War. 115, per Sugden, L. C.; Guy v. Sharp, 1 Mylne & K. 589.

(a) *Satisfaction of Devises.*—In the recent case of Burnham v. Comfort, 108 N. Y. 535, 2 Am. St. Rep. 462, 15 N. E. 710, the court of appeals of New York, following the authority of Davys v. Boucher, 3 Younge & C. 397, decided that the rule of ademption of legacies by subsequent advancements

term " portion " seems to have been used to designate the sum or amount of property given by a parent to a *younger* child, not the heir at law, as his intended share of the paternal estate not descending by inheritance to the heir. From this primary meaning the word seems to be extended so as to embrace the sum or amount given by a parent to any or to each of his children, as the recipient's intended share of the estate not descending to the heir. The two essential elements of the term in its legal signification seem to be, that it is intended to be the child's proportionate share of the

was not applicable to devises of real estate. The court, in its opinion, discussed the subject of ademption as if it operated as a *revocation* of the will, and reached the conclusion that the rule of ademption did not apply to devises of real estate, for the reason that to give it such operation would be to cause a *revocation* of the devise in a manner unauthorized by the statute of wills. While the point actually decided may be, and doubtless is, sustained by authority, the reasoning of the court on which its decision is based would be equally applicable to prevent the ademption of pecuniary legacies wherever the statute of wills applies to personal property and provides that a revocation of such wills can only be had in a certain prescribed manner. The fundamental error of this decision, as shown *post*, § 554, is in considering an ademption as being a revocation of the will. That the doctrine of ademption does not apply to devises of real estate is sustained by the decisions or *dicta* in the following cases: In Davys v. Boucher, 3 Younge & C. 397, it is said that no case can be found in which the doctrine is applied to devises, and that to so apply it would repeal the statute of frauds as to the revocation of wills of real estate. This case finally turned, however, on parol evidence of the intention of the donor-testator, it being held that such evidence showed that the advancements were intended by the testator as additional to the provisions of the will. In Clark v. Jetton, 5 Sneed, 229, the court says that the doctrine of ademption does not apply to real estate. In the course of the opinion it is said: " This distinction rests upon artificial reasons, the justice and propriety of which are not clear, nor the reasons on which it is founded approved. But that branch of the doctrine, having no application to the case before us, need not be discussed." The case was one of ademption of a legacy. In Allen v. Allen, 13 S. C. 512, 36 Am. Rep. 716, this point was directly involved, and directly decided against the application of the doctrine of ademption, notwithstanding the intention of the testator to produce a satisfaction of the devise was clearly shown. The court, while admitting that there was no logical reason why the testator's intention should not control in cases of a devise, refused to extend the doctrine to such cases, for the reason that it had never yet been so applied. To the same effect are Weston v. Johnson, 48 Ind. 1; Fisher v. Keithley, 142 Mo. 244, 64 Am. St. Rep. 560, 43 S. W. 650.

paternal estate, and that it is a share bestowed as a gift, and not inherited as a matter of right under the law of descent. While a portion is thus a gift, and not an inheritance, still the legal conception assumes that the recipient has a natural claim to it, and that a natural obligation rests upon the parent to bestow it. It will be seen that the equitable presumptions are directly derived from this assumed natural duty of the parent, the relations between him and his child being regarded as entirely different from those subsisting between him and strangers.[1] In this country formal settlements made by parents, upon or in favor of their children, are very infrequent. In the great majority of American cases, therefore, involving or depending upon this species of satisfaction, a legacy has first been given to a child, and subsequently, but before the will becomes operative, the testator either pays to the same child a sum by way of advancement, or agrees in some informal manner, either verbally or in writing, to pay such sum. The testator afterwards dying, the question arises, whether the child is entitled to the legacy.

§ 554. **Presumption of Satisfaction.**— Whenever a parent, or person *in loco parentis,* gives a legacy to his child, or to the individual whom he treats as a child, without stating any particular object for which it is given, such legacy is regarded as a portion.[1] And if the testator afterwards, during his own lifetime, makes a settlement upon the child by way of a portion, or pays to him a sum of money by way of a portion, or makes an advancement to him, or gives him a sum of money as an advancement, such payment, portion, or advancement amounts to a satisfaction — or, as is often said, an ademption — of the legacy, either *pro tanto* or in full, as the money thus paid or settled is less than, equal to,

§ 553, [1] With respect to the meaning and nature of "portions," see Ex parte Pye, 18 Ves. 151, per Lord Eldon; Shudall v. Jekyll, 2 Atk. 518; Suisse v. Lowther, 2 Hare, 424, 433, per Wigram, V. C.

§ 554, [1] Shudall v. Jekyll, 2 Atk. 518; Ex parte Pye, 18 Ves. 140, 151.

or greater than the amount of the legacy.[2][a] This rule is based upon a presumption against double portions; that is, a presumption adopted by courts of equity that a father, owing a common, natural duty to all his children, could not have intended to distribute his estate unequally among them, and to favor one at the expense of the others. This reasoning has sometimes been called artificial, and the rule itself harsh, but it is really founded upon equity and justice.[3] It

[2] Ex parte Pye, 18 Ves. 140; 2 Lead. Cas. Eq., 4th Am. ed., 741, and notes. In this leading case the rule was laid down by Lord Eldon in terms which have since been regarded as accurate, though not complete. He says: "Where a parent gives a legacy to a child, not stating the purpose with reference to which he gives it, the court understands him as giving a portion; and by a sort of artificial rule,— upon an artificial notion, and a sort of feeling upon what is called a leaning against double portions,— if the father afterwards advances a portion on the marriage of that child, though of less amount, it is a satisfaction of the whole or in part."

[3] Like all other general rules, it may sometimes work injustice under special circumstances; but the reasoning on which it is based, and the equitable presumption out of which it results, are certainly in accordance with the general experience of mankind. The *rationale* of the presumption and of the rule derived from it was well explained and vindicated by Wigram, V. C., in Suisse v. Lowther, 2 Hare, 424, 433, 435: "The language of the court in these cases is, that it 'leans against double portions,'— a rule which, though sometimes called technical, Lord Cottenham says was founded on good sense, and could not be disregarded without disappointing the intentions of donors: Pym v. Lockyer, 5 Mylne & C. 34, 46. . . . The rule of presumption, as I before said, is against double portions, as between parent and child; and the reason is this: a parent makes a certain provision for his children by his will; if they attain twenty-one, or marry, or require to be settled in life, he afterwards makes an advancement to a particular child. Looking to the ordinary dealings of mankind, the court concludes that the parent does not, when he makes that advancement, intend the will to remain in full force, and that *he has satisfied in his lifetime* the obligation which he would otherwise have discharged at his death; and having come to that conclusion as the result of general experience, the court acts upon it and gives effect to the presumption that a double portion was not intended. If, on the other hand, there is no such relation, either natural or artificial, the gift proceeds from the mere bounty of the testator; and there is no reason within the knowledge of the court for cutting off anything which has in terms been given. The testator may give a certain sum by one instrument, and precisely the same sum by

(a) The text is cited in Richardson v. Eveland, 126 Ill. 37, 18 N. E. 308, 311, 1 L. R. A. 203. See, also, Wallace v. Du Bois, 65 Md. 153, 4 Atl. 402; Van Houten v. Post, 33 N. J. Eq. 344; Hansborough v. Hooe, 12 Leigh (Va.), 322; Strother's Adm'r v. Mitchell's Ex'r, 80 Va. 149.

should be carefully observed that whenever the equitable presumption arises, and the rule based upon it applies, the satisfaction, either in whole or in part, of the prior legacy is accomplished absolutely by the act of the testator alone, without any regard to the act or assent of the legatee. It is not the case of a revocation, partial or complete, of the will; there is no analogy whatever between such a satisfaction and a revocation. The will, in fact, is legally supposed to remain in force unaltered in its disposition. But the testamentary gift being under the control of the testator, he in reality acts as his own executor; he anticipates his own death, and by his own hand pays the legacy, in whole or in part, as the case may be, during his lifetime. The legatee, having thus received payment of the single gift designed for his benefit, cannot equitably demand to be paid a second time out of the estate in the hands of the executor. While the legacy is not *revoked,* it is removed or taken away by the act of the testator, and therefore this instance of satisfaction may with some propriety be called an " ademption." This satisfaction or ademption, if it takes place at all, must necessarily take place without any regard to the assent or other conduct of the legatee.[4]

§ 555. **Subsequent Payment Less than the Legacy.**— Where the subsequent portion settled, advancement made, or sum paid by the parent was less than the prior legacy, the earlier cases had pushed the equitable presumption to such a logical

another; there is no reason why the court should assign any limit to that bounty, which is wholly arbitrary. The court, as between strangers, treats several gifts as *prima facie* cumulative. The consequence is, as Lord Eldon observed, that a natural child, who is in law a stranger to the father, stands in a better situation than a legitimate child; for advancement in the case of the natural child is not *prima facie* an ademption."

[4] Lord Chichester v. Coventry, L. R. 2 H. L. 71, 82, 86, 90, 91; In re Tussaud's Estate, L. R. 9 Ch. Div. 363, 380; see *ante,* § 524, and note, where extracts from the opinions in these cases are given.[b]

(b) See, also, to the same effect, Cowles v. Cowles, 56 Conn. 240, 13 Atl. 414; Low v. Low, 77 Me. 37; Allen v. Allen, 13 S. C. 512, 36 Am. Rep. 716.

extreme that they held it to be a complete satisfaction, on the ground that the parent must be regarded as the sole judge of the proportionate share of his estate naturally due to each child.[1] This purely logical consequence of the general presumption is so plainly opposed to justice and to common experience that Lord Cottenham boldly repudiated it, rejected the authority of the judicial *dicta* by which it was supported, and laid down the rule that a subsequent advancement, payment, or settlement less in amount than the prior legacy is a satisfaction *pro tanto* only.[2] The doctrine thus announced by Lord Cottenham is now established in England and in the United States, that if the subsequent advancement equals or exceeds the prior legacy, it is a satisfaction thereof in full; if less than the legacy, it is only a satisfaction *pro tanto*.[3] [a]

§ 556. Person in Loco Parentis.— As the presumption of a satisfaction applies not only to an actual parent, but ex-

1 Ex parte Pye, 18 Ves. 140, per Lord Eldon.

2 Pym v. Lockyer, 5 Mylne & C. 29. The opinion of Lord Cottenham in this case is one of the ablest and most exhaustive discussions of the doctrine, upon reason and principle, as well as upon authority, to be found in the reports.

3 Kirk v. Eddowes, 3 Hare, 509; Montague v. Montague, 15 Beav. 565; Hopwood v. Hopwood, 7 H. L. Cas. 728; Nevin v. Drysdale, L. R. 4 Eq. 517; Langdon v. Astor's Ex'rs, 16 N. Y. 9; reversing 3 Duer, 477; Hine v. Hine, 39 Barb. 507; Richards v. Humphreys, 15 Pick. 133, 136; Paine v. Parsons, 14 Pick. 318; Sims v. Sims, 10 N. J. Eq. 158; Miner v. Atherton's Ex'rs, 35 Pa. St. 528; Garrett's Appeal, 15 Pa. St. 212; Gill's Estate, 1 Pars. Cas. 139; Roberts v. Weatherford, 10 Ala. 72; Timberlake v. Parish's Ex'rs, 5 Dana, 346; Clendenning v. Clymer, 17 Ind. 155, 159; Weston v. Johnson, 48 Ind. 1; De Graaf v. Teerpenning, 52 How. Pr. 313; Jones v. Mason, 5 Rand. 577; 16 Am. Dec. 761; Howze v. Mallett, 4 Jones Eq. 194; Moore v. Hilton, 12 Leigh, 1; Hauberger v. Root, 5 Pa. St. 108; Clarke v. Jetton, 5 Sneed, 229; Dugan v. Hollins, 4 Md. Ch. 439; Swoope's Appeal, 27 Pa. St. 58. The legacy will be satisfied although the testator only covenants or agrees to pay the money as an advancement, or although the advancement is in the form of a loan, and some kind of security is taken from the legatee: Miner v. Atherton's Ex'rs, 35 Pa. St. 528; Garrett's Appeal, 15 Pa. St. 212; Hine v. Hine, 39 Barb. 507; Richards v. Humphreys, 15 Pick. 133.

(a) See, also, Wallace v. Du Bois, 65 Md. 153, 4 Atl. 402; Van Houten v. Post, 33 N. J. Eq. 344. That the ademption is only *pro tanto*, see In re Pollock, L. R. 28 Ch. D. 552.

tends also to a person *in loco parentis,* it becomes important to fix the true, legal signification of this term. It is clearly not necessary that the beneficiary should have been, in popular language, adopted by the donor, and actually received into his household; the parental relation need not have been established *in all respects and for all purposes.* The essential element of the legal conception *in loco parentis* depends rather upon the *intention* of the donor than upon his *conduct,* and consists of a design on his part to make future provision for the beneficiary, shown so clearly by his conduct that an obligation rests upon him, and a right arises on the part of the beneficiary, similar to the natural obligation and right existing between an actual father and child. The rule was first laid down in a clear and formal manner by Lord Cottenham, that a person *must mean and intend to provide* for the child, and thus to place himself *in loco parentis* towards it, and that such meaning and intent may be declared in an express manner, or may be shown by the donor's conduct; and where this is the case, it is immaterial that the child has a father living, with whom he resides, and by whom he is maintained according to his (the father's) means.[1] This most just and satisfactory rule, by which the

1 Powys v. Mansfield, 3 Mylne & C. 359; 6 Sim. 544. The opinion of Lord Cottenham is so clear and able that I shall give his own language without condensation. The child lived with her own father, as one of his family, and the question for decision was, whether her uncle stood *in loco parentis* towards her. In the court below the vice-chancellor held that the uncle had not placed himself *in loco parentis*, and laid down as a general rule "that no person can be held to stand *in loco parentis* to a child whose father is living, and who resides with and is maintained by the father, according to his (the father's) means." Lord Cottenham, on appeal, reversed this decision, saying: "The authorities leave in some obscurity the question as to what is meant by the expression, universally adopted, of one *in loco parentis.* Lord Eldon, however, in Ex parte Pye, 18 Ves. 140, has given to it a definition which I readily adopt, because it seems to me to embrace all that is necessary to work out and carry into effect the object and meaning of the rule. Lord Eldon says it is a person *meaning* to put himself *in loco parentis*,— in the situation of the person described as the lawful father of the child; but this definition must, I conceive, be considered as applicable to those parental offices and duties to which the subject in question has reference, namely, to the office and duty of the parent to make provision for the child. The offices and duties of a

question whether a person has assumed the *locus parentis* towards one who is not his own legitimate child must be determined, has been clearly established by the English decisions, and has also been substantially adopted by the

parent are infinitely various, some having no connection whatever with making a provision for a child; and it would be most illogical, from the mere exercise of any of such offices or duties by one not the father, to infer an intention in such person to assume also the duty of providing for the child. The relative situation of the friend and of the father may make this unnecessary and the other benefits most essential. Sir William Grant's definition is, 'A person assuming the parental character, or discharging parental duties' (Wetherby v. Dixon, 19 Ves. 407, 412), which may seem not to differ much from Lord Eldon's; but it wants that which, to my mind, constitutes the principal value of Lord Eldon's definition, namely, the referring to the intention, rather than to the act, of the party. The vice-chancellor says it must be a person who has so acted towards the child as that he has thereby imposed upon himself a moral obligation to provide for it; and that the designation will not hold where the child has a father with whom it resides and by whom it is maintained. This seems to infer that the *locus parentis* assumed by the stranger must have reference to the pecuniary wants of the child, and that Lord Eldon's definition is to be so understood; *and so far I agree with it;* but I think the other circumstances required are not necessary to work out the principle of the rule or to effectuate its object. The rule, both as applied to a father and to one *in loco parentis*, is founded upon the presumed intention. A father is supposed to intend to do what he is in duty bound to do,—to provide for his child according to his means. So one who has assumed that part of the office of a father is supposed to intend to do what he has assumed to himself the office of doing. If the assumption of the character be established, the same inference and presumption must follow. The having so acted towards a child as to raise a moral obligation to provide for it affords a strong inference in favor of the fact of the assumption of the character; and the child having a father with whom it resides, and by whom it is maintained, affords some inference against it, but neither are conclusive." The chancellor then held, upon the evidence, that the uncle, Sir John Barrington, did mean to put himself *in loco parentis* to his nieces, *so far as related to their future provision.*[a]

[a] In In re Pollock, L. R. 28 Ch. Div. 552, the doctrine of ademption of legacies, founded on the presumption arising from the parental or *quasi* parental relation, was held to apply also to cases where a moral obligation, other than parental, is recognized in the will, though without reference to any special application of the money. Thus where by her will a testatrix bequeathed to a niece of her deceased husband five hundred pounds, with the words "according to the wish of my late beloved husband," and she afterwards in her lifetime paid three hundred pounds to the legatee, with a contemporaneous entry in her diary that such payment was a legacy from the legatee's uncle, it was held that the legacy was adeemed *pro tanto* to the extent of three hundred pounds.

American cases which have dealt with the subject either by direct adjudication or by judicial *dictum*. As the assumption of the character depends upon the donor's meaning and intent, it plainly follows that this intent may be shown by parol evidence, since it is often, even if not generally, inferable from his conduct.[2] In order that the equitable presumption may arise, and the doctrine of satisfaction may apply, the assumption of the *locus parentis* must have been made, and the parental relation must have existed at the date of the will giving the legacy which is to be satisfied.[3] Where the intention, however, to assume the parental character, within the meaning of the rule, exists, any relative, or even a stranger both by blood and marriage, may place himself *in loco parentis*.[4] It is fully settled, in accordance with another doctrine of the common law, that the general presumption against double portions, and the doctrine of a satisfaction of a prior legacy by a subsequent portion or advancement, do not apply as between a father and *his own illegitimate* child unless the putative father has actually

2 Ex parte Pye, 18 Ves. 140, 154; Booker v. Allen, 2 Russ. & M. 270; Pym v. Lockyer, 5 Mylne & C. 29; Watson v. Watson, 33 Beav. 574; Campbell v. Campbell, L. R. 1 Eq. 383. The head-note of this case seems to convey the impression that the court had applied the presumption against double portions, and the doctrine of satisfaction to a grandfather and his grandchildren merely from the fact that such blood relationship existed between the testator and the legatees. But the facts and the opinion clearly show that the decision was placed entirely upon the ground that an intent of the testator to assume the *locus parentis* was established by parol evidence, partly by his declarations. The court, Page Wood, V. C., expressly stated that the case was like Powys v. Mansfield, 3 Mylne & C. 359, 6 Sim. 544, and even stronger in its facts: Gill's Estate, 1 Pars. Cas. 139; and see Langdon v. Astor's Ex'rs, 16 N. Y. 9; reversing 3 Duer, 477; Clendenning v. Clymer, 17 Ind. 175, and other American cases cited in preceding note. In Gill's Estate, 1 Pars. Cas. 139, the general rule was stated in a very clear and full manner by King, P. J., but the court fell into a grave error in applying the rule to the facts, and in settling the accounts and determining the amounts to which the legatees were entitled.

3 Watson v. Watson, 33 Beav. 574.

4 Monck v. Monck, 1 Ball & B. 298; Rogers v. Soutten, 2 Keen, 598. In this latter case, the *locus parentis* was established between a person and the illegitimate child of his son.

placed himself *in loco parentis.* The *legal* relation of parent and child, with its consequences, does not exist between a father and his illegitimate child; they are in law strangers to each other.[5] It is also clearly settled by the English decisions that where the intention to assume the *locus parentis* does not exist, no relative, however near, except the actual parent, not even a grandparent, will be considered as *in loco parentis,* so as to create the equitable presumption of a satisfaction.[6]

[5] Ex parte Pye, 18 Ves. 140, 152; Wetherby v. Dixon, 19 Ves. 406. This conclusion may sometimes give an illegitimate child an advantage over the legitimate; and this possible result, more than anything else, seems to have caused Lord Eldon's evident opposition to the whole doctrine of presumed satisfaction.

[6] Shudall v. Jekyll, 2 Atk. 516, 518; Powell v. Cleaver, 2 Brown Ch. 499, 517; Perry v. Whitehead, 6 Ves. 546; Roome v. Roome, 3 Atk. 183; Grave v. Salisbury, 1 Brown Ch. 425; Ellis v. Ellis, 1 Schoales & L. 1; Twining v. Powell, 2 Coll. 262; Lyddon v. Ellison, 19 Beav. 565, 572; and see Campbell v. Campbell, L. R. 1 Eq. 383; note *ante,* under this paragraph.[b] There seems to be some discrepancy upon this point between the English and the American decisions. Judge Story, in stating the general doctrine, couples grandchildren and children in the same clause, and makes the presumption of satisfaction apply alike to both in exactly the same words. See Story's Eq. Jur., secs. 1111, 1112. It is true that in a subsequent paragraph he seems to restrict the presumption to parents and their actual legitimate children, and to those who have placed themselves *in loco parentis.* The broad manner in which the doctrine is thus laid down by Judge Story, extending the presumption to grandchildren, is not sustained by a single English decision, nor, I believe, by a single *dictum* of any English judge; and it violates all the reasoning upon which the doctrine is founded, for a grandfather is not, *as such,* under any obligation to provide for grandchildren. It will be found, however, that

(b) See, also, Allen v. Allen, 13 S. C. 512, 36 Am. Rep. 716. In the recent case of In re Ashton, [1897] 2 Ch. 574, it was held by Stirling, J., that the *mother* of the child was not *in loco parentis* within the meaning of that phrase, so as to create an equitable presumption of satisfaction. The "parent" spoken of by all the English cases is the *father.* Since a mother, as such, has no duty of making provision for a child, the burden of proving that she assumes such duty rests on those who assert it, as in the case of a grandfather or any relative other than father. This decision of Stirling, J., was reversed on appeal, [1898] 1 Ch. 142, it appearing from the evidence that the child had accepted the sums advanced as prepayment of the legacy; but the question of law as to the meaning of *in loco parentis* was not discussed by the court of appeal.

§ 557. Circumstances Which do or do not Prevent the Presumption.— Notwithstanding the severe criticism upon the doctrine made by individual judges, the leaning of equity is so strong against double portions, and the presumption of a satisfaction is so favored by the courts, that its operation will not be prevented, "although there may be slight circumstances of difference between the advance and the portion" given by the prior will.[1] The following general proposition is clearly settled by the decisions: It is not necessary, in order that the doctrine of a satisfaction should apply, that the two sums given by the will and by the subsequent advancement should be equal in amount; nor that they should be payable at the same time; nor that the limitations of the bequest contained in the will should be precisely the same as those of the portion contained in the subsequent settlement or instrument of advancement. The latest English decisions have gone so far as to render it doubtful whether it is even necessary that the subject-matters of the two gifts should be *ejusdem generis*. The two gifts need not be equal in amount, since it has already been shown that where the subsequent advance is greater than the legacy, the satisfaction is in full; where it is less, the satisfaction is *pro tanto*. The doctrine applies, although the times of payment of the two gifts are different, and although one carries interest and the other does not.[2] Nor is the presumption of a satisfaction repelled by the fact that the limitations of the bequest contained in the will are quite different from those

in some of the American cases the courts have announced the rule of presumption in the same broad form as stated by Judge Story, so as to include grandchildren. In no case, however, is this point *decided*, nor do the facts require its decision. Notwitnstanding these *dicta*, therefore, it may well be doubted whether any rule has been established by the American decisions different from that settled in England. See Langdon v. Astor's Ex'rs, 16 N. Y. 9; 3 Duer, 477; Clendenning v. Clymer, 17 Ind. 155; De Graaf v. Teerpenning, 52 How. Pr. 313.

1 Per Lord Eldon, in Ex parte Pye, 18 Ves. 140.

2 Hartopp v. Hartopp, 17 Ves. 184, 191.

of the subsequent settlement or other instrument by which the advancement is made or secured.[3]

§ 558. If the legacy is of an uncertain amount,— as, for example, the bequest of a residue or part of a residue,— it is now settled by the more recent English decisions that a subsequent settlement or advancement of a definite sum will operate as a satisfaction in full or in part, if the circumstances are such as otherwise bring the case within the presumption. The earlier decisions had held that the presumption of a satisfaction would not arise where the prior legacy

[3] Lord Durham v. Wharton, 3 Clark & F. 146; 10 Bligh, N. S., 526; 3 Mylne & K. 472; 5 Sim. 297; Trimmer v. Bayne, 7 Ves. 508; Sheffield v. Coventry, 2 Russ. & M. 317; Booker v. Allen, 2 Russ. & M. 270; Carter v. Bowles, 2 Russ. & M. 301; Powys v. Mansfield, 3 Mylne & C. 359, 374; Platt v. Platt, 3 Sim. 503; Days v. Boucher, 3 Younge & C. 411; Phillips v. Phillips, 34 Beav. 19; Monck v. Monck, 1 Ball & B. 298; Nevin v. Drysdale, L. R. 4 Eq. 517.[a] Lord Durham v. Wharton, 3 Clark & F. 146, is the leading English case on this point. A father bequeathed by his will ten thousand pounds to trustees, one half payable three years and the other half six years after his death, with interest in the mean while, upon trust, for his daughter for life, and after her death, in trust, for all her children equally. Subsequently, upon the marriage of this daughter, the father covenanted to give her fifteen thousand pounds, to be paid over to the intended husband, he securing by his marriage settlement pin-money and a jointure for his wife, and portions for the *younger* children of the marriage. The house of lords held, reversing the decisions of Lord Chancellor Brougham and of the vice-chancellor, that the legacy of ten thousand pounds was satisfied by the subsequent advancement, although the limitations of the two were so very much different; and see Miner v. Atherton's Ex'rs, 35 Pa. St. 528; Paine v. Parsons, 14 Pick. 313.[b]

(a) See, also, In re Furness, [1901] 2 Ch. 346.

(b) Vickers v. Vickers, L. R. 37 Ch. Div. 525. In this last case a testator bequeathed his residue, including a business which he directed to be sold for the benefit of his children equally. He had two sons and three daughters. Subsequently, he assigned the business to his eldest son, on trust, which provided for the admission of the younger son as a partner, on equal terms with the elder, on attaining full age, the repayment, with interest, to the father of a sum temporarily employed by him in the business, and the payment to the father of a weekly sum for life. Notwithstanding the dissimilarity of these provisions, it was held by North, J., that the shares of the sons in the residue were adeemed to the extent of the value of the property assigned in trust for them. As illustrative of the principle that the presumption may be overcome by the facts and circumstances attending the subsequent gift, see Lacon v. Lacon [1891], 2 Ch. 482.

was of a residue, because, as it was said, the legal conception of a "portion" necessarily required a gift of a definite sum.[1] Where a legacy, bequeathed in the first place to a child, is given over to a third person upon the happening of a contingency,— as, for example, upon the death of the first legatee without issue,— if the legacy is satisfied as to the first donee by means of a subsequent portion or advancement, then the gift over is also adeemed and satisfied, and the person entitled under it is deprived of all benefit.[2] [c]

§ 559. **Payment to Husband of a Female Legatee.**— Where a father has given a legacy to his daughter, it is very clear that his subsequent settlement or advancement will not any the less operate as a satisfaction from the fact that he bestows some interest in it upon the daughter's husband,— as, for example, a life estate in it even prior to the interest settled upon or given to the daughter herself,— and this is true although the original legacy had been given to the daughter with a gift over to her children, which latter benefit would be cut off and adeemed by the subsequent satisfaction. But this rule goes much further. It appears to be no

[1] These recent cases are: Montefiore v. Guedalla, 1 De Gex, F. & J. 93; Beckton v. Beckton, 27 Beav. 99; Schofield v. Heap, 27 Beav. 93; and see Meinertzhagen v. Walters, L. R. 7 Ch. 670; Lady Thynne v. Earl of Glengall, 2 H. L. Cas. 131.[a]

Among the earlier cases holding that a prior bequest of residue is not thus satisfied are: Farnham v. Phillips, 2 Atk. 215; Freemantle v. Banks, 5 Ves. 79, 85; Smith v. Strong, 4 Brown Ch. 493; Watson v. Earl of Lincoln, Amb. 327; Davys v. Boucher, 3 Younge & C. 397; Clendenning v. Clymer, 17 Ind. 155; Clark v. Jetton, 5 Sneed, 229.[b] A legacy given in remainder, after a prior life interest, was held satisfied by a subsequent portion settled upon the legatee at her marriage, although the trusts were much altered: Phillips v. Phillips, 34 Beav. 19.

[2] Twining v. Powell, 2 Coll. 262; Hine v. Hine, 39 Barb. 507; Garrett's Appeal, 15 Pa. St. 212.

(a) See, also, In re Vickers, L. R. 37 Ch. D. 525.

(b) See, also, Allen v. Allen, 13 S. C. 512, 36 Am. Rep. 716, holding that while there is no presumption in such a case, proof of an intention to adeem an interest in the residue should be given full effect: Davis v. Whittaker, 38 Ark. 435.

(c) See, also, Wallace v. DuBois, 65 Md. 153, 4 Atl. 402.

less clearly settled by the decisions that where a father has given a legacy to his daughter, a subsequent payment by him to the daughter's husband alone, either at the time of or subsequent to their marriage, will operate as a satisfaction of the legacy in full or *pro tanto,* provided such payment was intended by the father to be in the nature of an advancement, and not to be a mere personal donation to his son-in-law; and this intention may appear in the very terms of the written instrument by which the payment is secured or which accompanies it, or by the circumstances surrounding it, or by the verbal declarations made by the donor as a part of the transaction; and of course extrinsic parol evidence is admissible to show such intention.[1] On the other hand, the

[1] Booker v. Allen, 2 Russ. & M. 270; Carver v. Bowles, 2 Russ. & M. 301; Kirk v. Eddowes, 3 Hare, 509; McClure v. Evans, 29 Beav. 422, 425; Ravenscroft v. Jones, 32 Beav. 669; 4 De Gex, J. & S. 224; Ferris v. Goodburn, 27 L. J., N. S., 574; Nevin v. Drysdale, L. R. 4 Eq. 517; Linsay v. Platt, 9 Fla. 150; Towles v. Roundtree, 10 Fla. 299; Bridges v. Hutchins, 11 Ired. 63; Barber v. Taylor, 9 Dana, 84; Wanmaker v. Van Buskirk, 1 N. J. Eq. 685; 23 Am. Dec. 748; Paine v. Parsons, 14 Pick. 103. As the point is one of importance, I add a brief abstract of these cases. In Booker v. Allen, 2 Russ. & M. 270, the testator gave to a cousin, to whom he stood *in loco parentis*, four thousand pounds, the income to be paid to her separate use for her life, and on her death the principal to be divided among her children. On her marriage with Booker, the testator executed a settlement by which he gave four thousand pounds to trustees, the income to be paid to the husband, Booker, for his life, then on his death, to the lady for her life, and then the principal to go for the benefit of their children. This settlement was accompanied by a *verbal* declaration of the testator that it was intended by him in lieu of the legacy. The master of rolls, Sir John Leach, held that the legacy was satisfied. The case of Carver v. Bowles, 2 Russ. & M. 301, is quite similar in its facts. Kirk v. Eddowes, 3 Hare, 509, is a case of high authority, and is very frequently cited. A father had bequeathed three thousand pounds to his daughter for her separate use during life, with remainder to her children. After the execution of the will, and after her marriage, the testator gave *to his daughter and her husband* a promissory note of some third person, then due to the testator, for five hundred pounds. This gift was without any writing; but the evidence showed that the testator was requested by the daughter to confer some benefit upon her husband, and that he therefore gave them the note, declaring at the same time that it was to apply on and be in part payment of the legacy. Wigram, V. C., held that the parol evidence of the intention was admissible, and that the gift of the note was an advancement in part satisfaction of the legacy. It should be observed that under the law the husband would become solely entitled to the proceeds of the note,

payment by the testator to his son-in-law may undoubtedly be intended as a mere personal donation, and in that case it is not in the nature of an advancement nor a satisfaction. This is expressly conceded in several of the decisions last cited.

free from any interest or claim of his wife. In Ravenscroft v. Jones, 32 Beav. 669, 4 De Gex, J. & S. 224, a father had given his daughter a legacy of seven hundred pounds. The daughter afterwards became engaged to be married, and her father gave her one hundred pounds with which to buy her outfit. After the marriage he gave the daughter's husband four hundred pounds in cash. On neither occasion did he make any reference to the legacy or the will. The master of rolls, Lord Romilly, held that the one hundred pounds was clearly intended as a gift, and not as an advancement. He also held that the four hundred pounds was not an advancement, putting his decision partly, if not mainly, upon the ground that the money was paid to the husband alone. On appeal to the lords justices, both of them were very clearly of opinion that the one hundred pounds was intended as a mere gift, and not at all by way of satisfying the legacy. With respect to the four hundred pounds, Knight Bruce, L. J., expressly declined to rest his opinion upon the fact that the money was paid to the husband, and not to the daughter. He reached the conclusion, however, upon all the facts of the case, that the testator intended to bestow a simple donation, and that the payment was not, under all the circumstances, an advancement and partial satisfaction, even if made directly to the daughter herself. Turner, L. J., dissented from this view, and held that the payment was an advancement. Ferris v. Goodburn, 27 L. J., N. S., 574, is directly in point, and goes even further than the statement of the rule which I have given in the text. A father had bequeathed a legacy to his daughter R. She was married during her father's lifetime, and he subsequently gave to her husband eight hundred pounds, in different sums, to be used by the husband in his business. This gift or payment was made *at the husband's request*, but there does not seem to have been any express declaration by the donor that it was to apply on the legacy, as in the case of Kirk v. Eddowes, 3 Hare, 509, and others. Page Wood, V. C. (afterwards Lord Chancellor Hatherley), held that these payments were advances in *pro tanto* satisfaction of the legacy to the daughter. He said: "There was no reason for giving money to Ferris [the husband], except that he had married the testator's daughter, and connecting these gifts with the marriage, and the request *made by the husband*, it is impossible to say that the presumption of satisfaction is not raised, or that parol evidence is not admissible, and there being no evidence to rebut the presumption, there must be a declaration that the legacy was adeemed to the extent of eight hundred pounds." It may certainly be concluded, from this decision by one of the ablest of modern equity judges, that where payments are made by a father-in-law to his daughter's husband, which can only be reasonably explained as advancements made on account of the existing marriage relation, they will be taken as in satisfaction of a prior legacy to the daughter, even though there was no express declaration of such an intention by the donor as a part of the transaction. Nevin

§ 560. **What Prevents the Presumption.**— There are circumstances attending the transaction, and differences between the legacy and the advancement, which prevent the presumption of a satisfaction from arising. These circum-

v. Drysdale, L. R. 4 Eq. 517, 519, is an equally strong case. A father bequeathed to his daughter five hundred pounds, in case she should marry. She afterwards married, in her father's lifetime, in September, and in the following November the testator gave the husband four hundred pounds for furnishing a house. He afterwards promised a further sum of six hundred pounds, but died before carrying out this promise. Page Wood, V. C., held that the legacy to the daughter had been satisfied *pro tanto* by this gift to her husband. He said: "There can be no doubt that the legacy of five hundred pounds, being given by the testator to his daughter on her marriage, was in the nature of a portion; and the authorities, of which Lady Thynne v. Earl of Glengall, 2 H. L. Cas. 131, is a leading instance, being very strong against double portions, even where there are great differences in the character of the gifts, there is, so far, a clear presumption, that the gift of four hundred pounds was in satisfaction of the legacy, and intended as a part payment of the daughter's portion." The court then goes on to show that the subsequent promise of the father-in-law to give six hundred pounds in addition, which was unperformed by reason of his death, did not operate to repel and overcome the presumption of satisfaction arising from the payment of the four hundred pounds. The American cases cited above are equally decided in sustaining the principle of the rule. In Linsay v. Platt, 9 Fla. 150, a father made an agreement with his son-in-law that he would never enforce the payment of a debt due to him from his son-in-law; but that the same should be considered an advancement to the daughter on account of her distributive share of his estate. The father afterwards dying intestate, it was held that the agreement having been fulfilled by him, the virtual discharge of the debt constituted an advancement equal to the amount of it on the daughter's share of the deceased father's estate. The court said: "There can be no doubt that the intestate intended this as an advancement. He made an express contract that it should be so considered. Nor is it material that the daughter did not, or might not, have known of the arrangement between her husband and her father, since it certainly appears that her father intended it as an advancement to her, and neither her knowledge or consent was necessary to make it a good advancement. The property in the lifetime of her father belonged to him; and it was for him to determine whether he would ever give her anything or not, either by advancement or will. His action in the disposition of his property did not depend in any measure upon her knowledge or assent." This ruling was reaffirmed by the same court in Towles v. Roundtree, 10 Fla. 299. A father paid a debt of his daughter's husband. The daughter died before her father. The father then dying intestate, it was held that the payment of her husband's debt was an advancement on the deceased daughter's share of her father's estate, going to her own children. Bridges v. Hutchins, 11 Ired. 68, holds that a gift to a daughter's husband during their coverture is undoubtedly an advancement to the daughter her-

stances and differences I shall briefly mention. In the first place, where a father advances or pays money to his child before the execution of his will, there is no presumption that such advancement or payment is to be in satisfaction of a legacy given to the same child in the subsequent will.[1] In

self. In Wanmaker v. Van Buskirk, 1 N. J. Eq. 685, 23 Am. Dec. 748, a father at the marriage of his daughter gave her husband $150; and this was held to be strictly an advancement, to be accounted for as a part of the daughter's distributive share of her father's estate on his death. In Barber v. Taylor, 9 Dana, 84, a father conveyed land to his son-in-law, reciting in the deed that "he conveyed the land as a part of his daughter's portion." Held, that the land so conveyed must be considered as an advancement to the daughter. In all these American cases, the question arose concerning an advancement made to a daughter upon her distributive portion of her father's estate when he dies intestate. So far as a payment to the daughter's husband constitutes an advancement, the principle is clearly the same, whether the daughter's portion is derived through operation of the statute of distributions or is given by her father's will. If payment to the husband is an advancement and satisfaction in the one case, it certainly must be an advancement and satisfaction in the other.[a]

[1] Taylor v. Cartwright, L. R. 14 Eq. 167, 176, per Wickens, V. C. It appears from this case that a legacy bequeathed by a father to his child for life, *with remainder to the issue of such child*, would not be satisfied by an advance made to the child prior to the will, although the father verbally declared his intention that the advance then made should have such a future operation and effect. On the other hand, if a payment by a father to his child prior to the father's will is made in pursuance of a contract by the child that it is to be in satisfaction of a subsequent legacy, such contract, it seems, is controlling, and a legacy given by a subsequent will is regarded as satisfied in whole or in part, as the case may be. Upton v. Prince, Cas. t. Talb. 71, is directly in point. A father gave his son fifteen hundred pounds, and the son executed a receipt, as follows: "Received of my father, W. P., the sum of fifteen hundred pounds, which I do hereby acknowledge to be on account of and in part of what he has given or shall in or by his last will give unto me, his son." The payment thus made and received was held to be a satisfaction of a legacy of fifteen hundred pounds, contained in a subsequent will of the father. The American cases substantially agree with the English decisions with respect to both phases of this rule, and hold that a prior advancement cannot operate as satisfaction of a subsequent legacy, even where the testator expressed an intention that such an effect should follow, unless it appears that the testator's intention was known by the legatee and

(a) See, also, the following cases of advances by intestate upon the daughter's distributive share: Dilley v. Love, 61 Md. 603; Bruce v. Slemp, 82 Va. 352; McDearman v. Hodnett, 83 Va. 281. But if the payment be made to the husband prior to the execution of the will there is, it seems, no satisfaction: Estate of Lyon, 70 Iowa, 375, 30 N. W. 642.

the second place, small sums paid, or small gifts occasionally made, to a child during the parent's lifetime will not be added up in order to raise an inference that a portion was intended as a satisfaction of a prior legacy.[2][b] In the third place, it has been regarded, as a general rule, that the legacy and the subsequent portion, advancement, or payment must be *ejusdem generis,* or else that no presumption of a satisfaction can arise; and there are decisions which certainly support this rule in its general statement.[3] The latest Eng-

assented to by him, so as to create an implied agreement on the legatee's part: Langdon v. Astor's Ex'rs, 16 N. Y. 9; 3 Duer, 477; Yundt's Appeal, 12 Pa. St. 575; 53 Am. Dec. 496; Musselman's Estate, 5 Watts, 9; Kreider v. Boyer, 10 Watts, 54; Zeiter v. Zeiter, 4 Watts, 212; 28 Am. Dec. 698.[a] As to how far entries made by the testator in his books of account, or other memoranda made by him, or his oral declarations, are admissible as evidence to show such an intent on his part, see the same cases last above cited.

2 Suisse v. Lowther, 2 Hare, 424, 434; Schofield v. Heap, 27 Beav. 93; Watson v. Watson, 33 Beav. 574; Nevin v. Drysdale, L. R. 4 Eq. 517.

3 In Holmes v. Holmes, 1 Brown Ch. 555, a legacy of five hundred pounds to a son was held not satisfied by a subsequent gift of the testator's stock in trade, worth fifteen hundred pounds; but this case has been doubted and criticised by Lord Cottenham in Pym v. Lockyer, 5 Mylne & C. 48;[c] and see Grave v. Lord Salisbury, 1 Brown Ch. 425; Davys v. Boucher, 3 Younge & C. 411. A legacy of a certain sum will not be satisfied by an annual allowance made to the legatee by the testator during his lifetime: Watson v. Watson, 33 Beav. 574; nor by a subsequent advancement depending upon a contingency: Spinks v. Robins, 2 Atk. 491, 493; Crompton v. Sale, 2 P. Wms. 553. While the rule that the subsequent advancement must be *ejusdem generis* with the legacy, in order to raise a presumption of satisfaction, has generally been enforced by the American courts, it is still well settled that the donor's

(a) Estate of Lyon, 70 Iowa, 375, 30 N. W. 642, 5 L. R. A. 71; Estate of Crawford, 113 N. Y. 560, 21 N. E. 692; Strother's Adm'r v. Mitchell's Ex'or, 80 Va. 149.

(b) And a sum expended by a father in paying a son's debts, though large, is not necessarily an advance by way of portion, but may be regarded as a temporary assistance: Taylor v. Taylor, L. R. 20 Eq. 155, *per* Jessel, M. R.; so held, in view of the circumstances of the gift, in In re Scott, [1903] 1 Ch. 1.

(c) Holmes v. Holmes is also criticised in In re Lawes, L. R. 20 Ch. Div. 81; In re Vickers, L. R. 37 Ch. Div. 525. See In re Lacon, [1891] 2 Ch. 482, for a case where there was no ademption by a gift of shares in a partnership business. But in In re Jacques, [1903] 1 Ch. 267, it was decided that Holmes v. Holmes, and the rule of *ejusdem generis* are still the law; and that the observations of Jessel, M. R., in In re Lawes were not to be taken as implying a change in the rule.

lish decisions, however, render it somewhat doubtful whether the rule can be accepted in all its generality.[4] [d]

§ 561. **Effect of a Codicil.**— Wherever a legacy has been satisfied by a portion, advancement, or payment, in pursuance of the presumption against double portions, it will not be revived by a subsequent codicil which simply purports to confirm the will and all the bequests in it. A codicil republishes a will, and reaffirms all the existing testamentary dispositions which purport to be operative, but does not reestablish particular bequests which have been already revoked or adeemed by the testator.[1] Nor can such a codicil be used as evidence tending to show that no satisfaction of the legacy was intended by the testator.[2] Since, however,

intention will govern. If the intention that a subsequent gift shall be in satisfaction of a prior legacy is expressly declared by the testator, then it makes no difference how unlike the two may be: a conveyance of land, if the intention were so expressed, would satisfy a legacy of money: Gill's Estate, 1 Pars. Cas. 139; Hanberger v. Root, 5 Pa. St. 108; Swoope's Appeal, 27 Pa. St. 58; Jones v. Mason, 5 Rand. 577; 16 Am. Dec. 761; Moore v. Hilton, 12 Leigh, 1; Dugan v. Hollins, 4 Md. Ch. 439; Weston v. Johnson, 48 Ind. 1. In Jones v. Mason, 5 Rand. 577, 16 Am. Dec. 761, parol evidence of testator's declarations was held admissible, although no presumption of satisfaction arose because the two gifts were not *ejusdem generis*.

[4] The necessity that the two amounts should be *ejusdem generis* is hardly reconcilable with these latest cases. In Dawson v. Dawson, L. R. 4 Eq. 504, a father had bequeathed to his son B. a share of a residue; on the subsequent marriage of B., the father by agreement made him an annual allowance of £350; the legacy to B. was held to be satisfied *pro tanto* by this yearly allowance.

[1] Powys v. Mansfield, 3 Mylne & C. 359, 376, per Lord Cottenham; Paine v. Parsons, 14 Pick. 313; Langdon v. Astor's Ex'rs, 16 N. Y. 9; Howze v. Mallett, 4 Jones Eq. 194; Miner v. Atherton's Ex'rs, 35 Pa. St. 528, 537.

[2] Powys v. Mansfield, 3 Mylne & C. 359, 376; Roome v. Roome, 3 Atk. 181; Montague v. Montague, 15 Beav. 565, 571; Langdon v. Astor's Ex'rs, 16 N. Y. 9, 37; Alsop's Appeal, 9 Pa. St. 374; but see the remarks of Knight Bruce, L. J., in Ravenscroft v. Jones, 4 De Gex, J. & G. 224, 228. In this case, however, the court held that a legacy given in the body of the will had *not* been satisfied by a subsequent payment. A codicil expressly confirmed the will, but made no reference to the legacy. The lord justice thought that the codicil, though not decisive of the question, was a fact for consideration.[a]

(d) In the very recent case of In re Jacques, [1903] 1 Ch. 267, these doubts were resolved in favor of the rule; see the last preceding note.

(a) In re Scott, [1903] 1 Ch. 1, also holds, in accordance with the opinion of Knight Bruce, L. J., that the codicil is a fact for consideration.

the question whether a legacy has been satisfied by a portion or advancement depends finally upon the intention of the donor, even where the case is governed solely by the equitable presumption, it follows that a codicil subsequent to the advancement, specifically referring to the legacy and treating it as still subsisting, will necessarily show that there was no intention to adeem it, and will thus defeat the presumption of a satisfaction.[3]

§ 562. Satisfaction of Legacies between Strangers.— If the testator is not the parent of the legatee, or does not stand to him *in loco parentis,* in general no presumption arises that a prior legacy is satisfied by a subsequent payment, or gift, or provision by way of portion or advancement; the legatee is, in general, entitled to the legacy, in addition to the other benefit.[1] To this general proposition there is, however, one important exception. If a legacy is given to a stranger *for any particular purpose,* and the testator subsequently makes a payment, advancement, or gift *for the same purpose,* such payment or advancement is presumed to be, and will operate as, a satisfaction of the legacy.[2] Parol

3 Hopwood v. Hopwood, 22 Beav. 493; 3 Jur., N. S., 549; and see In re Aird's Estate, L. R. 12 Ch. Div. 291.

1 Ex parte Pye, 18 Ves. 140, per Lord Eldon. This conclusion is either expressly or impliedly sustained by all the decisions heretofore cited which deal with the presumption as between parent-testator and child.

2 This is simply the case of a testator accomplishing during his lifetime the special purpose or object which he had contemplated, in the provisions of his will, should be accomplished after his death: Monck v. Monck, 1 Ball & B. 303; Rosewell v. Bennett, 3 Atk. 77; Debeze v. Mann, 2 Brown Ch. 166, 519, 521; Trimmer v. Bayne, 7 Ves. 516; Wetherby v. Dixon, 19 Ves. 411; Pankhurst v. Howell, L. R. 6 Ch. 136; Sims v. Sims, 10 N. J. Eq. 158; Hine v. Hine, 39 Barb. 507; Langdon v. Astor's Ex'rs, 16 N. Y. 9; 3 Duer, 477; Williams's Appeal, 73 Pa. St. 249; Roberts v. Weatherford, 10 Ala. 72; Jones v. Mason, 5 Rand. 577; 16 Am. Dec. 761.[a] In Monck v. Monck, 1 Ball & B. 303,

(a) See In re Pollock, L. R. 28 Ch. Div. 552, 556, by Lord Selborne, L. C. "To constitute a particular purpose, within the meaning of that doctrine, it is not, in my opinion, necessary that some special use or application of the money, by or on behalf of the legatee (e. g., for binding him an apprentice, purchasing for him a house, advancing him upon marriage, or the like), should be in the testator's view. It is not less a purpose,

evidence of the donor's intention in making the payment or gift is admissible for the purpose of repelling or strengthening the presumption.[3 b]

§ 563. **Satisfaction, when not Presumed, but Expressed.**— Every case of satisfaction of a prior benefit or obligation by a subsequent gift depends ultimately upon the *intention* of the donor in conferring the latter amount. If the natural or

Lord Chancellor Manners said, by way of illustrating this rule: "Suppose A bequeathed to his brother five thousand pounds to buy a house in Merrion Square, and that afterwards A bought one which he gave to his brother; are there two houses to be bought?" In Pankhurst v. Howell, L. R. 6 Ch. 136, a testator had given his wife a legacy of two hundred pounds, to be paid within ten days after his death; of this testamentary gift the wife was ignorant. During his last illness, a few days before his death, he gave his wife, at her request, two hundred pounds, so that she could have a sum of money under her control upon his death. The executors claimed that this gift was a satisfaction of the legacy; but Lord Romilly, M. R., and the court of appeal held that there was no satisfaction intended. James, L. J., said (page 137): "The rule on this subject is, that where the testator stands neither within the natural nor assumed relation of a parent to the legatee, the legacy will be considered as a bounty, and will not be adeemed by a subsequent advancement, unless the legacy is given for a particular purpose, and the testator advances money for the same purpose, or unless the intention otherwise legally appear of making the advancement with a view to ademption. I think this refers to a legacy given for a particular specific purpose, — as, for instance, a legacy given to purchase an advowson for a son, which would be adeemed, or perhaps it would be more correct to say satisfied, by the father afterwards purchasing the advowson for him. Here the legacy does not appear to me to have been given for a particular purpose, within the meaning of the rule."

3 Debeze v. Mann, 2 Brown Ch. 166, 519, 521; Trimmer v. Bayne, 7 Ves. 516; Richards v. Humphreys, 15 Pick. 135.

as distinguished from a mere motive of spontaneous bounty, if the bequest is expressed to be made in fulfillment of some moral obligation recognized by the testator, and originating in a definite external cause, though not of a kind which (unless expressed) the law would have recognized, or would have presumed to exist." For the facts of this case, see *ante*, note to § 556. But see In re Smythies, [1903] 1 Ch. 259: "A legacy to a trustee for the benefit of an infant, to whom the trustee is not *in loco parentis*, is not given for a particular purpose, within Pankhurst v. Howell, L. R. 6 Ch. 136, and In re Pollock, L. R. 28 Ch. D. 552, 556, so as to be adeemed by a subsequent gift of the same sum to the same trustee for the same purpose." A legacy to the trustees of the endowment fund of a hospital is a legacy for a "particular purpose," and is adeemed by a subsequent gift during the testator's lifetime of the same amount for the same purpose: In re Corbett, [1903] 2 Ch. 326.

(b) See, also, In re Pollock, L. R. 28 Ch. Div. 552.

acquired relation of parent and child subsists between the giver and the beneficiary, the intention of the donor is *implied* from the very fact of the two benefits conferred while such relation exists, and need not be expressed either in the writing by which the second gift is bestowed, nor in any collateral declaration, verbal or written. The rule concerning the equitable presumption of satisfaction, discussed in the foregoing paragraphs, is simply the statement of this result in a formal manner. In all other cases where the relation of parent and child does not exist, the intention of the donor to work a satisfaction of the prior benefit by a subsequent gift must be expressed, unless the case falls within the single special exception described in the last preceding paragraph. It is a proposition generally, even if not universally, true, that, whatever be the relation between the two parties, whether that of strangers or otherwise, where a testator has conferred a legacy upon an individual, he may afterwards during his own lifetime bestow a second gift of any nature upon the same beneficiary, with the intention that it shall be in satisfaction of the prior legacy; and if this intention is sufficiently expressed, and if the second gift is consummated so that the legatee accepts it or receives and enjoys its benefits, the prior legacy will thereby be satisfied. As this effect depends wholly upon the expressed intention of the donor, the nature of the two gifts, their identities or differences, are entirely immaterial,— a legacy of money might thus be satisfied by the gift of a specific chattel or of a specific tract of land. As this doctrine is important, and as its treatment by text-writers and even by some courts has been confused, I shall quote the language in which it has been stated by one of the ablest modern equity judges, Lord Romilly: "If the testator stands *in loco parentis,* the presumption of equity being against double portions, the presumption of satisfaction arises at once, and includes everything that the father gives which he intended to be in satisfaction of his previous promised benefit; and evidence is admissible for the purpose of rebutting or sustaining the presumption against double

portions, which in that case is in favor of satisfaction. In the case of a stranger, the presumption against double portions does not arise at all. It is wholly a question of construction, and no evidence is admissible either to sustain or rebut any presumption, for the reason that none arises. In this latter case the question of satisfaction never arises except upon *the express words of the donor,* and whether the gifts said to be given in satisfaction are given by a father or a stranger is wholly immaterial, and it is solely a question whether the original benefactor intended that his benefit should be diminished or adeemed by benefits derived from any other source, and if so, what other source. This may be shown pointedly in a case where the gifts supposed to be a satisfaction of the original gifts are gifts of land. In the case of a parent, or person *in loco parentis,* land would be no [presumed] satisfaction of a gift of money. But if the original gift was to a stranger, the doctrine of satisfaction becomes applicable according to the words of the original donor. There the question is, whether the words he has used, fairly interpreted, meant the gift of land as satisfaction of the benefits he has bequeathed or previously conveyed. It is therefore of paramount importance to consider in all cases whether the doctrine of presumption against double portions, or the doctrine of construction of instruments, is that which applies.'' [1]

§ 564. Rationale of the Rule in Such Cases.— It may be stated, therefore, as a general proposition, that wherever a testator has bequeathed a legacy to a child or to a stranger, and afterwards during his lifetime either advances an amount of money or gives any other species of property, lands, chattels, or things in action to the same legatee, and the beneficiary in accepting the money or other property expressly assents, acknowledges, or agrees that the same shall be in partial or complete payment or discharge of the prior

[1] Cooper v. Cooper, L. R. 8 Ch. 813, 819, note, per Lord Romilly, M. R.

bequest, then the legacy will be satisfied in whole or in part, as the case may be. Also, when a testator has in like manner bequeathed a pecuniary legacy, and afterwards pays to the legatee a sum of money which he expressly declares to be in discharge of the legacy, or gives to the legatee any other species of property which he expressly declares shall be in lieu of the legacy, and the legatee receives and enjoys the benefits of the payment or gift, the prior legacy is thereby satisfied.[1] Where a pecuniary legacy has been

[1] Hardingham v. Thomas, 2 Drew. 353; Richards v. Humphreys, 15 Pick. 133; Howze v. Mallett, 4 Jones Eq. 194.[a]

In these American cases the reasons for the rule are so clearly explained, and its operation so accurately described, that I shall quote some passages from the opinions. In Howze v. Mallett, 4 Jones Eq. 194, a grandfather had bequeathed five hundred dollars to each of certain grandchildren. On the marriage of one of these granddaughters the testator paid over to her husband five hundred dollars, and took back a receipt by which the husband acknowledged the payment of that sum, "to be deducted from the bequest to his wife." The court held that the legacy to the wife was thereby satisfied. Ruffin, J., said: "The only question is, whether, after payment by the testator expressly in satisfaction of a pecuniary legacy, a second payment can be enforced from the executor. . . . The delivery by the testator to the legatee of a specific thing bequeathed has always been held to be a satisfaction or ademption of the legacy. Although the tenor of the will stands, yet the gift is ineffectual, because the legatee, having got the thing intended for him, cannot get it again. In that respect, it must be the same with the pecuniary legacy. Express anticipated payment by the testator must exclude a claim for a second payment of the same sum, since the testator intended but one gift, and that he completed in his lifetime." In Richards v. Humphreys, 15 Pick. 133, a testator had bequeathed to his sister $500, and afterwards gave her $466 to enable her to purchase some land. She delivered to him in return a writing, by which she acknowledged the receipt of the money, and that it was paid to her "in part of her right of *dower* in his last will." The evidence also showed that the testator expressed a willingness to pay off the whole legacy, and actually offered his sister the balance, but she declined to receive it. During all this time she had a husband, who died, however, before the testator. The legatee sued the executors for the entire legacy. The court held that the testator's declarations were admissible in evidence, and that the receipt, in connection with these declarations, clearly showed his intent in advancing the $466, and that the legacy was thereby *pro tanto* satisfied. The reasons for this decision were set forth in an elaborate opinion, from which I make the following extracts: "The ademption of a specific and of a general legacy depend upon very different principles. . . . But when a general legacy is given, of a sum of money out of the

(a) See, also, Allen v. Allen, 13 S. C. 512, 36 Am. Rep. 716.

given, and the testator afterwards during his lifetime advances a sum of money expressly in payment of the prior gift, the legacy may properly be said to be "adeemed," but the result is the same whether the effect be termed "ademp-

testator's general assets, without regard to any particular fund, intention is of the very essence of ademption. The testator, during his life, has the absolute power of disposition or revocation. If he pay a legacy in express terms during his lifetime, although the term "payment," "satisfaction," "release," or "discharge" be used, it is manifest that it will operate by way of ademption, and can operate in no other way, inasmuch as a legacy during the life of the testator creates no obligation upon the testator or interest in the legatee which can be the subject of payment, release, or satisfaction. If, therefore, a testator, after having made his will containing a general bequest to a child or stranger, makes an advance, or does other acts which can be shown by express proof or reasonable presumption to have been intended by the testator as a satisfaction, discharge, or substitute for the legacy given, it shall be deemed in law to be an ademption of the legacy." The court then states and explains the doctrine concerning the presumption of satisfaction arising between a parent and child, and proceeds: "From this view of the subject of the ademption of general legacies, it seems manifest that the ademption takes effect, not from the act of the legatee in releasing or receiving satisfaction of the legacy, but solely from the will and act of the testator in making such payment or satisfaction, or substituting a different act of bounty which is shown by competent proof to be intended as such payment, satisfaction, or substitute. The question therefore is, whether, from the facts shown in the present case, it sufficiently appears that the advance of money made by the testator in his lifetime to his sister was intended as a part payment and satisfaction of the legacy given to her by his will; if it was so intended, the law deems it an ademption *pro tanto*." The court then examined the receipt, and held that its language acknowledging payment of the money "in part of her right of dower in his last will" must be interpreted as meaning to refer to the legacy given to her in his will, of which there could be no reasonable doubt; and also held that the testator's declarations were admissible in explanation of the ambiguity in the receipt, and in showing the testator's intention, and said, in conclusion: "As to the objection that at the time of the payment the plaintiff was a *feme covert*, we are of opinion that it does not vary the result. The only ground is, that the plaintiff was at the time of the payment under the disability of coverture. But we have seen that ademption depends solely on the will of the testator, and not at all upon the ability of the party receiving to give a valid discharge. Had the money been paid to trustees or others for her benefit, without any act or consent of hers, if given expressly in lieu or in satisfaction of such legacy to her, it would have operated as an ademption. Had he purchased a house or other property in her name and for her benefit, with the like intent and purpose expressed, it would have had the same effect. The circumstance of her disability at the time of the payment, therefore, is not inconsistent with the testator's intention in making it to advance and satisfy the legacy to her, nor does it affect the efficacy of such payment as an ademption."

tion " or " satisfaction," and in all the instances above described there is a satisfaction of the legacy. It is certainly not *essential* to a satisfaction, under any of the circumstances above mentioned, that the beneficiary should assent thereto so as to become a party to an agreement that the legacy shall be satisfied. A legacy, as long as the will is ambulatory, is completely under the control of the testator; a satisfaction takes place as the result of *his* intention and act; the consent and agreement of the legatee, in one of the cases described, is really efficacious, as it shows unequivocally the intent with which the testator made his second gift. There is, unfortunately, some confusion upon this subject in the books, but the real distinction and the true rule are perfectly clear, and based upon universally accepted principles. It is not every expressed intention of a testator that a prior legacy shall be annulled, no matter how plain and unequivocal, *but unaccompanied by any act of benefit to the legatee,* that can be operative. No such mere expression of an intent to annul a prior legacy can be operative unless it amounts to an actual revocation; and a general or pecuniary legacy can only be revoked either by an act which amounts to a cancellation, or by a written instrument executed with all the formalities required for a will. Satisfaction or ademption of a general legacy is not a revocation; it assumes that the original intention to confer the gift upon the legatee has not been changed; the testator simply anticipates his own death by either paying to the legatee the very amount of the legacy or by bestowing upon him some other gift expressly in lieu thereof. Satisfaction or ademption, in the sense in which it is here discussed, requires, therefore, that some benefit should be conferred upon the legatee, in anticipation by way of payment of the amount of the legacy, or of substitution of something in place of it; but its operation and effect depend upon the act and intention of the testator himself to make the prepayment or substitution, and not upon any active assent on the part of the legatee, so that he would be bound by an implied agreement to receive the present

benefit instead of the future donation. All the English and American cases of real authority are agreed upon this view of the nature of the satisfaction of a prior legacy, whether it arises from the equitable presumption between a parent testator and his child, or from the expressed intent of the testator where there is no such presumption.[2] [b]

§ 565. IV. Satisfaction of Portions by Subsequent Legacies or other Similar Provisions.— In pursuance of the same principle of opposition to double portions, the general rule is equally well settled, that where a portion is made payable under a settlement, or an instrument in the nature of a settlement, by a parent, or a person *in loco parentis*, and he afterwards makes a provision by a legacy in favor of the one entitled to the portion, a presumption arises that such provision is intended to be in complete or partial satisfaction of the portion, according as the amount of the legacy exceeds, is equal to, or is less than that of the prior portion. If the second provision is by a subsequent settlement instead of by will, it may also be a satisfaction; although the presumption does not seem to be as strong in that case as when the second gift is a legacy.[1] As the rules concerning this species of sat-

2 The opinion in Richards v. Humphreys, 15 Pick. 133, quoted in the last note, states this view in the clearest and strongest manner, and the same doctrine is laid down in many other decisions cited in preceding notes.

1 Jesson v. Jesson, 2 Vern. 255; Palmer v. Newell, 20 Beav. 32, 40; 8 De Gex, M. & G. 74; Bruen v. Bruen, 2 Vern. 439; Hinchcliffe v. Hinchcliffe, 3 Ves. 516; Warren v. Warren, 1 Brown Ch. 305, note; Ackworth v. Ackworth, 1 Brown Ch. 308, note; Copley v. Copley, 1 P. Wms. 147; Moulson v. Moulson, 1 Brown Ch. 82; Byde v. Byde, 2 Eden, 19; 1 Cox, 44; Duke of Somerset v. Duchess of Somerset, 1 Brown Ch. 309, note; Finch v. Finch, 1 Ves. 534; Sparkes v. Cator, 3 Ves. 530; Pole v. Lord Somers, 6 Ves. 309; Bengough v. Walker, 15 Ves. 507; Campbell v. Campbell, L. R. 1 Eq. 383; Lady Thynne v. Earl of Glengall, 2 H. L. Cas. 131; 1 Keen, 769; Chichester v. Coventry, L. R. 2 H. L. 71; Dawson v. Dawson, L. R. 4 Eq. 504; Paget v. Greenfell, L. R. 6 Eq. 7; McCarogher v. Whieldon, L. R. 3 Eq. 236; In re Tussaud's Estate, L. R. 9 Ch. Div. 363; Fairer v. Park, L. R. 3 Ch. Div. 309; Mayd v. Field, L. R. 3 Ch. Div. 587; Bethel v. Abraham, L. R. 3 Ch. Div. 590, note; Russell v. St. Aubyn, L. R. 2 Ch. Div. 398; Cooper v. Cooper, L. R. 8 Ch. 813.[a]

(b) This paragraph of the text is cited in Richardson v. Eveland, 126 Ill. 37, 18 N. E. 308, 1 L. R. A. 203.

(a) See, also, Montagu v. Earl of Sandwich, L. R. 32 Ch. Div. 525.

isfaction are substantially the same as those which govern the satisfaction of prior legacies by subsequent provisions, any detailed discussion of the subject is unnecessary, and I need only state the more important phases of the doctrine without further illustration.[2]

§ 566. **What Differences do not Defeat the Presumption.**— Since courts of equity lean strongly against double portions, as well when the first portion is given by a settlement or other agreement as when it is given by a will, it is well settled that slight differences — and as appears by some decisions even considerable differences — between the prior portion and the subsequent legacy will not be sufficient to rebut the presumption of the legacy being intended as a satisfaction of the portion. These differences may be either in the times of payment, or in the trusts and limitations contained in the settlement and in the subsequent will, or in the nature and amount of the two gifts. The question always is, as stated in a leading decision, whether the two provisions are substantially the same, and this question every judge must decide for himself from a comparison of the two instruments, under the light of surrounding circumstances. Thus it has been recently held that the bequest of a residue, or a part of a residue, will be presumed to be a satisfaction, in whole or *pro tanto,* as the case may be, of a prior portion given to the same beneficiary.[1]

2 For example, the rules determining when a person is *in loco parentis* are exactly the same in this kind of satisfaction as in the one described under the preceding subdivision. As family settlements, and agreements in the nature of such settlements, by which parents bestow or covenant to bestow portions on their children, are quite rare in this country, it naturally follows that comparatively a very few American decisions have dealt with this species of satisfaction. See Gilliam v. Chancellor, 43 Miss. 437; 5 Am. Rep. 498; Guignard v. Mayrant, 4 Desaus. Eq. 614; Winn's Adm'r v. Wier, 3 B. Mon. 648; Taylor v. Lanier, 3 Murph. 98; 9 Am. Dec. 599.

1 Lady Thynne v. Earl of Glengall, 2 H. L. Cas. 131; 1 Keen, 769; Hinchcliffe v. Hinchcliffe, 3 Ves. 516; Sparkes v. Cator, 3 Ves. 530; Weall v. Rice, 2 Russ. & M. 251, 268; Copley v. Copley, 1 P. Wms. 147; Russell v. St. Aubyn,

§ 567. **What Differences Defeat the Presumption.**— While the foregoing general rule is universally admitted, it is equally well settled that the presumption *may* be overcome by *intrinsic* evidence, appearing in the provisions of the two instruments, of the donor's intention that the legacy shall be in addition to and not in satisfaction of the prior portion. The most recent English decisions of the highest authority have established the natural and exceedingly just doctrine that the presumption of a satisfaction is not so strong when the settlement or agreement to bestow a portion precedes the will, as it is when the will precedes the settlement or agreement. The conclusion necessarily follows from this doctrine, that differences or variations between the two provisions will avail to overcome and destroy the presumption of a satisfaction when a prior portion is given by settlement or agreement, and a subsequent legacy is conferred by a will, which would not be sufficient to produce the same result

L. R. 2 Ch. Div. 398; Campbell v. Campbell, L. R. 1 Eq. 383; and see the cases cited in the next following note.[a]

(a) In In re Lawes, L. R. 20 Ch. 81, a father bound himself to pay his reputed son ten thousand pounds on a certain day four years later. A few weeks before the day of payment he took his son into partnership, and it was provided in the articles that the capital should consist of thirty-seven thousand five hundred pounds, to be brought in by the father, of which nineteen thousand pounds should be considered as belonging to the son. He also assigned to his son the lease of the premises on which the business was carried on. The father died without having paid any part of the ten thousand pounds secured by the bond. It was held by the court of appeal that the rule against double portions applied, and that the benefit given to the son under the partnership articles must be taken in satisfaction of the sum due under the bond. In Montagu v. Earl of Sandwich, L. R. 32 Ch. Div. 525, a father, by a marriage settlement, covenanted to pay his second son an annuity of one thousand pounds a year, and to charge the annuity on a sufficient part of his real estate. By his subsequent will, he devised his real estate, "subject to the charges and encumbrances thereon," in strict settlement on his first son, and after other legacies, gave his second son legacies, the income of which would be considerably more than one thousand pounds a year. It was held on appeal by Bowen, L. J. and Cotton, L. J. (Fry, L. J., dissenting), reversing the decision of Pearsons, J., that the presumption against double portions applied, and that the words "subject to the charges and encumbrances thereon," used in the will, did not rebut it.

when a legacy is first given, and is followed by a settlement or advancement. The reasons for this distinction are obvious and convincing. A prior legacy is wholly under the control of the testator; it creates no obligation upon him, nor right or interest in the legatee; it can be adeemed by the sole act and intent of the testator without any consent of the legatee; and the presumption of an intent to adeem or satisfy it easily and naturally arises from his subsequent bounty. A prior settlement or agreement to bestow a portion, on the other hand, does create an obligation upon the donor, and a right and interest in the donee; the donor cannot discharge or satisfy it by any act or intent of his own,— the consent of the beneficiary is essential. The distinction between the two cases is clear, and inheres in their very nature. The conclusion reached by the recent English decisions is therefore natural and just; the presumption of an intended satisfaction is less strong and is more easily overcome when the settlement or agreement precedes the will than when the will precedes the settlement.[1] The settlement

[1] The subject is fully examined and the conclusions stated in the text are clearly established by the house of lords, in the case of Chichester v. Coventry, L. R. 2 H. L. 71. See quotations from the opinions *ante*, in note under § 524; also Dawson v. Dawson, L. R. 4 Eq. 504; Paget v. Grenfell, L. R. 6 Eq. 7; McCarogher v. Whieldon, L. R. 3 Eq. 236; Lethbridge v. Thurlow, 15 Beav. 334; In re Tussaud's Estate, L. R. 9 Ch. Div. 363; Russell v. St. Aubyn, L. R. 2 Ch. Div. 398.[a] As examples of the differences between the two provisions which prevent the presumption from arising, a legacy given upon a contingency is not a presumptive satisfaction of a prior certain portion: Bellasis v. Uthwatt, 1 Atk. 426, 428; Hanbury v. Hanbury, 2 Brown Ch. 352; and the legacy must be *ejusdem generis* with the prior portion, in order to create a presumption of satisfaction. A devise of land will not be a satisfaction of money given as a portion, nor a legacy of money a satisfaction for a settlement of land: Goodfellow v. Burchett, 2 Vern. 298; Chaplin v. Chaplin, 3 P. Wms. 245; Bellasis v. Uthwatt, 1 Atk. 426, 428; Savile v. Savile, 2 Atk. 458; Ray v. Stanhope, 2 Ch. Rep. 159; Grave v. Earl of Salisbury, 1 Brown Ch. 425. A direction by the testator in the will to

(a) See, also, Montagu v. Earl of Sandwich, L. R. 32 Ch. Div. 525, 546–548, judgment of Fry, L. J. In Cartwright v. Cartwright, [1903] 2 Ch. 306, the differences between the provisions were so great as to defeat the presumption of satisfaction of a portion by a subsequent life insurance policy.

or agreement to give a portion may sometimes contain a provision to this effect: that if the parent should afterwards, during his lifetime, make an advancement to the donee, such advancement should be a complete or partial satisfaction of the portion. If, instead of making a technical advancement, the parent should afterwards, by his will, leave a legacy of a specific sum or of a residue, the legacy given under such circumstances is held to be a compliance with the provision, and to operate as a satisfaction in full or in part of the portion.[2] [c]

§ 568. **Election by the Beneficiary.**— Where the former provision is by will, the satisfaction takes place, as has been shown, without any assent of the legatee, from the act and intent of the testator alone, so that no election on the part of the beneficiary is either necessary or possible. The legacy, being ambulatory, creates no obligation upon the

pay all debts is a circumstance very materially affecting the presumption, even if not completely overcoming it: Lord Chichester v. Coventry, L. R. 2 H. L. 71; Paget v. Grenfell, L. R. 6 Eq. 7; Dawson v. Dawson, L. R. 4 Eq. 504. No presumption could possibly arise where the second gift is expressly stated in the will, either not to be in satisfaction of the portion, or to be in addition to it: Burges v. Mawbey, 10 Ves. 319, 327; Donce v. Lady Torrington, 2 Mylne & K. 600. On the other hand, if the will should expressly declare that the gift therein bestowed, whatever be its nature or amount, was intended to be in satisfaction or in lieu of a portion which the testator had before settled or agreed to pay to the same donee, such expressed intention would necessarily control, independently of any presumption, and the beneficiary would be put to an election between the two provisions.[b]

2 Onslow v. Michell, 18 Ves. 490; Leake v. Leake, 10 Ves. 489; Noel v. Lord Walsingham, 2 Sim. & St. 99; Fazakerley v. Gillibrand, 6 Sim. 591; Papillon v. Papillon, 11 Sim. 642. A share of a parent's property, when he dies intestate, is not such an advancement: Twisden v. Twisden, 9 Ves. 413.

(b) The fact that two documents are contemporaneous, so that both are present in the mind of a donor when he executes each of them, is a strong reason against holding a gift in one of them to be a satisfaction of an obligation under the other to pay a like sum. So held in Horlock v. Wiggins, L. R. 39 Ch. Div. 142, of an obligation contained in a separation deed, whereby the husband covenanted that his executors should pay a certain sum to his wife, and a like provision in his contemporaneous will.

(c) The text is quoted and commented upon in Estate of Zeile, 74 Cal. 127, 133, 15 Pac. 455, a case falling within the principle of § 548, *ante*.

testator, nor any right or interest in the legatee. It is otherwise, however, when the prior provision is by a settlement or other agreement for the payment of a portion. Such settlement or agreement, being a valid and effective contract, creates a distinct legal obligation resting upon the donor, and a distinct legal right and interest belonging to the donee. The two parties, if not strictly a debtor and a creditor, stand in a relation closely analogous to that of debtor and creditor. It is evident, therefore, that the obligation resting upon one party, and the right held by the other, cannot be discharged and annulled except by the co-operation of the one in whose favor the right exists. There can be in such a case no effectual and operative satisfaction of the prior portion by the act and intent of the donor, however clearly expressed, unless the beneficiary also consents and voluntarily accepts the subsequent provision as a substitute for or satisfaction of the prior obligation. It follows, therefore, that whenever a portion is secured by a settlement or by any other agreement, and a subsequent provision is made for the same beneficiary by a legacy or otherwise, which would either operate as a satisfaction in pursuance of the equitable presumption, or which is expressly declared by the donor to be given in satisfaction, in each case the beneficiary has an election between the two provisions. He may, at his option, accept the subsequent legacy and surrender the prior portion, or he may reject the substituted legacy and claim the prior portion. By electing to take either, he necessarily renounces his claim to the other.[1]

[1] The rules which determine how an election is made, either expressly or impliedly, who may elect, the effect of an election, and the like, are the same in this particular instance as in the cases which were considered in the preceding section upon election: Copley v. Copley, 1 P. Wms. 147; Lady Thynne v. Earl of Glengall, 2 H. L. Cas. 131; Finch v. Finch, 1 Ves. 534; Hinchcliffe v. Hinchcliffe, 3 Ves. 516; Pole v. Lord Somers, 6 Ves. 309; and see the other cases cited under the preceding paragraphs which deal with the satisfaction of portions by subsequent legacies. The same doctrine of election, of course, applies to the case where the prior obligation satisfied by a subsequent legacy is an ordinary debt due from the testator; the creditor-legatee has an election whether to accept the testamentary gift or to enforce his prior demand.

§ 569. **V. Admissibility and Effect of Extrinsic Evidence.**— There is certainly some conflict among the judicial decisions with respect to the question, How far may extrinsic and parol evidence of the donor's intention be admitted in these four cases of satisfaction? and the treatment of the subject by the text-writers has sometimes been confused, inaccurate, and unsatisfactory. If, however, we form and constantly keep in mind a clear conception of the exact circumstances under which such evidence is offered in each particular case, and the real purpose for which it is offered, and give their proper force and effect to certain elementary general rules concerning the use of parol evidence in connection with written instruments, the question will be freed from all its apparent difficulties, and will be found to be one of very easy solution.

§ 570. **General Principles Discussed and Explained.**— A few preliminary observations will be useful to clear the ground from all irrelevant matter, to describe the real condition of circumstances from which the questions arise, and to explain the exact nature of these questions themselves which are to be examined. In the first place, it is evident that the same principles must apply to and govern the admissibility of evidence in all of the four instances of satisfaction heretofore discussed, namely, the satisfaction of debts by subsequent legacies, of legacies by subsequent legacies, of legacies by subsequent advances or portions, and of portions by subsequent legacies. Each of these four instances, although they differ somewhat among themselves with respect to their external form, depends upon the same general principle of equity; in each instance the satisfaction, so far as it falls under the control of equitable rules, arises from the one equitable doctrine of a presumption that the donor did not intend to confer double benefits upon the single recipient of his bounty. How far extrinsic evidence is admissible affecting this intention, showing it either to exist or not to exist, must plainly be regulated by the same rules in all of these

four instances. In the second place, it is equally clear that in all of these four instances of satisfaction which arise from equitable doctrines, the extrinsic evidence of the donor's intention must refer alone to the second gift, whatever be its form and nature.[1] In every case the first benefit which is claimed to have been satisfied is either a pure gift, a legacy contained in a will, and of course still under the power of the donor; or it is a definite obligation,— either a portion secured by a settlement or some other similar written agreement, or a debt which may either be evidenced by a written instrument or may have been contracted verbally. Whatever be its external form, its nature is fixed and settled, and is always determined by the terms of the will in which it is given, or of the obligation by which it is created. In some special cases a resort may be had to the express terms of the will or other instrument, which may refer to a subsequent benefit expected to be conferred by way of substitution; but extrinsic evidence can never be necessary in direct application to the first benefit for the purpose of showing whether or not it has been satisfied. The intent to satisfy must, from the very nature of the case, be an element connected with the subsequent benefit; and so far as extrinsic evidence is admissible to disclose that intention, it must relate exclusively to such subsequent benefit, whether legacy, portion, advancement, gift, or payment. It should be remembered, however, that evidence of the surrounding circumstances, of the situation of the subject-matter, of the situation and relations of the parties, and the like, is always admis-

[1] The correctness of this proposition is expressly admitted by Lord Chancellor Sugden in the celebrated case of Hall v. Hill, 1 Dru. & War. 94, 133. A father had created a certain obligation in favor of his son-in-law and daughter by a marriage contract; he afterwards gave the daughter a legacy, and it was claimed that the legacy was given in satisfaction of the prior contract obligation. Parol evidence of the testator's intent was offered. With respect to this proposed evidence Lord Chancellor Sugden said (p. 133): "If I admit parol evidence, it must be in connection with the will; it has nothing to do with the debt. The debt was contracted before the will was made; and the declarations of the testator, which have been offered in evidence, cannot apply to the debt, but must be used in reference to the will only."

sible to throw light upon and thus explain the nature of every writing or other transaction, however formal; and such evidence is therefore admissible in relation to the first benefit, the will, settlement, agreement, or debt, as well as for the purpose of describing the effect and operation of the second donation. In the third place, it is clear that the subsequent benefit, claimed to be in satisfaction of the prior one, may be conferred either by a written instrument or verbally without any accompanying writing. Where it is a legacy or a portion, it must necessarily assume a written form; where it is an advancement, gift, or pecuniary payment merely, the donor's act and intention may be contained in a written instrument, or the entire transaction on the donor's part may be wholly verbal,— may wholly consist of his external acts and accompanying words. This difference between a written and a verbal form of bestowing the second benefit gives rise to a distinction concerning the admissibility of extrinsic evidence entirely unconnected with the *essential nature* of the transaction; that is, with the equitable presumption of a satisfaction, and depending solely upon the difference of external form. Whenever the subsequent benefit is conferred by means of a written instrument on the part of the donor,— a will, settlement, agreement, assignment, conveyance, or other writing,— it is, of course, subject to the universal rule, that, as between the parties thereto and their successors in interest, a written instrument cannot be altered, modified, added to, or subtracted from by extrinsic parol evidence directly showing the intention with which the writing was executed.[a] The only extrinsic evidence generally admissible is that which discloses the circumstances surrounding the execution of the instrument, the nature and situation of the subject-matter, the relations of the parties, and the like, and which thus places the court in the very position which the parties occupied when the writing was executed. This rule

(a) The text is cited to this effect in Estate of Lyon, 70 Iowa, 375, 378, 30 N. W. 642.

obviously has no particular connection with the equitable presumption of satisfaction, but it applies to all written instruments of donation from which a satisfaction of a prior benefit may arise. Parol extrinsic evidence tending to show the donor's intention that a satisfaction should or should not be wrought by his second gift, so far as it would violate this general rule, cannot, of course, be admitted. On the other hand, wherever the second benefit is wholly verbal, where it consists of an advancement, or payment, or gift made by the donor's acts and words alone, without any accompanying writing on his part, the transaction is clearly not subject to any such restrictive rule concerning the admissibility of extrinsic evidence; there is nothing in the policy of the law which forbids a resort to such evidence for the purpose of describing all the acts and declarations of the donor, so far at least as they formed a part of the transaction in and by which the gift was bestowed. This distinction between the two cases of a written and a verbal gift, although self-evident, has sometimes been overlooked in the discussions of the question as to the admissibility of extrinsic evidence; and it must be employed to explain and limit some of the general statements contained in judicial opinions. Having thus described the several conditions of circumstances from which the questions as to the admission of extrinsic evidence can arise, I shall proceed to state and discuss the questions themselves. What these questions are is now very clear. When may extrinsic parol evidence be admitted, and when may it not, in relation to the second or subsequent benefit, to show the donor's intention, either that it should be, or should not be, in satisfaction of a prior gift bestowed or prior obligation conferred upon the same beneficiary? The two distinct cases, before mentioned, in which these questions can arise will be examined separately, namely: 1. Where the second or subsequent benefit is conferred by means of a written instrument on the part of the donor; and

2. Where it is conferred verbally, without any writing by the donor.[b]

§ 571. **The Subsequent Benefit Given by a Writing.**— It is plain that all possible cases of a written form of conferring the second benefit by the donor may be reduced to the following: 1. Where the written instrument states in express terms the donor's intention that the benefit therein contained is or is not bestowed by him in lieu of or in satisfaction for the prior gift or obligation; and 2. Where the writing is wholly silent with respect to any such intention, and is *merely* an instrument of donation, assignment, or transfer; in other words, where it is a will giving a legacy *simpliciter,* or a written agreement simply bestowing or covenanting to bestow a portion, or a writing simply showing an advancement or payment of money, or an instrument simply operating as an assignment, conveyance, or transfer of chattels, lands, things in action, or other property, in either case without any additional language indicating an intention that the benefit thus given should or should not be in lieu of, or in substitution for, or in satisfaction of the prior gift or obligation. Finally, this second form of the writing may occur between two different classes of persons having different legal relations towards each other, namely, the donor may be the parent of, or stand *in loco parentis* to, the beneficiary, so that the equitable presumption of an intent to satisfy will arise from the naked fact of the second gift; or the donor

(b) In some of the United States statutes have been passed on this subject, which require that the testator's intention should be evidenced by a writing, in order that the advancement should have the effect of an ademption. In California, the Civil Code (sec. 1351) provides that "advancements or gifts are not to be taken as ademptions of general legacies, unless such intention is expressed by the testator in writing"; and in section 1397 it is provided, in cases of intestacy: "All gifts and grants are made as advancements, if expressed in the gift or grant to be so made, or if charged in writing by the decedent as an advancement, or acknowledged in writing as such by the child or other successor or heir." Similar statutes have been enacted in Illinois: Rev. Stats. 1874, c. 39, sec. 7; Hurd's Stats. 1887, p. 505, secs. 4–7; Wilkinson v. Thomas, 128 Ill. 363, 21 N. E. 596; Wallace v. Reddick, 119 Ill. 151, 8 N. E. 801.

may stand in the legal relation of a stranger to the beneficiary, so that no equitable presumption of a satisfaction arises from the transaction. These three classes comprise all the instances of a second benefit conferred by a writing.

§ 572. The Writing Expressly States the Donor's Intention. — The first of these three cases plainly requires no discussion. It may occur either where the donor stands in the parental relation towards his beneficiary, so that the equitable presumption of a satisfaction would otherwise have arisen, or where he stands in the relation of a stranger to his beneficiary, so that no such presumption would arise. Under either of these circumstances, if the donor inserts into the written instrument of donation an express declaration of his intention that the benefit thereby bestowed should be in substitution for or in satisfaction of the prior gift or obligation, or on the other hand, that it should be cumulative, and in addition to the prior benefit, such express statement of the intention is conclusive, and must control. There is no place, under these circumstances, for any presumption; all necessity and even opportunity for the operation of presumptions is obviated. No extrinsic parol evidence of the donor's declarations, nor other parol evidence showing his intention, is admissible. The only effect of such evidence would be to alter, modify, vary, or add to the express terms of a written instrument, in direct violation of the general rule applicable to all similar cases. The written instrument, with its express statement of the donor's intention, must speak for itself, under the light, however, thrown upon it by the proof of the circumstances in which it was executed, which proof is, of course, always proper.[1] That no other

[1] In Kirk v. Eddowes, 3 Hare, 509, 516, 517, Wigram, V. C., said, on this particular point: "Where similar questions have arisen upon gifts given by two distinct instruments, the law as to the admissibility of parol evidence has, I believe, been long since settled. In such case, the rule of law applies, that written instruments cannot be added to or explained by parol evidence. . . . . Again, if the second instrument, in terms, adeems the gift by the first, it could not, I apprehend, be contended that it would not produce its intended

kind of extrinsic evidence can be resorted to in such a case for the purpose of showing the donor's intention, and of either producing or preventing a satisfaction, is a proposition too clear for discussion.

§ 573. The Writing Silent as to the Donor's Intention, and No Presumption Arises from It.— In the second class of instances, as above mentioned, the written instrument of donation by which the second benefit is conferred is wholly silent with respect to any intention on the part of the donor of

effect; a party claiming under and having taken the benefit of it could not claim that benefit, and at the same time refuse to give full effect to it."

This rule would plainly apply to every form of written donation made between parties standing towards each other in every legal relation. If the prior benefit was a pecuniary legacy, and the testator should in the same instrument give exactly the same sum of money, stated to be given for exactly the same motives, but expressly declared in its written terms to be additional to the former legacy; or if the testator should in a subsequent codicil bequeath to the same person a chattel or thing in action, or devise to him a piece of land, and should expressly declare that this second benefit was in lieu of or in substitution for the prior legacy,— in either case there could be no extrinsic evidence for the purpose of altering, adding to, or explaining this unequivocal expression of the testator's intention in writing. Also, if the prior liability was a certain, fixed, legal obligation owing to a child, to any family relative, or to a stranger, in the form of an ordinary debt, a covenant, a settlement securing the payment of a portion, and the like, and a subsequent bequest should be stated in express terms either to be in addition to such prior obligation, or to be in substitution for or satisfaction of the same, no extrinsic evidence of the testator's intention could be admitted; in the one case the beneficiary could both claim the gift conferred by the will, and also enforce the obligation against the estate, while in the other case he would be compelled to elect between the two. Finally, if the prior benefit was a legacy bestowed either upon a child or upon a stranger, and the testator should subsequently, during his lifetime, pay or advance a sum of money, or transfer any property to the legatee, which payment, advance, or transfer was accomplished by means of a writing expressly declaring the intent of the testator, either to thereby satisfy and pay off the legacy, or to bestow an additional and separate gift, the written expression of intention in either case would be final and conclusive. These propositions may appear to be self-evident; but they are important, in order to present the real questions in their simplicity.[a]

(a) In Low v. Low, 77 Me. 38, a testator in his lifetime gave to a son a sum of money, and the son executed to him a writing releasing and discharging him and his representatives from paying "the legacy named in said will, or any sum of money or property under any other will of my said father." It was held that there was an ademption of all legacies in the will to the son.

satisfying the prior gift or obligation; it is a *mere* instrument of donation, a legacy given *simpliciter,* a contract simply giving a portion, a simple advancement or payment of money, or assignment of property evidenced by a writing from the donor. The relation between the donor and his beneficiary, however, is of such a kind that no equitable presumption of a satisfaction arises from this subsequent benefit. With respect to this class, there are English decisions, at one time regarded as authoritative, and as settling the rule, which laid down the broad doctrine that, although no presumption of a satisfaction arose, and no intention was expressed in the written instrument, still the *intention* with which the second legacy, portion, advancement, or other gift was bestowed might always be proved by extrinsic parol evidence, even by the verbal declarations of the donor.[1] The

[1] These cases in fact held that extrinsic evidence was alike admissible whether a presumption of satisfaction did or did not arise from the second gift, whenever the instrument of donation did not in express terms declare the donor's intention one way or the other: Weall v. Rice, 2 Russ. & M. 251, 263; Booker v. Allen, 2 Russ. & M. 270; Lloyd v. Harvey, 2 Russ. & M. 310, 316; Lord Glengall v. Barnard, 1 Keen, 769. In the leading case of Weall v. Rice, 2 Russ. & M. 251, 263, Sir John Leach, M. R., said: "The rule of the court is, as in reason I think it ought to be, that if a father makes a provision for a child by settlement on her marriage, and afterwards makes a provision for the same child by his will, it is *prima facie* to be presumed that he does not mean a double provision; but this presumption may be repelled or fortified by *intrinsic* evidence derived from the nature of the two provisions, or by *extrinsic* evidence. Where the two provisions are of the same nature, or there are but slight differences, the two instruments afford intrinsic evidence against a double provision. Where the two provisions are of a different nature, the two instruments afford intrinsic evidence in favor of a double provision. *But in either case extrinsic evidence is admissible of the real intention of the testator.*" In this statement of the rule, the court expressly repudiated any distinction between the case where the *prima facie* presumption against double portions and therefore of a satisfaction arises, and that where no such presumption exists; and declares that extrinsic evidence of the donor's intention is admissible in both. The actual decision upon the facts of this case may have been correct; the subsequent criticism has rather been directed to this broad statement of the rule. In Booker v. Allen, 2 Russ. & M. 270, a testator had given a legacy to a young lady towards whom he stood *in loco parentis;* he subsequently made a settlement upon her; but the provisions of the will and of the settlement were so entirely different that the court held no presumption of a satisfaction could

authority of these decisions has, however, been more than questioned, and the broad doctrine which they lay down has been very much limited by the more recent English cases. In the class of instances now under consideration, where the instrument bestowing the second donation is wholly silent with respect to any intention of satisfying the prior benefit, *and where no equitable presumption of a satisfaction arises on the face of the instrument* from the nature of the gift, the doctrine, as settled by the more recent English cases, excludes all extrinsic evidence of the donor's declarations, and all similar evidence directly showing his intention, on the ground that such evidence would alter or add to the terms of the writing. This conclusion, and the judicial opinions by which it is sustained, are fully explained in the next succeeding paragraph.[2]

§ 574. **The Writing Silent as to Donor's Intention, but a Presumption of Satisfaction Arises from It.**— In the third class of instances, as above described, the written instrument of donation, by which the second benefit is conferred, is wholly

thereby arise. Nevertheless, Sir John Leach admitted parol evidence of the donor's declarations, for the purpose of showing his intention that the prior legacy should be satisfied by the subsequent settlement, and upon such evidence decreed in favor of a satisfaction. In Lloyd v. Harvey, 2 Russ. & M. 310, 316, a similar decision was made. The court held that no presumption of a satisfaction of a prior settlement arose from the terms of a subsequent will; but admitted parol evidence of the testator's declarations showing an intention that the legacy should operate as a satisfaction, and made a decree in accordance with such evidence. In Earl of Glengall v. Barnard, 1 Keen, 769, 794, Lord Langdale, M. R., quoted and approved the general rule as laid down by Sir John Leach in Weall v. Rice, 2 Russ. & M. 251, 263.

The authority of these decisions by Sir John Leach seems to have been recognized and approved by several American cases, which seem to lay down the broad rule admitting the evidence both when a presumption does and does not arise. See the American cases cited near the end of the first note under the next following paragraph.

[2] See Kirk v. Eddowes, 3 Hare, 509; Hall v. Hill, 1 Dru. & War. 94; Hunt v. Beach, 5 Madd. 351, 360; Lee v. Pain, 4 Hare, 201; Palmer v. Newell, 20 Beav. 32.

silent with respect to any expressed intention on the part of the donor to satisfy the prior gift or obligation; but still the relations between the donor and his beneficiary, and the two benefits themselves, are of such a nature that an equitable *presumption of a satisfaction arises on the very face of the subsequent* instrument. In this class of cases it is well settled that extrinsic evidence of the donor's intention, and even of his declarations, is admissible either to sustain and fortify, or on the other hand to rebut and destroy, the presumption which would arise and which would otherwise control; and, according to the modern English decisions, this is the only class of cases where a second benefit is conferred by a written instrument, which admit of parol evidence directly tending to show the donor's intention. The following is a statement of the rule as laid down by Lord St. Leonards, when lord chancellor of Ireland: "If, *by the construction of the instruments* the conclusion is arrived at by the court that the second gift *was or was not* a satisfaction of the first, then parol evidence could not be admitted to show the *intention.* But if *by the construction* no such conclusion was arrived at, and the gift was of such a nature that a *presumption* arose according to the rule of equity that the latter gift was intended to be in satisfaction of the former, then parol evidence would be admissible either to fortify or to rebut such presumption." The same rule, in slightly different language, was thus formulated by Vice-Chancellor Wigram: "Where the second instrument does in terms adeem the gift by the first, it will operate accordingly. Where the second gift does not expressly adeem the gift or satisfy the obligation by the first, but the case is of such a description that, from the relation between the author of the instrument and those claiming under it, *the law raises a presumption of ademption or of satisfaction,* then evidence is admissible to show that such presumption is not in accordance with the intention of the author of the gift. And where evidence is *admissible* for that purpose,

counter-evidence is also admissible. The evidence is admissible to ascertain whether the presumption is well or ill founded."[1] The result of the modern authorities — cer-

[1] The two leading authorities in support of this restricted doctrine, as stated in the text, are Hall v. Hill, 1 Dru. & War. 94, and Kirk v. Eddowes, 3 Hare, 509. In Hall v. Hill, 1 Dru. & War. 94, a father, on the marriage of his daughter, gave his bond to her husband for the payment of eight hundred pounds in installments, upon certain trusts; and afterwards gave his daughter a legacy out and out of eight hundred pounds, and died leaving his will containing the bequest. Lord Chancellor Sugden held,— 1. That from the peculiar nature of the prior settlement on the husband and daughter, the subsequent legacy to the daughter did not of itself operate as a satisfaction; that the case did not fall under the equitable presumption against double portions. Parol evidence was offered of the testator's declarations, which, if admissible, would have shown his intention that the prior settlement should be satisfied by the legacy; and the question chiefly discussed was in relation to the admission of this evidence: Pages 111–133. Sir E. Sugden's opinion contains an exhaustive review of the cases. After referring to certain decisions upon the general subject of parol evidence in connection with writings, he takes up those which relate to the satisfaction of legacies by subsequent advancements, and of portions by subsequent legacies, and divides them into three classes. In the first class there was first a legacy and then an advancement, so that a presumption of satisfaction arose, and parol evidence was held admissible, either to repel or to confirm this presumption; since such evidence would not contradict nor alter the terms of either instrument. In this class he places the cases of Rosewell v. Bennett, 3 Atk. 77; Biggleston v. Grubb, 2 Atk. 48; Monck v. Lord Monck, 1 Ball & B. 298; Pole v. Lord Somers, 6 Ves. 309; Freemantle v. Bankes, 5 Ves. 79. In the second class the circumstances were the same, and parol evidence was held admissible to show that the advancement was not intended to be a satisfaction, but that the legatee should have both amounts; for such evidence merely rebuts the *prima facie* presumption. To this class belong Shudall v. Jekyll, 2 Atk. 516; Debeze v. Mann, 2 Brown Ch. 165; 1 Cox, 346; Trimmer v. Bayne, 7 Ves. 508. In the third class he placed certain cases where a prior portion or debt had been followed by a legacy, or where a prior legacy had been followed by a second legacy, but without creating any *prima facie* presumption of a satisfaction, namely: Fowler v. Fowler, 3 P. Wms. 353; Wallace v. Pomfret, 11 Ves. 542; Wilmot v. Woodhouse, 4 Brown Ch. 227; Coote v. Boyd, 2 Brown Ch. 521; Osborne v. Duke of Leeds, 5 Ves. 369; Hurst v. Beach, 5 Madd. 351; Guy v. Sharp, 1 Mylne & K. 589; and the three cases of Weall v. Rice, 2 Russ. & M. 251; Booker v. Allen, 2 Russ. & M. 270; and Lloyd v. Harvey, 2 Russ. & M. 310,— all decided by Sir John Leach. Lord Chancellor Sugden strongly disapproved of the decisions by Sir John Leach in these three last-named cases, but approved and adopted the rule as laid down by the same judge in Hurst v. Beach, 5 Madd. 351. The decision in this case (Hurst v. Beach) had confined the admissibility of parol evidence showing the donor's intention to those instances in which, according to equitable doctrines, a presumption of satisfaction arises from the mere fact of the

tainly of the modern English authorities — is clearly as follows: In the single case of a subsequent benefit conferred by a written instrument which does not in terms

second provision being made; such evidence is then admitted either to rebut the presumption or to strengthen or confirm it. This doctrine Lord Chancellor Sugden very strongly approved, and made it the basis of his decision. As the legacy of the testator's daughter, under the circumstances, raised no presumption that he intended thereby to satisfy the prior portion settled upon her husband and herself, parol evidence of such an intention could not be received. He concluded as follows (p. 133): "If I admit parol evidence it must be in connection with the will; it has nothing to do with the debt. The debt was contracted before the will was made; and the declarations of the testator which have been offered in evidence cannot apply to the debt, but must be used in reference to the will only. I am now asked to insert in the will a declaration by the testator, which I do not find in it, namely, that he means the legacy to be a satisfaction of the debt. I am of opinion that I can do no such thing. If I were to admit the evidence, it would be, not with a view to extrinsic circumstances, but to the construction of the will itself." In Kirk v. Eddowes, 3 Hare, 509, Wigram, V. C., said (p. 516): "Where the questions have arisen upon gifts given by two distinct instruments, the law as to the admissibility of parol evidence has, I believe, been long settled. In such cases the rule of law applies, that written instruments cannot be added to or explained by parol evidence; and therefore, unless the second instrument, in express terms or by presumption of law, adeems the gift made by the instrument of earlier date, no question can arise; both instruments will take effect. Again, if the second instrument in terms adeems the gift by the first, it could not be contended that it would not produce its intended effect. If, however, the second instrument do not in terms adeem the first, but the case is of that class in which, from the relations between the author of the instrument and the party claiming under it (as in the actual or assumed relation of parent and child), or on other grounds, the law raises a presumption that the second instrument was an ademption of the gift by the instrument of earlier date, then evidence may be gone into to show that such presumption is not in accordance with the intention of the author of the gift; and where evidence is admissible for that purpose, counter-evidence is also admissible. In such cases, the evidence is not admitted on either side for the purpose of proving, in the first instance, with what intent either writing was made; but for the purpose only of ascertaining *whether the presumption which the law has raised be well or ill founded.* For this it will be sufficient to refer to the case of Hurst v. Beach, 5 Madd. 351, and to the cases cited in the elaborate judgment of the lord chancellor of Ireland in the late case of Hall v. Hill, 1 Dru. & War. 94, and to Hartopp v. Hartopp, 17 Ves. 192, Powys v. Mansfield, 8 Mylne & C. 359, and numerous other cases."

The following American cases also involve the doctrine discussed in the text. In some of them the rule seems to be laid down in the same general terms, as though applicable alike where the subsequent benefit is conferred by a writing and where it is verbal; while in several of them the broad doctrine of Weall v. Rice, 2 Russ. & M. 251, seems to be followed, or at least no

express the author's intention that the benefit thus given shall or shall not be in ademption or satisfaction of the prior gift or obligation, but from which, by the operation of equitable doctrines, there arises the *prima facie* presumption that such an ademption or satisfaction *was* intended by the author,— in this single case extrinsic parol evidence of the donor's actual intention may be resorted to, and may be used either to rebut and destroy the presumption, or to confirm, support, and establish it. The meaning is, not

distinction is drawn between the arising or not arising of a presumption: Gilliam v. Chancellor, 43 Miss. 437; 5 Am. Rep. 498; Langdon v. Astor's Ex'rs, 16 N. Y. 9, reversing 3 Duer, 477; Hine v. Hine, 39 Barb. 507; Paine v. Parsons, 14 Pick. 313; Gill's Estate, 1 Pars. Cas. 139; Zeigler v. Eckert, 6 Pa. St. 13, 18; 47 Am. Dec. 428; Sims v. Sims, 10 N. J. Eq. 158, 162, 163; Jones v. Mason, 5 Rand. 577; 16 Am. Dec. 761; Clendenning v. Clymer, 17 Ind. 155; Timberlake v. Parrish's Ex'rs, 5 Dana, 346; Parks v. Parks, 19 Md. 323; Cecil v. Cecil, 20 Md. 153; Lawson's Appeal, 23 Pa. St. 85. In the recent case of Gilliam v. Chancellor, 43 Miss. 437, 5 Am. Rep. 498, a husband had settled five thousand dollars on his wife by a marriage contract, and left her a legacy of five thousand dollars. The court (pp. 453–456) discussed the question as to the admissibility of evidence with some fullness, citing the modern English cases, and stating the rule which they establish; but held that it was not necessary to decide the question, since the testator's intention was clear, from a construction of his will, that the legacy was to be in lieu of the sum settled by the marriage contract. Langdon v. Astor's Ex'rs, 16 N. Y. 9, is by far the most instructive case on the doctrine of satisfaction to be found in the American reports. The testator had given a large legacy; subsequently he gave, by a written assignment, accompanied by entries in his books of account, and by verbal declarations, certain stocks and other securities. The court laid down the rule in conformity with that contained in the text, holding that all declarations of the testator forming a part of the transaction may be proved; but expressed a strong doubt, and perhaps even a decided opinion, against the admission of subsequent declarations. In Clendenning v. Clymer, 17 Ind. 155, the court, after admitting and applying the rule as to parol evidence for the purpose of rebutting or sustaining the presumption, held that the doctrine of presumed satisfaction does not extend to a legacy of residue, and therefore extrinsic evidence is not admissible to show that an advancement by the testator was to apply on a legacy of residue. In Parks v. Parks, 19 Md. 323, Cecil v. Cecil, 20 Md. 153, and Lawson's Appeal, 23 Pa. St. 85, the question arose concerning advancements made, not by a testator to his legatee, but by an intestate to his children. In each case it was held that evidence of the donor's declarations made at the time of the transaction of the donee's subsequent admissions, and of other facts and circumstances showing the intent, was admissible for the purpose of showing whether the gift was an advancement on the child's share of the father's estate, or was an additional donation and gratuity.

that one of the parties may produce evidence tending to rebut the presumption, and when such testimony has been received, the opposing party may, by way of answer, introduce contrary evidence tending to sustain the presumption: all the decisions show the true meaning to be that the respective parties may, in the first instance, and to support their own contention, introduce original evidence which tends either to overthrow or to support the presumption; and this evidence may be of the donor's declarations. The evidence thus admitted in pursuance of this rule does not in fact violate the general doctrine which forbids a resort to parol evidence for the purpose of adding to, taking from, or modifying the terms of a written instrument. Primarily, the second instrument of donation, if read literally, and enforced according to its very terms, would necessarily confer a distinct and separate benefit, independent of and in addition to the previous gift or obligation; but from certain considerations of policy, an equitable presumption has been created which modifies the terms of this instrument, which prevents them from operating according to their literal import. Now, the parol evidence which is permitted to rebut and remove this presumption simply restores the instrument to its literal meaning; instead of contradicting, or altering, or taking from the terms of that instrument, the evidence in fact only renders the very written terms effective and obligatory according to their simple and literal signification. On the other hand, when the extrinsic evidence is admitted to strengthen and confirm the presumption, its operation is wholly in accordance with the *legal meaning and effect* of the written instrument. It is true, the evidence does not in this case apply to and enforce the literal terms of the writing; those terms have already been modified by the presumption, and a legal effect has been given to the instrument different from that which would have resulted from the mere language in the absence of the presumption. This *legal* import and effect of the instrument are strengthened, confirmed, and as it were ratified, by the

extrinsic parol evidence. In neither aspect of the case does the extrinsic evidence of the donor's intention alter, add to, or take from the written instrument, and its admission violates no general rule concerning the use of such evidence. In every other case, however, where a second benefit is conferred by a written instrument which contains no express indication of the author's intention, and from which no presumption arises of an intention to adeem or satisfy the prior gift or obligation, the admission of extrinsic evidence directly showing the author's intention would necessarily contradict, alter, take from, or add to the written terms, and would therefore violate the familiar general rule which forbids such evidence.[2]

[2] Monck v. Lord Monck, 1 Ball & B. 298; Hurst v. Beach, 5 Madd. 351, 360; Lee v. Pain, 4 Hare, 201; Palmer v. Newell, 20 Beav. 32; Powys v. Mansfield, 3 Mylne & C. 359; Hartopp v. Hartopp, 17 Ves. 192; Pole v. Lord Somers, 6 Ves. 321; Wallace v. Pomfret, 11 Ves. 542; Freemantle v. Bankes, 5 Ves. 79; Biggleston v. Grubb, 2 Atk. 48; Rosewell v. Bennett, 3 Atk. 77; Shudall v. Jekyll, 2 Atk. 516; Debeze v. Mann, 2 Brown Ch. 165; 1 Cox, 346; Trimmer v. Bayne, 7 Ves. 508; and see also, in this connection, Fowler v. Fowler, 3 P. Wms. 353; Wilmot v. Woodhouse, 4 Brown Ch. 227; Coote v. Boyd, 2 Brown Ch. 521; Osborne v. Duke of Leeds, 5 Ves. 369; Guy v. Sharp, 1 Mylne & K. 589. The case of Monck v. Lord Monck, 1 Ball & B. 298, is a very instructive one, although the second gift, concerning which the controversy arose, was conferred without any writing, so far as appears from the report. Lord Monck had given a legacy of five thousand pounds to his brother, W. D. S. Monck, to whom he confessedly stood *in loco parentis*, upon certain trusts for himself and children. Afterwards Lord Monck executed his bond for four thousand pounds, as a portion for the same brother, upon trusts slightly differing from those contained in the will. Some time previous to this last-named settlement, but after the execution of the will, Lord Monck gave one thousand pounds to the same brother, to enable him to purchase a house. This gift seems to have been wholly verbal. Upon Lord Monck's death, his brother brought this suit to recover the whole legacy of five thousand pounds. The court held that the portion of four thousand pounds was clearly a satisfaction *pro tanto* of the legacy. With reference to the payment of the one thousand pounds, evidence of Lord Monck's verbal declarations, showing his intention, was offered by the executors, but was objected to by the plaintiff as inadmissible. Upon this question, Lord Manners said (p. 305): "It appears from the testimony of a witness that the one thousand pounds had been paid at the desire of the plaintiff. The plaintiff objects to all this evidence as inadmissible, insisting that such evidence cannot be received to support but only to rebut a presumption." He then quotes Rosewell v. Bennett, 3 Atk. 77, and Pole v. Lord Somers, 6 Ves. 321, in which he states that such evidence

§ 575. **Cases to Which the Foregoing Rules Apply.**— The rules formulated in the foregoing paragraphs, being founded upon general doctrines concerning the effect of verbal evidence upon written instruments, and the admissibility of such evidence, clearly apply alike to all cases of double benefits to the same person, where the second benefit is conferred by means of a written instrument. They equally apply to and govern the cases of a prior legacy and a subsequent portion, advancement, payment, or gift in writing; a prior portion, and a subsequent legacy or portion; a prior legacy, and a subsequent legacy, in the same or in a different instrument; a prior indebtedness and a subsequent legacy. Although most of the decisions heretofore cited have arisen either from prior legacies and subsequent portions, advancements, or gifts, or from prior portions and subsequent legacies, yet it will be found that the same rule has been recognized or actually enforced in both

had been admitted by Lord Hardwicke and Lord Eldon, in order to confirm as well as to rebut a presumption, and proceeds: "Well, then, one thousand pounds is advanced by Lord Monck, and this is proved by the testimony of Miss Isabella Quinn. She states that it was advanced between the time of making the will and the plaintiff's marriage, and that Lord Monck often declared that his brother (the plaintiff) was very desirous of getting some of the money intended to be settled upon him; that Lord Monck had in consequence thereof advanced one thousand pounds, which he considered as part of the five thousand pounds he intended to leave or settle on the plaintiff, or as a part of what he had left by will; and deponent often heard Lord Monck say that he had given one thousand pounds to the plaintiff, and had settled four thousand pounds on his marriage; and that the five thousand pounds he intended to leave him was paid in that manner, and in lieu of the legacy; and she always heard Lord Monck say that he intended to provide for his brothers equally." This decision has been repeatedly cited and approved, and its correctness has never been doubted. It is instructive as showing the kind of extrinsic evidence which has been admitted, where any evidence of intent was admissible. See also the following American cases: Gilliam v. Chancellor, 43 Miss. 437, 453–456; 5 Am. Rep. 498; Langdon v. Astor's Executors, 16 N. Y. 9; Hine v. Hine, 39 Barb. 507; Gill's Estate, 1 Pars. Cas. 139; Zeigler v. Eckert, 6 Pa. St. 13, 18; 47 Am. Dec. 428; Sims v. Sims, 10 N. J. Eq. 152, 153, 158; Jones v. Mason, 5 Rand. 577; 16 Am. Dec. 761; Clendenning v. Clymer, 17 Ind. 155; Timberlake v. Parrish's Executors, 5 Dana, 346; Paine v. Parsons, 14 Pick. 313; Parks v. Parks, 19 Md. 323; Cecil v. Cecil, 20 Md. 153; Lawson's Appeal, 23 Pa. St. 85.

the other classes of double benefits. Thus in case of two legacies to the same person, if the equitable doctrine itself raises the presumption against double legacies,— that is, where two legacies of exactly the same amount are given *simpliciter* by the same instrument,— verbal evidence is admissible to rebut this presumption, and to show the testator's intention that the legatee should receive both the gifts; for such evidence does not contradict but rather sustains the literal meaning of the will. If the evidence is allowed to rebut and overcome the presumption, then it is also allowable, under the rule, to support and confirm it. On the other hand, if no presumption arises from the instrument itself,— as, for example, where legacies of the same amount are given *simpliciter* by different instruments,— no parol evidence can be admitted; the decision must be made solely upon a construction of the writings.[1] The same rule must, on principle, and to preserve any consistency in dealing with the doctrine of satisfaction, control the case of a prior debt and a subsequent legacy, where a debtor bequeaths a legacy to his creditor.[2]

1 Lee v. Pain, 4 Hare, 216; Hurst v. Beach, 5 Madd. 351.

2 It must be conceded, however, that there is some conflict and inconsistency among the decisions which apply the rule to this class of instances. Wherever the equitable doctrine raises a presumption of a satisfaction from the mere bequest of a legacy by a debtor to his creditor,— namely, where a legacy equal to or greater than the debt is given *simpliciter*,— then on principle, and in accordance with the rule established for all other cases, parol evidence is admissible both to rebut and to support the presumption. See Plunkett v. Lewis, 3 Hare, 361. In Fowler v. Fowler, 3 P. Wms. 353, Lord Chancellor Talbot refused to admit evidence under such circumstances, and his decision seems to have been approved of by Lord Chancellor Sugden in Hall v. Hill, 1 Dru. & War. 94; but the decision and the apparent approval are in conflict with the conclusion reached and the general doctrine established by Chancellor Sugden in that celebrated case. On the other hand, in Wallace v. Pomfret, 11 Ves. 542, the testator had stated his intention in express words; nevertheless, Lord Eldon, in opposition to an argument of Sir Samuel Romilly, which advocated the doctrines as now settled, admitted parol evidence of the testator's intention in conflict with the express terms of the will. This decision is clearly opposed to principle, and was condemned by Chancellor Sugden in Hall v. Hill, 1 Dru. & War. 94. The rule has also been extended to a legacy by a creditor to his debtor. In Zeigler v. Eckert, 6 Pa. St. 13, 18, 47

§ 576. The Subsequent Benefit Given Verbally.— In three classes of cases,— namely, a prior portion and a subsequent legacy or portion, a prior legacy and a subsequent legacy, a prior debt and a subsequent legacy,— the second benefit must necessarily be conferred by a writing, and there can be no room for any other rule than those already stated in the foregoing paragraphs. In the single case of a prior legacy and a subsequent advancement, payment, or gift, it is alone possible that the second benefit may be bestowed otherwise than by a writing,— by mere acts and words of the donor. We are to consider the rule concerning the admission of extrinsic parol evidence applicable to this case. In the first place, it is plain that the admission of such evidence cannot be fettered by the general doctrine prohibiting parol evidence to contradict, alter, or add to a written instrument, so far as such evidence is directed to the second benefit itself; because the benefit is conferred without any writing, and there is no foundation in fact for the operation of the doctrine. How far such general doctrine might apply to the prior benefit — the will — is another question, and will be separately considered. In the second place, it is equally plain that the admission of the evidence is wholly independent of any presumption arising or not arising that the second benefit is intended to be in satisfaction of the prior legacy. In the rule established for the three classes of cases already discussed, the admission of parol evidence is made to depend upon the existence of the presumption solely because it is such presumption alone which prevents the evidence from altering or contradicting the written instrument by which the second benefit was conferred, and thus violating the general doctrine. In the present case,

Am. Dec. 428, it was held that a legacy by a creditor to his debtor is presumed *not* to be in discharge or release of the debt; but that this presumption may be overcome by parol evidence of the testator's declarations made both at and after the time of executing the will, to the effect that the debt was thereby discharged; and that contrary evidence sustaining the presumption was also admissible.

there being no written instrument which can be altered or contradicted, the aid of the presumption is unnecessary, and the admission of evidence is wholly independent of its presence or absence. In all cases, therefore, of a prior legacy and a subsequent verbal advancement, payment, or gift, as well in those where, from the relation between the two parties, a presumption of satisfaction arises as in those where no such presumption exists, there is nothing in principle which should prevent a resort to parol evidence for the purpose of disclosing the real intent of the donor, either that the second benefit was to be in lieu and satisfaction of the prior legacy, or was to be cumulative and in addition thereto. In fact, the transaction being entirely parol, *the mere fact of the gift itself must be proved by verbal evidence;*[a] and as the whole transaction must be shown, in order to disclose its true nature and effect, a resort to verbal evidence for that purpose becomes absolutely necessary. If the donor accompanied his parol advancement or payment by an express stipulation or declaration that it was or was not to be in lieu and satisfaction of the prior legacy, such express stipulation or declaration would have the same effect as a similar one incorporated in the instrument of donation when the second benefit is conferred by writing. It is thus demonstrated that, so far as it relates directly to the second benefit itself, verbal evidence of the donor's intention is on principle admissible; the question remains, whether it is admissible so far as it relates to and affects the prior will. The answer to this is equally clear. The evidence does not in any manner contradict, alter, or add to the terms of the will. Even if it should be shown by extrinsic parol evidence that the subsequent advancement was made with an express verbal stipulation or declaration that it was given in lieu and satisfaction of the prior legacy, the will would remain untouched and unaltered in all of its

(a) In Van Houten v. Post, 33 N. J. Eq. 344, it is held that evidence of parol declarations of the testator of the fact of giving the advance is not admissible, but charges in books made by the testator against the child are.

terms. The effect of such a verbal stipulation or declaration would not be to revoke the legacy. On the contrary, it expressly recognizes the bequest as operative; it simply shows that the testator has resolved to anticipate the payment of his intended gift,— to pay it himself to the legatee in his own lifetime, instead of postponing the payment until after his own death. These conclusions, so entirely in accordance with principle, are fully sustained by decisions of the highest authority.[1] From the foregoing discussion of the prin-

[1] The leading case is Kirk v. Eddowes, 3 Hare, 509. A testator had bequeathed three thousand pounds to his daughter upon certain trusts for the benefit of herself, and after her death for her husband and children. After the date of the will, he verbally gave to his daughter and her husband a note for five hundred pounds, then due and payable from a third person to the testator. In an administration suit, brought after the testator's death, the question arose for decision, whether this gift of five hundred pounds was a partial satisfaction of the legacy. Parol evidence was offered that after the date of the will the testator was requested by his daughter to confer some benefit on her husband, and that therefore the testator gave them the promissory note, declaring that it was to be in part satisfaction of the legacy, and that the testator was advised by his attorney that it was not necessary to alter his will in order to give it that effect. Wigram, V. C., decided as to the admission and effect of this evidence as follows (p. 517): After stating the rules applicable when the second benefit is conferred by a writing, as heretofore quoted, he said: "The advance of five hundred pounds was after the date of the will. This transaction, however, is not evidenced by any writing, and the technical rule to which I have referred against admitting evidence to prove what was the intention of the parties to that transaction does not therefore apply. The question is, whether any other rule applies which shall exclude the evidence. . . . . The defendant's evidence was not objected to, nor could it have been successfully objected to, so far as it went to show the gift of Warner's note, its amount, and other circumstances attending it, with the exception of the testator's declarations accompanying the gift; for the court which has to decide whether the transaction has affected a partial ademption of the legacy must know what the transaction was. But the declarations of the testator accompanying the transaction were objected to. Why should those accompanying declarations not be admissible? They are of the essence of the transaction, and the truth of the transaction itself cannot be known to the court without them. The rule which would exclude the evidence if the intention of the parties had been expressed in writing does not apply. I assume that if the intention of the parties as proved by the evidence had been in writing, it could not be contended on the part of Mrs. Kirk, to whom a legacy was given for her separate use absolutely, that a payment to her husband of the amount of her legacy, at her instance and at her request, would not have precluded her from claiming it under her father's will; or in other words,

ciple, and from the decisions cited in the note, the following conclusions are reached: Where the relations between the testator and the legatee and the nature of the two gifts are such that a presumption of satisfaction arises from the subsequent verbal advancement, payment, or donation, extrin-

that the advance made under such circumstances would not have adeemed the legacy. If that be not so, the argument must be, that an advance made by a testator to one of his legatees, under an agreement in writing that the legatee shall accept the advance in full satisfaction of his legacy, would leave the legatee at liberty to claim the legacy notwithstanding the agreement; and if such an argument be not admissible, the declarations of the testator must be admissible in the case I am now considering, unless there be some rule of law which hinders a transaction, like that which the defendant relies upon, from being valid unless it be evidenced by writing. This, however, cannot be successfully contended for. The evidence does not touch the will; it proves only that a given transaction took place after the will was made, and proves what that transaction was, and calls upon the court to decide whether the legacy given by the will is not thereby adeemed. Ademption of the legacy, and not revocation of the will, is the consequence for which the defendant contends,— a distinction which is marked by Lord Hardwicke in the case of Rosewell v. Bennett, 3 Atk. 77. The defendant does not say the will is revoked; he says the legatee has received his legacy by anticipation. In principle, therefore, I cannot see my way to reject the evidence in question. How, then, does the case stand upon authority?" He quotes, as sustaining his conclusions, and comments upon the cases cited below, at the conclusion of this note, and adds: "It was said that there was a distinction in this case, inasmuch as the advance was made, not, as in the cases cited, to the legatee herself, but to the husband of the legatee. That circumstance might be material upon the question of *implied* ademption, but it cannot affect the question of admitting or rejecting evidence to prove what the transaction was. In more than one of the cases cited the same circumstance occurred." See also Monck v. Lord Monck, 1 Ball & B. 298; Rosewell v. Bennett, 3 Atk. 77; Biggleston v. Grubb, 2 Atk. 48; Shudall v. Jekyll, 2 Atk. 516; Thellusson v. Woodford, 4 Madd. 420; Bell v. Coleman, 5 Madd. 22; Hoskins v. Hoskins, Prec. Ch. 263; Chapman v. Salt, 2 Vern. 646; Powel v. Cleaver, 2 Brown Ch. 499; Grave v. Lord Salisbury, 1 Brown Ch. 425; 18 Ves. 152; Ex parte Dubost, 18 Ves. 140.[b] In Monck v. Lord Monck, 1 Ball & B. 298, where a verbal gift of one thousand pounds was made to the legatee, evidence was admitted of the testator's subsequent declarations showing his intention, as well as of the immediate transaction itself. See the facts and opinion, quoted in a former note [*ante*, § 574]. The American cases fully sustain the conclusions of the text, and some of them even go further than the English judges have gone in their recent decisions. In one of these cases the question is so directly presented, and the discussion by the court is so full, clear, and able, that I shall add an extract from the opinion. In Richards v. Humphreys, 15 Pick. 133,

(b) See, also, In re Pollock, L. R. 28 Ch. Div. 552.

sic parol evidence may be resorted to for the purpose of rebutting the presumption, and of showing the testator's intention that the beneficiary was to receive both gifts; and his verbal declarations accompanying the advancement or payment may be shown; and since such evidence is admis-

a testator had bequeathed $500 to his sister, and afterwards made her a verbal advancement of $466, and she gave back a written paper acknowledging that the money was paid and received by her, "in part of her right of dower in his last will." There was also evidence that he wished to pay off the entire legacy, and offered her the balance, which she declined to accept. Evidence of other verbal declarations by the testator was also given. The court, in a most able opinion, discussed the general doctrine of satisfaction, and the admissibility of extrinsic evidence. After stating the rules as to satisfaction, and their applicability to this case, (which portion of the opinion has been quoted in a prior note), the court proceeds: "In the present case we are of opinion that, conforming strictly to the rules of law in regard to the admissibility of evidence, it is quite apparent from the facts proved that the payment was intended by the testator as an advancement on account of this legacy, and an ademption *pro tanto*." It then examines and construes the peculiar language of the receipt given back by the legatee, and determines its real meaning, and adds: "But the ground upon which the court decides the cause is this: Whatever may be the difficulties in applying the rule which prohibits the admission of parol evidence to alter or control a written instrument, there is one modification which will sanction its admission in the present case. Whenever an act is done, the declarations of the party doing it, made at the time, are received to show the character of the act, and the purpose and design with which it is done. It is readily conceded that it would not be competent to give in evidence the declarations of the testator showing that he intended by any clause in his will something different from the dispositions expressed, or to limit or control the legal inferences or presumptions arising from those expressions. Nor would it be admissible to show such declarations alone (i. e., without any gift) to prove a direct intent of the testator to revoke or adeem a legacy. It would be, in either case, to make or revoke a will by parol; which is alike contrary to the general rule of law and to the statute of frauds. But when an act is done which, *if done with one intent, will operate as an ademption, and if with a different intent, otherwise*, under the rule already stated evidence of the declarations of the intent may be given to qualify the act, and the act operates by way of ademption. Here the declarations made at the time of the advance and payment of the money, not being contradictory to the receipt, but in conformity with it, prove conclusively that they were made in part satisfaction of the legacy. . . . . But there is another fact which it seems competent to show by parol evidence, and which leads to the same conclusion. It is stated that the testator expressed his desire to the plaintiff, at the same time, to pay off the whole legacy, and that he offered to pay her the balance of her legacy, which she declined receiving." The very broad statement of the general rule, in the sentence above indicated by Italics, seems to approve and adopt the view taken

sible to rebut the presumption, it may also be admitted to confirm it. Where no such presumption arises,— in other words, where the testator is not a parent of or *in loco parentis* to the legatee, or where the two gifts are not *ejusdem generis,* if the testator confers his subsequent verbal advancement, payment, or donation, with an express verbal

by Sir John Leach in Weall v. Rice, 2 Russ. & M. 251, 263, and other similar decisions, rather than the more restricted doctrine of the recent English authorities, such as Hall v. Hill, 1 Dru. & War. 94. In other words, this rule is so broad that it would seem to allow parol evidence of the donor's actual intention in conferring a subsequent benefit by a written instrument, both where a presumption of satisfaction would arise, and where no such presumption would exist. See also Langdon v. Astor's Ex'rs, 16 N. Y. 9; Hine v. Hine, 39 Barb. 507, 512; Paine v. Parsons, 14 Pick. 313; Sims v. Sims, 10 N. J. Eq. 158, 162, 163; Gill's Estate, 1 Pars. Cas. 139; Jones v. Mason, 5 Rand. 577; 16 Am. Dec. 761; Clendenning v. Clymer, 17 Ind. 155.[c] In Hine v. Hine, 39 Barb. 507, 512, a father had made a bequest to his son, and afterwards gave him fifteen hundred dollars, taking a receipt as follows: "Received of E. H. [the father] fifteen hundred dollars, to make payment on a farm which I have bought of A. B., which money I am to account for, without interest," signed O. H. [the son]. No written assignment or transfer was made by the testator. Declarations of the father and admissions of the son, showing that this advance was intended to be in satisfaction *pro tanto* of the legacy, were received in evidence. The general rule as to the admissibility of such parol evidence was laid down by Allen, J., citing Williams v. Crary, 4 Wend. 443. In Paine v. Parsons, 14 Pick. 313, a father had bequeathed a legacy to his married daughter; he afterwards gave her articles and money, took a receipt from her husband for a part of the money as so much received of her portion, made charges against her of the sums in his account-books; evidence of all these facts was admitted, and the legacy held to have been satisfied. In Sims v. Sims, 10 N. J. Eq. 158, 162, 163, after a legacy bequeathed to a son, the testator delivered him the amount thereof, as it appears, by a verbal gift. Testator's declarations and the legatee's admissions that the payment was in satisfaction of the legacy were admitted. The court held that such evidence was as proper to sustain the presumption as to rebut it. In Jones v. Mason, 5 Rand. 577, 16 Am. Dec. 761, a father had made bequests to his children; he afterwards bestowed property upon some of them, partly by putting them in possession of farms and partly by verbal gifts of slaves. The court held that the presumption of a satisfaction may be rebutted by evidence of testator's intent; and also, when there is no presumption because the legacy and the subsequent gift are not *ejusdem generis*, evidence of the testator's intent that the gift shall be in satisfaction is still admissible.

(c) To the same effect, see Richardson v. Eveland, 126 Ill. 37, 18 N. E. 308, 1 L. R. A. 203; Wallace v. Du Bois, 65 Md. 153, 4 Atl. 402; Van Houten v. Post, 33 N. J. Eq. 344.

stipulation, declaration, or condition that the same was to be in lieu and satisfaction of or in addition to the prior legacy, — the entire transaction, the declarations as well as the mere act of donation, may always be proved by extrinsic parol evidence. This would be so whether the subsequent benefit were of equal, greater, or less value than the legacy, and whether it were a payment of money, a conveyance of land, a transfer of chattels, or an assignment of things in action; for in either case an express stipulation or declaration by the testator would render the benefit conferred and received a satisfaction of the prior legacy. There is still a third case. Between any of the parties, and under any of the relations and circumstances mentioned in the two foregoing cases, the testator's subsequent advancement, payment, transfer, or gift might be wholly verbal, but the beneficiary might give back a written receipt, or other written instrument, expressly acknowledging, declaring, or stipulating that the benefit was given and received either in lieu and satisfaction of the prior legacy or in addition thereto. In this case, also, proof of the testator's declarations, and other evidence of his intention, would be admissible, since the question whether a subsequent gift was or was not a satisfaction must depend mainly upon the testator's own intention in bestowing it. Several of the American cases in which parol evidence was admitted and relied upon by the court have presented exactly this last condition of circumstances.[2]

[2] In the leading case of Kirk v. Eddowes, 3 Hare, 509, the reasoning of the court is expressly directed only to those verbal declarations of the testator which immediately accompanied the gift, which necessarily disclosed the nature of the act, which formed a part of the single continuous transaction, a part of the *res gestæ*. I have therefore so formulated the rules in the text that they only extend to end embrace *such* declarations. The question will naturally be suggested, whether *subsequent* declarations of the testator, showing his intent, are also admissible. The more recent English cases which have professedly examined the general subject with care — e. g., Hall v. Hill, 1 Dru. & War. 94, Kirk v. Eddowes, 3 Hare, 509, and the like — do not seem to have passed upon this particular question. In some of the earlier cases, like Monck v. Lord Monck, 1 Ball & B. 298, such subsequent declarations seem to have

§ 577. **Amount of Evidence.**— With reference to the sufficiency of the extrinsic evidence in all cases where it is admissible, whether the subsequent benefit be conferred by a writing or be verbal, each case must, of course, depend upon its own circumstances. There is no general rule applicable to all.[1]

SECTION IV.

CONCERNING PERFORMANCE.

ANALYSIS.

§ 578. *Rationale.*
§ 579. Definition.
§§ 580–583. I. Covenant to purchase and settle or convey.
§ 580. General rule: Lechmere v. Earl of Carlisle.
§ 581. Forms of covenant to which the rule applies.
§ 582. Special rules.
§ 583. Such covenant creates no lien.
§§ 584–586. II. Covenant to bequeath personal property.
§ 584. General rule: Blandy v. Widmore; Goldsmid v. Goldsmid.
§ 585. Limitations on the rule; covenant must not create a debt in lifetime of deceased.
§ 586. A legacy not a performance; distinction between "performance" and "satisfaction of legacy."
§ 587. Presumption of performance by trustees.
§§ 588–590. Meritorious or imperfect consideration; theory of.
§§ 589, 590. Defective execution of powers; relief of.
§ 590. Requisites for such relief; a partial execution necessary.

§ 578. **Rationale.**— The equity of Performance has a close resemblance to that of Satisfaction, and the two have sometimes been confounded; yet there is a clear and essential distinction between them. Both, however, as well as the doctrine of Election, ultimately rest, as it seems to me, upon

been admitted without any attempt to distinguish between them and the declarations forming a part of the transaction itself. As illustrations of the text, see Richards v. Humphreys, 15 Pick. 133; Howze v. Mallett, 4 Jones Eq. 194; Paine v. Parsons, 14 Pick. 313; Hine v. Hine, 39 Barb. 507. In each of these cases the donee gave back a writing acknowledging that the verbal gift was in satisfaction, wholly or partly, of the prior legacy; and in each of them extrinsic evidence was admitted.

[1] See Trimmer v. Bayne, 7 Ves. 508; Robinson v. Whiteley, 9 Ves. 577; Powys v. Mansfield, 3 Mylne & C. 359.

that broad principle of equity which refuses to admit double benefits to a single recipient, by raising a presumption that only one benefit was intended. Where A is under a prior obligation to bestow a particular kind of thing upon B, and he afterwards bestows upon B a different kind of thing, the question arises, whether the latter benefit was *intended* as a substitute for the prior obligation.[1] The whole would turn upon the donor's intention, although that intent might be presumed. If the second benefit was thus intended as a substitute, it would be a *satisfaction,* and not a performance; the prior obligation would be satisfied, but not performed. Equity would not permit the recipient to claim both benefits; but since he is not bound to accept the satisfaction of the obligation existing in his favor, he is entitled to elect between them. On the other hand, where A is under some positive obligation, as a covenant, to bestow a particular kind of thing upon B, in a certain specified manner, as by conveyance, or by will, and instead thereof he either voluntarily bestows the same kind of thing upon B in a different manner, or else permits the same kind of thing to devolve upon B by operation of law, as by descent, or by succession, there is clearly no substitution, and therefore no satisfaction. Equity, however, sees in such a transaction no indication of an intent that the recipient is to enjoy double benefits; it rather sees a contrary intention. If the benefit actually given to, or permitted to devolve upon, B was not intended to be a bounty, and was not a substitute for and satisfaction of the prior obligation, then it can only be regarded as a performance, and A must be presumed to have intended to perform the very duty which he owed to B. In such a case B obtains the very benefit which he had a right to demand,— the fulfillment of the very obligation existing in his favor,— and he has therefore no election. To sum up: In satisfaction a different kind of thing is given, with the intention that it shall be accepted as a substitute for

[1] See quotation from Goldsmid v. Goldsmid, 1 Swanst. 211, *ante,* in vol. 1, note 1, under § 521.

and in lieu of the benefit due by the terms of the original obligation; and the donee has, in general, a right of election. In performance, the same kind of thing is either conferred in a different manner, or is left to devolve by operation of law, with the intention of thereby fulfilling the very terms of the original obligation; and there is no right of election on the part of the recipient. While this particular doctrine concerning performance ultimately rests, in my opinion, upon the equitable principle of antagonism to double benefits, it is undoubtedly the immediate and direct result of the maxim, Equity imputes an intention to fulfill an obligation. To this maxim the doctrine has generally been referred by text-writers and judges.[2]

§ 579. **Definition.**— From the foregoing analysis it appears that the equity of Performance should be defined, or rather described, as follows: When a person has definitely bound himself to do a certain act, by which a particular kind of thing will be bestowed upon another in a specified manner, and instead thereof he either bestows the same kind of thing upon the obligee in a different manner, or else permits the same kind of thing to devolve upon the obligee in course and by operation of law, so that what is thus done or permitted may amount to a complete or partial fulfillment of the existing obligation, then the party will be presumed to have done or permitted this with *the intention* of performing the very obligation itself in whole or in part, and the obligation will be thus wholly or partially performed, as the case may be.[1] Equity imputes to the party an intention of fulfilling the obligation resting upon him,

2 For an explanation of the maxim, and its effect upon this and other doctrines, see *ante*, vol. 1, §§ 420–422.

1 Wilcocks v. Wilcocks, 2 Vern. 558; Blandy v. Widmore, 1 P. Wms. 324; 2 Vern. 709; 2 Lead. Cas. Eq., 4th Am. ed., 833; Lechmere v. Earl of Carlisle, 3 P. Wms. 211, 227; Deacon v. Smith, 3 Atk. 323; Sowden v. Sowden, 1 Brown Ch. 582; 3 P. Wms. 228, note; Goldsmid v. Goldsmid, 1 Swanst. 211. The definition given by some writers is, as it seems to me, faulty, since the terms are so broad and general that they necessarily include satisfaction as well as performance. See, for example, Snell's Equity, 193.

rather than the intention of violating that duty, or of conferring a mere bounty. Equity thus says, not only that a man should be, but that he is, just before he is generous. The cases involving this doctrine may be arranged, for purposes of convenience, into two classes: 1. Where a person covenants to purchase and settle, or to purchase and convey, lands, and he afterwards purchases such lands without expressing any purpose for which the purchase is made, and does not convey or settle them in pursuance of his covenant; 2. Where a person covenants to leave property by will, and he does not make the bequest, but on his death the covenantee receives the same kind of property by succession. These two classes will be examined separately.

§ 580. **I. Covenant to Purchase and Settle or Convey.**— Where a person covenants to purchase lands and settle, or to purchase lands and convey them, and he afterwards purchases lands answering to the description,— that is, of the same estate and tenure,— without expressing the object or purpose of making the purchase, and he does not convey or settle in accordance with the terms of his covenant, but dies, leaving the lands as part of his estate, and they devolve by descent upon the covenantee as heir at law, then the purchase and suffering the lands to descend will be presumed to have been with the intention of performing the covenant in whole or in part; the acquisition of the lands by inheritance will be a total or partial performance, as the case may be; the covenantee-heir cannot specifically enforce the covenant, so far as it has thus been performed, against the covenantor's estate.[1]

[1] Wilcocks v. Wilcocks, 2 Vern. 558; 2 Lead. Cas. Eq. 833; Lechmere v. Earl of Carlisle, 3 P. Wms. 211; Deacon v. Smith, 3 Atk. 323; Tooke v. Hastings, 2 Vern. 97; Sowden v. Sowden, 1 Brown Ch. 582; Wilson v. Piggot, 2 Ves. 351, 356; Mathias v. Mathias, 3 Smale & G. 552; Mornington v. Keane, 2 De Gex & J. 292. The opinion in Lechmere v. Earl of Carlisle, 3 P. Wms. 211, has uniformly been regarded as a complete and accurate statement of the entire doctrine; subsequent decisions have simply repeated and applied its reasoning. I shall therefore quote from this case at some length; there is, in fact, but little more to be added for a full exposition of the doctrine. Lord Lechmere, upon his marriage, covenanted to lay out, within a year after the marriage,

§ 581. **Forms of the Covenant.**— The doctrine is not confined in its operation to any particular form of covenant. It applies where a person, at the time owning no real estate,

thirty thousand pounds, in the purchase of *freehold lands, in possession*, with the consent of certain trustees named. The lands thus purchased he covenanted to settle in a certain manner, among other things, so as to secure an income of eight hundred pounds for his wife, and with remainder in all the lands to his eldest and other sons in tail, remainder to himself and his heirs. At the time of his marriage, Lord Lechmere owned some lands in fee. After his marriage he purchased some estates in fee of about five hundred pounds per annum, some life estates, some reversions in fee-expectant on prior life estates, and *contracted* for the purchase of some other estates in fee in possession. None of these purchases were made after consultation with or with consent of the trustees named. He died intestate, without making any settlement. Mr. Lechmere, his heir at law, to whom all his estates in fee descended, filed a bill for a specific performance of the covenant, praying that the administrators be compelled to lay out thirty thousand pounds of the personal estate of the deceased in purchase of lands, as agreed by the covenant. The master of rolls decreed in favor of a specific performance, holding that none of the lands purchased by Lord Lechmere, and inherited by the plaintiff, were in part performance of the covenant. On appeal, this decree was reversed by Lord Chancellor Talbot, so far as related to the estates in fee purchased after the covenant and suffered to descend; such estates were to be considered as purchased in part performance of the covenant. On this subject the chancellor said: "As to questions of satisfaction, where they are properly so, they have always been between debtor and creditor, or their representatives. [This statement is not exactly accurate as the doctrine of satisfaction is now understood. See preceding section, on satisfaction.] As to Mr. Lechmere, I do not consider him as a creditor, but as standing in the place of his ancestor, and thereby entitled to what would have vested in his ancestor. A constructive satisfaction depends on the intention of the party, to be collected from circumstances. [He further explains "satisfaction."] But I do not think the question of satisfaction properly falls within this case, for here it turns on what was the intention of Lord Lechmere in the purchase made after the articles; for as to all the estates purchased precedent to the articles, there is no color to say they can be intended in performance of the articles; and as to the leaseholds for life, and the reversion in fee-expectant on the estates for life, it cannot be taken they were purchased in pursuance of the articles, because they could not answer the end of them. But as to the other purchases (in fee-simple in possession, etc.), though considered as a satisfaction to a creditor, yet they do not answer, because they are not of equal or greater value [i. e., they do not answer *as a satisfaction*]. Yet why may they not be intended as bought by him with a view to make good the articles? Lord Lechmere was bound to lay out the money with the liking of the trustees, but there was no obligation to lay it out all at once, nor was it hardly possible to meet with such a purchase as would exactly tally with it. But it is said the lands are not bought with the liking of the trustees. The intention of naming trustees was

covenants to convey and settle, and he afterwards purchases land, but does not convey nor settle it;[1] where the covenant is merely to settle lands;[2] and where the covenant is to pay a sum of money to trustees, to be laid out by them

to prevent unreasonable purchases; and the want of this circumstance, if the purchases are agreeable in other respects, is no reason to hinder why they should not be bought in performance of the articles. It is objected that the articles say the lands shall be conveyed immediately. It is not necessary that every parcel should be conveyed as soon as bought, but after the whole was purchased, for it never could be intended that there should be several settlements under the same articles. Whoever is entitled to a performance of the covenant, the personal estate must be first applied so far as it will go; and if the covenant is performed in part, it must make good the deficiency. But where a man is under an obligation to lay out thirty thousand pounds in lands, and he lays out part as he can find purchases, which are attended with all material circumstances, it is more natural to suppose those purchases made with regard to the covenant than without it. When a man lies under an obligation to do a thing, it is more natural to ascribe it to the obligation he lies under than to a voluntary act independent of the obligation. Then as to all the cases of satisfaction, though these purchases are not strictly a satisfaction, yet they may be taken as a step towards performance; and that seems to me rather his intention than to enlarge his real estate. The case of Wilcocks v. Wilcocks, 2 Vern. 558, 2 Lead. Cas. Eq. 833, though there are some circumstances that are not here, yet it has a good deal of weight with me. . . . It is true, a settlement hath not been made, but they were bought with an intention to make a settlement, and you can make one. The same will hold as strong in the present case, that these lands were bought to answer the purposes of the articles, and fall within that compass; and it is not an objection to say they are of unequal value, for a covenant may be performed in part, though it is not so in satisfaction; and in this particular I differ from the master of rolls. There must be an account of what lands in fee-simple in possession were purchased after the articles entered into, and so much as the purchase-money of such lands amounts to must be looked on in part satisfaction [performance] of the thirty thousand pounds to be laid out in land under the articles, and the residue of the thirty thousand pounds must be made good out of the personal estate." In the leading case of Wilcocks v. Wilcocks, 2 Vern. 558, 2 Lead. Cas. Eq. 833, A covenanted on his marriage to purchase lands of two hundred pounds a year value, and settle them for the jointure of his wife, and to his first and other sons in tail. He purchased lands of that value, but made no settlement, and on his death the lands descended to his eldest son. The eldest son filed a bill for a specific enforcement of the covenant, but it was held that the purchase and descent were a full performance, so that the bill stated no case for relief.

[1] Deacon v. Smith, 3 Atk. 323; and see Wellesley v. Wellesley, 4 Mylne & C. 561; but see observations on this case in Mornington v. Keane, 2 De Gex & J. 292.

[2] Tooke v. Hastings, 2 Vern. 97; Powdrell v. Jones, 2 Smale & G. 335.

in lands, and the covenantor afterwards purchases an estate which he does not settle nor convey to the trustees.[3] The doctrine has also been extended to the case where the obligation to purchase and settle lands arose from a statute.[4] Wherever such covenants are performed in whole or in part by a descent of the lands to the covenantee, they are, for the same reason, performed by a devise of the lands to him from the covenantor.[5]

§ 582. **Special Rules.**— The following special rules have been settled in connection with all these forms of covenant, which either expressly or impliedly look to a future purchase and conveyance or settlement of lands by the covenantor. Where the covenant specifies the value of the lands to be purchased, a purchase of less value operates as a performance *pro tanto*.[1] In such a covenant, it cannot be presumed that lands which the covenantor owned at the time of making it, and which he suffers his heir to inherit, were intended to be acquired by the heir in performance of the obligation.[2] Also, if the covenantor purchases property of a different nature — different estate or tenure — from that mentioned in the agreement, no presumption of an intention to perform arises.[3] A provision that the purchase is to be with the consent of trustees named is not material, provided that the purchase is otherwise a proper one, and conforms to the terms of the covenant.[4]

§ 581, [3] Sowden v. Sowden, 1 Brown Ch. 582; 3 P. Wms. 228, note.

§ 581, [4] Tubbs v. Broadwood, 2 Russ. & M. 487. The statute in this case was a private act authorizing a tenant for life to sell a settled estate, but requiring him to lay out the proceeds in the purchase of other lands, and to settle them upon the same uses. He bought lands, but died without making any settlement of them.

§ 581, [5] Wilson v. Piggott, 2 Ves. 351, 356; 1 Watson's Compendium of Equity, 609.

§ 582, [1] Lechmere v. Earl of Carlisle, 3 P. Wms. 211; Lechmere v. Lechmere, Cas. t. Talb. 80; Sowden v. Sowden, 1 Brown Ch. 582; 3 P. Wms. 228, note.

§ 582, [2] Lechmere v. Earl of Carlisle, 3 P. Wms. 211; Lechmere v. Lechmere, Cas. t. Talb. 80; see Warde v. Warde, 16 Beav. 103.

§ 582, [3] Lechmere v. Earl of Carlisle, 3 P. Wms. 211; Lechmere v. Lechmere, Cas. t. Talb. 80; Deacon v. Smith, 3 Atk. 323; Pinnell v. Hallett, Amb. 106; Att'y-Gen. v. Whorwood, 1 Ves. Sr. 534, 540.

§ 582, [4] Lechmere v. Earl of Carlisle, 3 P. Wms. 211.

§ 583. **No Lien Created.**— A covenant to purchase and convey or settle, or to convey and settle, lands generally, without specifying any parcel or tract of land in particular, although it may give rise to the presumption that any particular lands subsequently purchased were intended to be in performance of the obligation, does not create a lien upon such lands afterwards purchased, in favor of the covenantee, and consequently a mortgagor or purchaser of those lands, even with notice, is not affected by it; the covenantee cannot enforce the covenant upon the lands in the hands of such mortgagor or purchaser.[1] In other words, while the purchase by the covenantor raises a presumption that he intended thereby to perform, this presumption may be overcome or destroyed by his conveyance of the land to a third person.

§ 584. **II. Covenant to Bequeath Property.**— In this second class of cases to which the doctrine applies, if a person covenants to leave, or that his executors shall pay to a designated individual, a sum of money, or a part of his personal estate, and the covenantor afterwards dies intestate, and the individual becomes entitled to a distributive share of the personal property, equal to or greater than the amount agreed to be left or paid, then such share will be a full performance of the covenant, and the beneficiary cannot claim both; if the share is less than the amount agreed, it will be *pro tanto* a performance. In order, however, that the case may fall within the doctrine, and the distributive share be a total or partial performance, the covenant must be such that it is broken, if at all, at or after the covenantor's death. That the devolution of the share is a performance under these circumstances, and not a mere satisfaction,

[1] Mornington v. Keane, 2 De Gex & J. 292; Deacon v. Smith, 3 Atk. 323. In the case of Mornington v. Keane, 2 De Gex & J. 292, the subject is examined with great care, the prior decisions are all compared, explained, and limited, especially that of Roundell v. Breary, 2 Vern. 482, and the rule as stated in the text is settled. See Pinch v. Anthony, 8 Allen, 536.

is expressly held in several of the decisions.[1] The covenants which have ordinarily belonged to this class have been those made by husbands to leave money or property to their wives, but there are no grounds, upon principle, for confining the rule to this particular species of agreements.

§ 585. Limitations — When Covenant Creates a Debt in the Lifetime of Deceased.— The courts have been careful not to extend the rule controlling this class of cases to circumstances in which the reasons for it do not apply. Where the covenant is such that it must be performed during the covenantor's lifetime, and the breach occurs before his death, a distributive share does not operate as a performance, either in whole or in part. The breach of such a covenant creates an ordinary *debt* due from the deceased, and it is well settled that a distributive share of the debtor's estate devolving upon the creditor cannot be treated as a payment of his demand. An illustration of such agreements is a

[1] Blandy v. Widmore, 1 P. Wms. 324; 2 Vern. 209; 2 Lead. Cas. Eq., 4th Am. ed., 834, 842; Lee v. D'Aranda, 3 Atk. 419; Garthshore v. Chalie, 10 Ves. 1; Goldsmid v. Goldsmid, 1 Swanst. 211; Barrett v. Beckford, 1 Ves. Sr. 519; 1 P. Wms. 324, note 1; Thacker v. Key, L. R. 8 Eq. 408. In Goldsmid v. Goldsmid, 1 Swanst. 211, which was a case of intestacy, because the will had failed to be operative, the master of rolls, Sir Thomas Plumer, after commenting upon the prior authorities cited above, and after distinguishing the case of a distributive share devolving upon the covenantee from that of a legacy bestowed upon him, said: "Lord Eldon, in Garthshore v. Chalie, 10 Ves. 1, speaking of Blandy v. Widmore and other cases, says: 'These cases are distinct authorities that where a husband covenants to leave or to pay at his death a sum of money to a person who, independent of that agreement, by the relation between them and the provision of law attending upon it, will take a provision, the covenant is to be construed with reference to that.' Considering the contract as made with that reference, it must be interpreted as intended to regulate what the widow is to receive; and consequently when the event of intestacy ensues, the single question is, Does she not obtain that for which she contracted? If the object of the covenant is, that the executors of the husband shall pay to the widow a given sum, and in her character of widow, created by the same marriage contract, she in fact obtains from the administrator that sum, the court is bound to consider that as payment under the covenant. These are not cases of an ordinary debt; *during the life of the husband there is no breach of the covenant, no debt;* the covenant is, to pay *after* his death, and the inquiry is, not whether the payment of the distributive share is a *satisfaction*, but a question perfectly distinct, *whether it is a performance.*"

covenant by a husband to pay a certain sum to his wife within two years from their marriage; he outlives the two years, and dies intestate, without having made the payment, and leaving a large distributive share to devolve upon her. She is entitled both to her distributive share and to the sum due from the estate to her as a creditor.[1] Also, where the covenant is not to leave or pay a certain specified sum in gross, but is to give an annuity for life, or the annual interest on a named amount for life, the doctrine of performance has been held not to apply.[2]

§ 586. **A Legacy not a Performance.**— The devolution of a distributive share in performance of a covenant to pay or leave money at the covenantor's death should be carefully distinguished, in its effects, from a legacy. If a husband has made such a covenant to leave or pay to his widow a certain sum of money, a bequest which he may give to her *simpliciter,* either of a definite amount or of the whole or a part of a residue, without any provision in the will expressly showing an intention on his part that the gift was to be in payment, will not operate as a performance of the covenant; a legacy is *prima facie* a bounty, and gives rise to a presumption that the testator intended to increase the provision made for his widow by the covenant, and not to pay and discharge it.[1] This particular situation suggests the importance of distinguishing, in general, between the cases of *performance,* discussed in the foregoing paragraphs, and the cases of *satisfaction* of debts by legacies, considered in the preceding section. The essential differences between satisfaction and performance have already been sufficiently pointed out. The instances of satisfaction of debts by legacies involve and depend upon certain presumptions

§ 585, [1] Oliver v. Brickland, cited in 1 Ves. Sr. 1, 12; 3 Atk. 420, 422; Lang v. Lang, 8 Sim. 451; and see Garthshore v. Chalie, 10 Ves. 1, 12, per Lord Eldon.

§ 585, [2] Couch v. Stratton, 4 Ves. 391; Salisbury v. Salisbury, 6 Hare, 526; Young v. Young, 5 I. R. Eq. 615.

§ 586, [1] See Haines v. Mico, 1 Brown Ch. 129; Devese v. Pontet, 1 Cox, 188. It should be remembered that there are no presumptions against double portions between a husband and his widow. See the preceding section on satisfaction.

which do not exist in cases of performance. "In cases of satisfaction [i. e., satisfaction of debts by legacies], the presumption will not hold where the thing substituted is less beneficial (either in amount, or certainty, or time of enjoyment, or otherwise) than the thing contracted for, since satisfaction implies the doing of something *equivalent,* and the presumption is so much weakened where the thing *substituted* is not equivalent to the thing *contracted for,* and a part satisfaction will not be intended; whereas in cases where the thing done can be considered as a *part performance* of the thing contracted for, it shall be so taken."[2]

§ 587. **Presumption of Performance by Trustees.**— There is another and quite different case, which has sometimes been regarded by writers and judges as an instance of performance, but which properly belongs to trusts arising by operation of law. I shall therefore briefly mention it in this connection; its full discussion will be found in the subsequent chapter upon trusts. Whenever a trustee or other person standing in fiduciary relations, acting apparently within the scope of his powers, has trust funds in his hands, which he ought, in pursuance of his fiduciary duty, to employ in the purchase of property for the purposes of the trust, and he *does* purchase property with such funds, but takes the title thereto in his own name, without any declaration of trust, then a trust with respect to such property at once arises in favor of the original *cestui que trust* or other beneficiary. Equity imputes an intention to fulfill the obligation resting upon the trustee; and, independently of any element of fraud, it regards the trustee as *intending to perform* the obligation,— as intending to act in accordance with his fiduciary duty, and not in violation thereof. It therefore treats the purchase as made for the benefit of the person beneficially interested. This doctrine is one of wide

[2] Note of Mr. Cox to Blandy v. Widmore, 1 P. Wms. 324; and see remarks in Goldsmid v. Goldsmid, 1 Swanst. 211. 220, 221; also *ante,* section on satisfaction.

operation, of great efficiency, and is applied to every variety of persons occupying fiduciary relations.[1]

§ 588. Meritorious or Imperfect Consideration.— Closely akin to the equity of performance, and properly a special instance of it, is that of meritorious or imperfect consideration. Indeed, all cases of satisfaction and of performance have been treated by some writers as applications of this equity.[1] All agreements, so far as the binding efficacy of their promises is concerned, must be referred to one or the other of three *causes*,— a valuable consideration, a mere voluntary bounty, or the performance of a moral duty. The first alone is binding at law, and enables the promisee to enforce the obligation against the promisor. The second, while the promise is executory, is a mere nullity, both at law and in equity. The third constitutes the meritorious or imperfect consideration of equity, and is recognized as effective by it within very narrow limits, although not at all by the law. While this species of consideration does not render an agreement enforceable against the promisor him-

§ 587, [1] See *ante*, vol. 1, § 422.

Trustees.— Trench v. Harrison, 17 Sim. 111; Lench v. Lench, 10 Ves. 511; Mathias v. Mathias, 3 Smale & G. 552; Ouseley v. Anstruther, 10 Beav. 461; Deg v. Deg, 2 P. Wms. 412, 414; Perry v. Phelips, 4 Ves. 108; 17 Ves. 173; Schlaefer v. Corson, 52 Barb. 510; Ferris v. Van Vechten, 73 N. Y. 113; McLarren v. Brewer, 51 Me. 402.

Executors and Administrators.— White v. Drew, 42 Mo. 561; Stow v. Kimball, 28 Ill. 93; Barker v. Barker, 14 Wis. 131.

Directors of Corporations.— Church v. Sterling, 16 Conn. 388.

Guardians.— Johnson v. Dougherty, 18 N. J. Eq. 406; Bancroft v. Consen, 13 Allen, 50.

Committees of Lunatics.— Reid v. Fitch, 11 Barb. 399.

Agents.— Bridenbecker v. Lowell, 32 Barb. 10; Robb's Appeal, 41 Pa. St. 45.

Partners.— Smith v. Burnham, 3 Sum. 435; Oliver v. Piatt, 3 How. 333, 401; Homer v. Homer, 107 Mass. 82; Settembre v. Putnam, 30 Cal. 490; Jenkins v. Frink, 30 Cal. 586; 89 Am. Dec. 134.[a]

§ 588, [1] See Adams's Equity, pp. 97–106 (230–244).

(a) An agreement among mining partners, in pursuance of which one of them locates a claim in his own name, is a familiar instance in the Western states: Moritz v. Lavelle, 77 Cal. 10, 11 Am. St. Rep. 229, 18 Pac. 803; Murley v. Ennis, 2 Colo. 300; Hirbour v. Reeding, 3 Mont. 15; Welland v. Huber, 8 Nev. 203. See, further, § 1049.

self, nor against any one in whose favor he has altered his original intention, yet if an intended gift based upon such meritorious consideration has been partially and *imperfectly* executed or carried into effect by the donor, and if his original intention remains unaltered at his death, then equity will, within certain narrow limits, enforce the promise thus imperfectly performed, as against a third person claiming merely by operation of law, who has no equally meritorious foundation for his claim.[a] The equity thus described as based upon a meritorious consideration only extends to cases involving the duties either of charity, of paying creditors, or of maintaining a wife and children. This last duty of maintaining children includes persons to whom the promisor stands *in loco parentis*.[2] [b] The specific cases involving these three kinds of duties to which the doctrine has been applied by courts of equity are the supplying surrenders of copyholds against the heir,[3] and the supporting and completing defective executions of powers, where the defect is formal, against the one who would be entitled in remainder. Since the first of these cases does not exist under our law, it is only necessary to consider the second.

§ 589. **Defective Execution of Powers.**— Where the defect in the execution is merely formal, equity will support, correct, and complete the defective execution of powers,

2 See *ante*, vol. 1, § 556, and cases cited in notes.

3 Rodgers v. Marshall, 17 Ves. 294.

(a) The text is cited in Sipley v. Wass, 49 N. J. Eq. 463, 24 Atl. 233, to the point that a deed of conveyance from husband directly to wife, having a nominal consideration, passes an equitable estate in fee, the holder of which is entitled to have the legal title from the heirs of the husband.

(b) The greater part of this paragraph is quoted in Powell v. Morisey, 98 N. C. 426, 2 Am. St. Rep. 343, 4 S. E. 185, in support of the proposition that equity will correct mistakes in those deeds only which are supported by a valuable or meritorious consideration (see Pom. Equitable Remedies, "Reformation"); holding, also, that a voluntary conveyance by a grandfather to a grandchild is not proof of his intention to place himself *in loco parentis* to the grantee, and thus render the consideration meritorious.

as against a remainderman who has no equally meritorious claim, on behalf of the classes of persons in whose favor the "meritorious consideration" exists,— that is, on behalf of charities, purchasers, creditors, children, or wives. The *rationale* of this doctrine is the following: Although in the absence of a valuable consideration there is no complete obligation resting upon the promisor, yet from the presence of the meritorious consideration there is, in contemplation of equity, as between the meritorious beneficiary and the remainderman possessing no equally meritorious claim, a *quasi* obligation,— a duty binding between the parties thus situated. An attempt having been made to execute the power, which is only *formally* defective, equity imputes to the donee in making the attempt an intent to fulfill this *quasi* obligation. An intent to perform having been thus shown and partly accomplished, a court of equity carries it into effect by decreeing a complete performance. The case is thus brought, in appearance at least, within the general principle concerning performance, and the equitable maxim which underlies that principle. The *rationale* thus described may be exceedingly artificial; it may be in reality unsound and inconsistent with other established principles; but notwithstanding these objections, the doctrine itself is firmly settled upon the basis of authority.[1 a]

§ 590. Requisites — A Partial Execution Necessary.— The powers which the doctrine may thus enforce are those given in wills, family settlements, and other similar instruments,

1 Holmes v. Goghill, 7 Ves. 499; 12 Ves. 206; Reid v. Shergold, 10 Ves. 370; Tollett v. Tollett, 2 P. Wms. 489; Bradish v. Gibbs, 3 Johns. Ch. 523; Schenck v. Ellingwood, 3 Edw. Ch. 175; Dennison v. Goehring, 7 Pa. St. 175; 47 Am. Dec. 505; Porter v. Turner, 3 Serg. & R. 108; Innes v. Sayer, 3 Macn. & G. 606; 7 Hare, 377 (in favor of a charity); Long v. Hewitt, 44 Iowa, 363.

(a) §§ 589, 590 are cited in Ellison v. Branstrator, 153 Ind. 146, 54 N. E. 433 (defective execution of a deed under a power of attorney from a married woman, aided). See, also, American Freehold L. Mtg. Co. v. Walker, 31 Fed. Rep. 103; Freeman v. Eacho, 79 Va. 43 (defective execution of power by married woman).

and not bare authorities conferred by law. In the first place, there must be an execution of the power by the donee thereof formally defective, or a contract amounting to such a defective execution; otherwise the doctrine does not apply. If there has been no execution at all, the court cannot interfere; for the donee, having an option by the very terms of the power, has shown an intention not to execute. If the defect is substantial, and not formal, the court cannot relieve, for its interposition would then frustrate the intention of the donor, that the power, if executed at all, should be executed in a prescribed manner, or by specified means.[1] In the second place, the original intention of the donee in making the defective execution must continue unaltered. The fact that the defective appointment is left untouched is rather evidence that the donee's intention continued unchanged, than of a contrary intent. If, however, any subsequent act of his shows a change of his original intent, then the right to the interposition of a court of equity, for the purpose of completing the execution, is gone, since the court interferes only to carry out his intention, and never to relieve in opposition to that intention.[2] Finally, the party against whom the completed execution is sought must not have an equally meritorious claim. If, therefore, the heir at law or remainderman to whom the estate would pass in case the attempted appointment under the power should fail is a child or even a grandchild wholly unprovided for, the relief, it seems, will not be granted. It is not enough to defeat the equitable right to an enforcement that the heir is disin-

1 Tollett v. Tollett, 2 P. Wms. 489; Reid v. Shergold, 10 Ves. 370; Lippencott v. Stokes, 6 N. J. Eq. 122; Drusadow v. Wilde, 63 Pa. St. 170; Bingham's Appeal, 64 Pa. St. 345. As to statutory powers, see Smith v. Bowes, 38 Md. 463.a

2 Finch v. Finch, 15 Ves. 43, 51; Antrobus v. Smith, 12 Ves. 39.

(a) Statutory powers: see Cox v. Holcomb, 87 Ala. 589, 13 Am. St. Rep. 79, 6 South. 309 (defective conveyance of homestead not aided); Williams v. Cudd, 26 S. C. 213 (defective execution of statutory power given to married woman, not aided. Compare Freeman v. Eacho, 79 Va. 43).

herited by his own immediate ancestor, for if he has been provided for by some one else, his claim is not equally meritorious, and it makes no difference from whom the provision came. The relative amount of the provisions, if any, made for different children in such cases is immaterial, for the parent himself is the judge of the amount proper for each child.[3]

SECTION V.

CONCERNING NOTICE.

ANALYSIS.

§ 591. Questions stated: Le Neve v. Le Neve.
§ 592. Knowledge and notice distinguished.
§ 593. Kinds; actual and constructive.
§ 594. Definition.
§§ 595–603. Actual notice.
§ 596. When shown by indirect evidence.
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§ 609. Species of constructive notice.
§§ 610–613. 1. By extraneous facts; acts of fraud, negligence, or mistake; general rule as to putting on inquiry; visible objects, etc.
§§ 614–625. 2. By possession or tenancy.
§§ 614, 615. General rules, English and American.
§§ 616–618. Extent and effect of the notice.
§§ 619–622. Nature and time of the possession.
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§ 625. Possession by a tenant or lessee.
§§ 626–631. 3. By recitals or references in instruments of title.
§ 626. General rules.
§§ 627–631. Nature and extent of the notice; limitations; instances, etc.
§§ 632–640. 4. By *lis pendens*.
§ 632. *Rationale:* Bellamy v. Sabine.
§§ 633, 634. General rules; requisites.
§§ 635, 636. To what kind of suits the rule applies.

[3] Rodgers v. Marshall, 17 Ves. 294; Hills v. Downton, 5 Ves. 557; Morse v. Martin, 34 Beav. 500; Porter v. Turner, 3 Serg. & R. 108.

§§ 637, 638. What persons are affected.
§§ 639, 640. Statutory notice of *lis pendens*.
§§ 641–643. 5. By judgments.
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§§ 645, 646. (1) The statutory system; abstract of statutes.
§§ 647–649. (2) General theory, scope, and object of the legislation.
§§ 650–654. (3) Requisites of the record, in order that it may be a notice.
§ 655. (4) Of what the record is a notice.
§§ 656–658. (5) To whom the record is a notice.
§ 657. Not to prior parties.
§ 658. To subsequent parties holding under the same source of title; effect of a break in the record.
§§ 659, 660. (6) Effect of other kinds of notice, in the absence of a record.
§§ 661–665. (7) What kinds of notice will produce this effect.
§ 662. English rule.
§§ 663, 664. Conflicting American rules; actual or constructive notice.
§ 665. True *rationale* of notice in place of a record.
§§ 666–676. 7. Notice between principal and agent.
§§ 666–669. Scope and applications.
§§ 670–675. Requisites of the notice.
§ 670. (1) Notice must be received by agent during his actual employment.
§§ 671, 672. (2) And in the same transaction; when in a prior transaction.
§ 673. (3) Information must be material; presumption that it was communicated to the principal.
§§ 674, 675. Exceptions; agent's own fraud.
§ 676. True *rationale* of this rule.

§ 591. Questions Stated.— It has been shown in the preceding chapter that there are two fundamental *principles* or maxims affecting to a greater or less degree nearly the entire body of equity jurisprudence,— nearly the entire administration of equitable rights and remedies,— namely, where there are equal equities, the one which is prior in time must prevail, and where there are equal equities, the law must prevail. These two principles necessarily find their most important application in cases, which are constantly arising, where several different, and perhaps successive, equitable, or legal and equitable, interests in or claims upon the same subject-matter exist at the same time, and there is a contest for the precedence among the respective holders of these interests or claims. It has also been shown that the application of these maxims turns upon the question, When are the different equities simultane-

ously subsisting with respect to the same subject-matter "equal"? or on the other hand, what renders them "unequal," so that one shall have an essential inherent superiority over another? In answering this question, the doctrine of Notice plays a most important part. When a person is acquiring rights with respect to any subject-matter, the fact whether he is so acting with or without notice of the interests or claims of others in or upon the same subject-matter is regarded throughout the whole range of equity jurisprudence as a most material circumstance in determining the extent and even the existence of the rights which he actually acquires. In conformity with this view, the general rule has been most clearly established, that a purchaser with notice of the right of another is in equity liable to the same extent and in the same manner as the person from whom he made the purchase. The same rule may be thus expressed in somewhat different language: a person who acquires a legal title or an equitable title or interest in a given subject-matter, even for a valuable consideration, but with notice that the subject-matter is already affected by an equity or equitable claim in favor of another, takes it subject to that equity or equitable claim. On the other hand, a person who has acquired a title, and paid a valuable consideration, without any notice of an equity actually existing in favor of another, *may* by that means obtain a perfect title, and hold the property freed from the prior outstanding equity.[a] This general doctrine was formulated by Lord Hardwicke in a celebrated case in the following emphatic terms: "The ground of it is plainly this: that the taking of a legal estate, after notice of a prior right, makes a person a *mala fide* purchaser. This is a species of fraud and *dolus malus* itself; for he knew the first purchaser had the clear right of the estate, and after knowing that, he takes away the right of another person by getting the

(a) The text is cited to this effect in Seibet v. Bath, 5 Wyo. 409, 40 Pac. 756.

legal estate. Now, if a person does not stop his hand, but gets the legal estate when he knew the right was in another, *machinatur ad circumveniendum*. It is a maxim, too, in our law that *fraus et dolus nemini patrocinari debent.*" [1] Lord Hardwicke was here speaking of the effect of an actual notice; and undoubtedly it is an act savoring of fraud for a person who has received actual, direct notice of another's right, to go on and knowingly acquire the property in violation of that other's right. But on the other hand, to base the entire doctrine of notice upon fraud, to regard all its rules as inferences from the equitable principle against fraud, is, in my opinion, to ignore the plain meaning of words, and to introduce an unnecessary and misleading fiction into the subject. Most of the confusion in the discussion by courts and writers has resulted, as it seems to me, from their acceptance of this *dictum* of Lord Hardwicke as universally true, and from their attempt to treat the effects of notice, under all circumstances, as mere instances and results of fraud. The great importance of the subject having thus been exhibited, its further examination will be conducted in the following order: 1. The nature of notice, what constitutes it, and its various kinds and classes; 2. The effects of notice, and especially the consequences of notice or the want of notice in determining priorities among equitable claims to or upon the same subject-matter.

§ 592. **Knowledge and Notice Distinguished.**— Before entering upon this examination, a few preliminary observations are necessary, to clear the ground and to explain the exact nature of the questions which are to be discussed, and of the conclusions to be reached by such discussion. In the first place, it is of the utmost importance to distinguish between the objects and purposes for which the fact of notice having been given may be invoked. One object of notice may be simply to affect the priority of a right which the one receiving it has acquired, and to subordinate such

[1] Le Neve v. Le Neve, Amb. 436; 2 Lead. Cas. Eq., 4th Am. ed., 109.

right to an interest in the same subject-matter held by another. On the other hand, notice *may* be regarded as an ingredient or badge of fraud, as a feature which renders the transaction entered into by the person who receives it fraudulent. A distinction clearly exists between these two purposes; and the rules which govern the nature and effect of notice in each must be different. That might easily be sufficient to subordinate a person's right to another interest which would at the same time fall far short of stamping his conduct with actual fraud. In the second place, it should be most carefully borne in mind that the legal conception of "notice," as contained in the settled doctrines and rules of equity, is somewhat artificial and even technical. In this purely legal artificial sense, notice is by no means synonymous with knowledge, *although the effects produced by it are undoubtedly the same which would result from actual knowledge.* In other words, while the doctrines of equity on the subject do not assume that notice *is* knowledge, nor even that it is necessarily followed by knowledge, they still often impute to it the very same consequences which would flow from actual knowledge acquired by the party. As the notice spoken of by the rules is not knowledge, there may be notice without knowledge, and knowledge without notice. If a person, A, were negotiating with B for the purchase of a piece of land, and should be informed either by B or by C that B had already given a deed or mortgage of the same land to C, such information would be notice, and even the highest kind of notice; but A would not thereby, in any true meaning of the word, have *knowledge* of the deed or mortgage, of its various provisions and legal effect. On the other hand, if, before the negotiation, A had been casually shown the deed or mortgage itself by some third person in whose possession it happened to be, had been permitted by such person to take and read the instrument, had carefully examined it, and had thus become familiar with all of its provisions and its legal effect, he would not, within the set-

tled meaning of the legal term, have received *notice,* but he would most certainly have obtained, and would be acting with, a complete *knowledge* of the instrument. Again, under certain circumstances, if A, while dealing with respect to a piece of property, deliberately and intentionally refrains from making inquiries concerning outstanding encumbrances or claims for the very purpose of avoiding any information, he is charged with notice of the encumbrances and claims which are actually outstanding; but he certainly does not acquire, and cannot possibly have, a *knowledge* of such prior charges or interests. The record of a deed or mortgage, when regularly and properly made, is constructive notice to subsequent purchasers and encumbrancers; but it does not necessarily convey any knowledge to such persons; while A, in purchasing land from B, is absolutely and conclusively bound by the proper record of a prior instrument affecting the same premises, he may be acting in perfect good faith and in most complete ignorance of the actual existence of any such instrument. If, however, before making the purchase, A had examined the official records, and had there discovered and read a deed or mortgage of the same land copied at length in the book of records, but under such circumstances that it was not legally entitled to be recorded, on account of a defective acknowledgment or other irregularity, he would not thereby have received any legal *notice* within the true meaning of the term, but he would as certainly have obtained a full *knowledge* of the instrument. These instances are sufficient to illustrate the distinction between notice, in its legal and somewhat artificial conception, and knowledge, and to show that one may exist without the other. Unless this distinction is clearly apprehended and constantly borne in mind, much of the judicial discussion concerning the nature and effect of notice will seem to be confused and uncertain, and an irreconcilable conflict will appear among many of the decisions; the distinction renders the discussion clear and certain, and the decisions harmonious. Whenever the mere

notice, in its strict signification, is relied upon, even though not accompanied or followed by any actual knowledge, then, from considerations of policy and expediency, the same effects are attributed to it which would have resulted from actual knowledge; and it will be found that what constitutes this notice is determined by definite, precise, and even somewhat technical rules. Whenever, on the other hand, a party is shown to have obtained an actual knowledge, even though there has been nothing which constitutes a notice in its true sense, then there is no longer any necessity of resorting to the artificial conception of notice; the consequences must naturally and necessarily flow from an actual knowledge of facts by a party, which from motives of expediency are attributed to a *notice* of the same facts given to him, in the absence of actual knowledge. In a word, among the complicated affairs and transactions of life, it is often necessary that mere "notice" should take the place of actual knowledge; but this does not and cannot mean that actual knowledge shall not produce the same effects upon the rights of parties which, from motives of policy, are given to its representative and substitute notice. This conclusion is, as it seems to me, self-evident, and it is most important; it reconciles at once all the confusion and conflict of opinion which, it must be confessed, appear in some of the decisions, and it has the support of the ablest judicial authority. It has been expressly sanctioned and adopted as the settled principle upon which courts of equity act, in a recent case by one of the ablest of modern English equity judges, Lord Cairns. He is speaking of a trustee dealing with the trust fund in his hands, and acting with *knowledge,* but without the true notice, actual or constructive, required by the settled rules, of an encumbrance on the property created by the *cestui que trust.* The general language which he uses with respect to these particular facts will apply to all cases of knowledge as distinct from notice. Lord Cairns says: "All I can do

is to apply those principles which have been well established as part of those principles on which the court proceeds. . . . . I am bound to say that I do not think it would be consistent with the principles upon which this court has always proceeded, or with the authorities which have been referred to, if I were to hold that under no circumstances could a trustee, without express notice from the encumbrancer, be fixed with knowledge of an encumbrance upon the fund of which he is the trustee. It must depend upon the facts of the case. But I am quite prepared to say that I think the court would expect to find that those who alleged that the trustee had knowledge of the encumbrance had made it out, not by any evidence of casual conversations, much less by any *proof of what would only be constructive notice,* but by proof that the mind of the trustee has in some way been brought to an intelligent apprehension of the nature of the encumbrance which has come upon the property, so that a reasonable man, or an ordinary man of business, would act upon the information, and would regulate his conduct by it in the execution of the trust. If it can be shown that *in any way* the trustee has got *knowledge* of that kind,— knowledge which would operate upon the mind of any rational man, or man of business, and make him act with reference to the knowledge he has so acquired,— there I think the end is attained, and that there has been fixed upon the conscience of the trustee, and through that upon the trust fund, a security against its being parted with in any way that would be inconsistent with the encumbrance which has been created."[1] This extract states what is, in my opinion, the general doctrine, applied here to a trustee, but applicable to all persons whose rights or liabilities can be affected by notice of rights belonging to others. It declares that although there may be no technical "notice," not even a *constructive* notice, still there

[1] Lloyd v. Banks, L. R. 3 Ch. 488, 490, per Lord Cairns.

may be an *actual knowledge,* acquired in modes which do not amount to notice; and this *knowledge* may produce the same effects which the rules of equity attribute to "notice."[a]

§ 593. Kinds — Actual and Constructive.—Notice has been divided by judges and writers into the two main classes,— "actual" and "constructive"; but there is a great diversity of opinion among text-writers in determining what particular kinds shall come within each of these two classes. According to some, "constructive" notice includes those instances in which no information of the existence of any prior right or claim is directly or indirectly communicated to the party, but certain facts are shown to have existed, and from these the party is *conclusively* presumed to have received the information, and is therefore conclusively charged with notice. In other words, the information amounting to a notice, although not in fact given, is inferred as a conclusive presumption of the law, and this presumption cannot be rebutted by any evidence to the contrary. All other kinds, according to this theory, are "actual." This latter class, therefore, embraces many degrees, from the highest, where a positive, personal information of a fact is directly communicated to the party, down through every grade, in which the notice is either implied by *prima facie* presumptions of law from certain facts shown to exist, or is inferred as an argumentative conclusion, with greater or less cogency, from evidence which is perhaps entirely circumstantial. The objections to this mode of classification are plain. It is, in fact, no classification; it groups under the head of "actual" notice different species which have no common features, no real resemblance, and the name "actual" is an evident misnomer; while on the other hand the class of "constructive" is, from its definition, necessarily confined to a very few species, technical and artificial in their nature, the most important one being wholly the

(a) This section is cited in Cleveland Woolen Mills v. Sibert, 81 Ala. 140, 1 South. 773; Kirkham v. Moore, 30 Ind. App. 549, 65 N. E. 1042.

creature of statute. I prefer and shall adopt the classification approved and followed by many of the most eminent judges, which has the merit of simplicity, naturalness, and certainty. According to this arrangement, " actual " notice embraces all those instances in which positive personal information of a matter is directly communicated to the party, and this communication of information, being a fact, is established by evidence *directly* tending with more or less cogency to its proof. " Constructive " notice includes all other instances in which the information thus directly communicated cannot be shown, but the information is either *conclusively* presumed to have been given and received from the existence of certain facts, or is implied by a *prima facie* presumption of the law in the absence of contrary proof.[a]

§ 594. **Definition.**— Judges and text-writers have seldom attempted to define notice in the abstract, but have generally contented themselves with specifying instances, or describing its kinds and effects. Within the meaning of the rules, notice may, I think, be correctly defined as the *information concerning a fact* actually communicated to a party by an authorized person, or actually derived by him from a proper source, or else presumed by law to have been acquired by him, which information is regarded as equivalent *in its legal effects* to full knowledge of the fact, and to which the law attributes the same consequences as would be imputed to knowledge. It should be most carefully observed that the notice thus defined is not knowledge, nor does it assume that knowledge necessarily results.[a] On the other hand, the in-

§ 593, (a) This section is cited in Cleveland Woolen Mills v. Sibert, 81 Ala. 140, 1 South. 773. In Drey v. Doyle, 99 Mo. 459, 12 S. W. 287, the court commented on the confusion produced by the erroneous use of the terms " actual " and " constructive " notice, and approved the definitions given in the text.

§ 594, (a) This definition is quoted, with approval, in Cleveland Woolen Mills v. Sibert, 81 Ala. 140, 1 South. 773. This and the two sections following are cited in Kirkham v. Moore, 30 Ind. App. 549, 65 N. E. 1042, where a finding that a purchaser had no " actual knowledge," was held not to be equivalent to a finding that he had " no actual notice."

formation which constitutes the notice may be so full and minute as to produce complete knowledge.[1] Although an actual knowledge is not necessarily assumed to result, yet in many instances, as will be seen, the party is not permitted to show this fact, but the same consequences follow with respect to his rights and interests as though he had obtained real knowledge. The correctness of the definition which I have formulated will appear from a comparison of all the cases hereafter cited in the discussions of this section. In dealing with the subject, great care should be taken to distinguish between notice and the evidence by which it is established. The personal communication of information which constitutes notice is a fact which may be proved by any kind of competent evidence submitted to, weighed, and passed upon by the tribunal which decides matters of fact. Whenever the notice is inferred by a conclusive or *prima facie* presumption from certain facts, the office of evidence is to prove the existence of those facts. Notice is either actual or constructive; but the legal effect of each kind, when established, is exactly the same.[2]

1 Of the few definitions given by text-writers, the following are examples: The English editors of the Leading Cases in Equity attempt no general definition. The American editor says: "In legal parlance, notice is information given by one duly authorized, or derived from some authentic source. Notice may be either actual or constructive." While this definition has the merit of extreme brevity, and of correctly preserving the distinction between notice and knowledge, it lacks, as it seems to me, some of the essential elements of the entire legal conception: 2 Lead. Cas. Eq., 4th Am. ed., 144. Another American writer says: "Notice, then, in its technical sense, is the legal cognizance of a fact. It differs from knowledge, for knowledge may exist without notice, and there may be notice without any actual knowledge. . . . Notice, therefore, in the sense here used, may be said to be the definite legal cognizance, either actual or presumptive, of a right or title": Bispham's Equity, 325. While the distinction between notice and knowledge is here distinctly emphasized, yet the definition itself, in calling notice the "legal cognizance" of a fact, gives the *effect* of notice rather than describes the thing itself. Legal cognizance means simply legal knowledge, and is the effect which the law regards as produced by notice.

2 Prosser v. Rice, 28 Beav. 68, 74.

§ 595. **Actual Notice.**[a]— Actual notice is information concerning the fact,— as, for example, concerning the prior interest, claim, or right,— directly and personally communicated to the party.[1] The distinction between actual and constructive notice does not primarily depend upon the *amount* of the information, but on the manner in which it is obtained, or assumed to have been obtained. In actual notice information is not *inferred* by any presumption of law; the personal communication of it is a fact, and, like any other fact, is to be proved by evidence. The information *may* be so full, minute, and circumstantial, that the party receiving it thereby acquires a complete knowledge of the prior fact affecting the transaction in which he is then engaged, or it may fall far short of conveying such knowledge.[2] Again, the evidence may be so direct, positive, and overwhelming as to establish the fact that the information was personally given and received in the most convincing and unequivocal manner, or it may be entirely indirect and circumstantial. Wherever, from competent evidence, either direct or circumstantial, the court or the jury is entitled to infer, *as a conclusion of fact, and not by means of any legal presumptions,* that the information was personally communicated to or received by the party, the notice is actual. In short, actual notice is a conclusion of fact, capable of being established by all grades of legitimate evidence.[3] [b]

[1] "Notice is actual when the purchaser is aware of the adverse claim or title, or has such information as would lead to knowledge": Am. note in 2 Lead. Cas. Eq., 4th Am. ed., 144.

[2] Williamson v. Brown, 15 N. Y. 354. Actual notice need not be full, circumstantial information of every material fact affecting the right of the person receiving it; it is enough that it be information directly tending to show the existence of the fact, and sufficient to put the party on an inquiry: Barnes v. McClinton, 3 Penr. & W. 67; 23 Am. Dec. 62; Tillinghast v. Champlin, 4 R. I. 173, 215; 67 Am. Dec. 510.

[3] Tillinghast v. Champlin, 4 R. I. 173, 215; 67 Am. Dec. 510; Warren v. Swett, 31 N. H. 332, 341, 342; Hull v. Noble, 40 Me. 459, 480; Buttrick v.

(a) This section is cited in Coleman v. Dunton, (Me.) 58 Atl. 430.

(b) See, also, Knapp v. Bailey, 79 Me. 195, 1 Am. St. Rep. 295, 9 Atl. 122; Batavia v. Wallace, 102 Fed. 240, 42 C. C. A. 310; Haskett v. Auhl,

§ 596. **When Shown by Indirect Evidence.**[a]— It is admitted by all text-writers and by many judges that much confusion and inaccuracy of language are exhibited in the decisions concerning actual and constructive notice; notices are not infrequently called "constructive," which are really "actual," and the rules governing the two are confounded.[1] That the party has knowledge or information of facts sufficient to put him upon an inquiry has often been treated as peculiarly the characteristic of constructive notice. In truth, however, this test is equally applicable to every instance of actual notice inferred by process of rational deduction from circumstantial evidence.[2] The distinction is plain and

Holden, 13 Met. 355, 357; Trefts v. King, 18 Pa. St. 157, 160; Rogers v. Jones, 8 N. H. 264; Griffith v. Griffith, 1 Hoff. Ch. 153; Nelson v. Sims, 23 Miss. 383, 388; 57 Am. Dec. 144; Curtis v. Blair, 26 Miss. 309, 328; 59 Am. Dec. 257; Bartlett v. Glascock, 4 Mo. 62, 66; Epley v. Witherow, 7 Watts, 163, 167; Jaques v. Weeks, 7 Watts, 261, 274; Blatchley v. Osborn, 33 Conn. 226, 233; Buck v. Paine, 50 Miss. 648, 655; Carter v. City of Portland, 4 Or. 339, 350, per McArthur, J. (a very clear and accurate statement of the doctrine); Speck v. Riggin, 40 Mo. 405; Maupin v. Emmons, 47 Mo. 304, 306, 307; Maul v. Rider, 59 Pa. St. 167, 171, 172.

1 Williamson v. Brown, 15 N. Y. 354, per S. L. Selden, J.

2 The confusion mentioned in the text is easily and completely dispelled and the necessary distinction between the two kinds of notice is clearly shown by a brief analysis of their essential operation. When A is dealing with B for the purchase of land which he knows, sees, or is told to be in the possession of a stranger, C, such possession does not show or tend to show that any information or knowledge of C's interest was directly and personally communicated to A; but *the law presumes* that information of C's real interest and claim was communicated. But the presumption in this case is rebuttable; it is said that A is put upon an inquiry; if he fails to make *any* inquiry, or to prosecute it with reasonable diligence, then the presumption is absolute; if he does prosecute it with reasonable diligence, and does not discover the truth, then the presumption is overcome. But it should be observed that the jury or court does not find the existence of a notice as a conclusion of fact deduced by rational argument from the fact of C's possession; the only province of the triers of fact in this case is to determine the nature, extent, and effect of A's inquiry as a means of rebutting the presumption. A second kind of con-

3 Kan. App. 744, 45 Pac. 608; Simon Gregory Dry Goods Co. v. Schooley, 66 Mo. App. 406; Lewis v. Dudley, 70 N. H. 594, 49 Atl. 572; Aultman & Co. v. Utsey, 34 S. C. 559, 13 S. E. 848; all holding that actual notice is a conclusion of fact.

(a) This section is cited in Coleman v. Dunton, (Me.) 58 Atl. 430.

natural. In all cases of constructive notice, there is no evidence which directly tends to show that any information of the prior conflicting claim was personally brought home to the consciousness of the party affected; the particular facts of which he is shown to have knowledge do not directly tend to show such information; but from these facts the legal presumption arises, either conclusive or rebuttable, that the in-

structive notice arises from recitals, statements, and references in title deeds. Here, also, it is very plain that there is nothing tending to show direct personal information, since the party is affected with the notice although he may not have read the deed, and even though he may not have seen it. A is the grantee in a deed of conveyance. From the mere fact that he must derive his title through that instrument and through the line of prior conveyances, he is charged with notice of all that they contain or refer to. This fact does not in the least tend to show that A received any direct personal information of a conflicting interest or claim; the inference is a pure presumption of law, based upon considerations of general policy, and does not require any argumentative deduction from evidence. A third instance of constructive notice is that with which a principal is charged, when information or knowledge has been obtained by his agent. When this particular case is carefully considered, it will be perceived that it is governed by precisely the same principles as those which have already been examined. The *mere fact* that the agent has acquired information does not tend to show that the information has been directly and personally communicated to the principal; nor does the rule depend in the slightest degree upon such an assumption. That information constituting notice is imputed to the principal is entirely a presumption of law, supported by considerations of expediency, and made without any reference to the actual fact. The last instance of constructive notice which I shall mention is that resulting from registration pursuant to statute. The *mere fact* that an instrument, of which the party is profoundly ignorant, has been recorded, certainly does not tend to show that he has received any direct personal information concerning it, and the interest or claim which it creates. The presumption arises from the positive mandate of a statute; there is no occasion for, nor even possibility of, any conclusion of fact drawn from evidence by a process of argument.

The foregoing instances show the *rationale* of the operation of all constructive notices. A similar analysis will disclose the true operation of actual notice. When A is dealing with B for the purchase of land, and the evidence shows that A is directly and personally informed, either by B or by C, that C already holds a conveyance, or mortgage, or encumbrance, or possesses an easement or other charge upon the same premises, the case is so simple, and the notice is so clearly actual, that no doubt can exist concerning it. Whenever the object is to prove that A has received the same kind of personal information concerning some prior interest or claim held by C, but the fact cannot be shown by any direct evidence, *but must be established by indirect and circumstantial evidence,*— that is, must be inferred by the jury or court as a

formation was received. In all cases of actual notice inferred from circumstantial evidence, the facts proved do directly tend to show that information of the prior conflicting claim was personally brought home to the consciousness of the party. The court or jury infers from the facts proved, by a process of rational deduction, *but without the aid of any legal presumption,* that such information was

legitimate deduction from such evidence,— the notice is none the less actual; it is to be inferred as a conclusion of fact, by a weighing of the evidence and process of argument, *unaided by any legal presumptions.* One illustration will suffice. A purchased land from B. A third person, C, from whom B obtained the property, has a claim upon it; and the question is, whether A took with notice of C's claim. There is no direct evidence of any information given to A by either B or C. But it is proved that A is B's son, and has constantly lived in his house and been a member of his family; that for several years A has been acquainted with his father's business affairs, and has taken an active part in their management; that A was familiar with the transaction by which B obtained the premises from C, and aided his father in negotiating the contract with C, etc. If from these and similar facts a notice should be inferred, it would be an actual notice, and not constructive. No legal presumptions would aid the court or jury; they would simply arrive at the conclusion, by a process of rational argument, that at some time information or knowledge of C's claim was directly and personally communicated to or acquired by A, in exactly the same manner as a jury may infer that a certain man and woman were at some past time actually married, from the circumstantial evidence of their cohabitation and holding each other out to the world as husband and wife. The only question of law in such a case is, whether the evidence is sufficient to warrant the finding of fact that information or knowledge of C's claim was actually acquired by A. It is true that many cases say, under such circumstances, that "the facts proved are sufficient to put the party, A, upon an inquiry, and if he neglected to make a due inquiry he must be charged with notice." Such a mode of statement is entirely proper; but it is incorrect, misleading, and a confounding of the two kinds of notice, to say under such circumstances that if the party neglects to make a due inquiry *he is presumed to have received the information* which constitutes notice. In all cases of information constituting actual notice inferred from circumstantial evidence, this statement that "the facts proved are sufficient to put the party upon an inquiry," etc., is simply tantamount to saying that the facts and circumstances, when uncontradicted and unexplained, are sufficient evidence to warrant a finding that the information was directly and personally acquired by the party, but that the facts and circumstances may be sufficiently explained by the party's showing that he did make a reasonable inquiry, and did seek for information, but failed to obtain it. By such means the conclusion which would otherwise have been drawn from the unexplained circumstances is overcome and negatived. For illustrations of these positions, see cases cited in the next following note.

actually received. In weighing this evidence, the tribunal may properly ask whether the facts proved were sufficient to put the party upon an inquiry, so that, if he went on with the transaction without making any inquiry, his actual receipt of information and consequent notice is a legitimate or necessary conclusion; or whether, on the other hand, he prosecuted an inquiry to such an extent and in such a manner that his actual failure to acquire information is a just inference of fact.[3] A careful examination of the cases con-

[3] In a large number of American cases the discussion concerning actual notice has arisen upon an interpretation of a statutory provision which expressly requires "actual notice" of a prior unrecorded deed or encumbrance, in order that it may have priority over a subsequent deed or mortgage which is first put on record. In a few of the states the courts have interpreted the intention of the legislature as demanding that the personal information of the unrecorded instrument should be proved by direct evidence, and as excluding all instances of actual notice established by circumstantial evidence. In most of the states, however, where this statutory clause is found, the courts have defined the "actual notice" required by the legislature as embracing all instances of that species in contradistinction from "constructive notice,"— that is, all kinds of actual notice, whether proved by direct evidence or inferred as a legitimate conclusion from circumstances.[b] Whichever view of the statute be taken, these decisions are all useful in describing the nature of actual notice, and especially in distinguishing actual notice proved by circumstantial evidence from constructive notice. See Brinkman v. Jones, 44 Wis. 498, 517, 519, 521, 523; Brown v. Volkening, 64 N. Y. 76, 82, 83; Lambert v. Newman, 56 Ala. 623, 625; Helms v. Chadbourne, 45 Wis. 60, 70, per Cole, J.; Chicago etc. R. R. Co. v. Kennedy, 70 Ill. 350, 361, per Walker, J.; Shepardson v. Stevens, 71 Ill. 646; Erickson v. Rafferty, 79 Ill. 209, 212; Reynolds v. Ruckman, 35 Mich. 80; Loughridge v. Bowland, 52 Miss. 546, 553, 555; Trefts v. King, 18 Pa. St. 157, 160; Rogers v. Jones, 8 N. H. 264; Griffith v. Griffith, 1 Hoff. Ch. 153; Nelson v. Sims, 23 Miss. 383, 388; 57 Am. Dec. 144; Barnes v. McClinton, 3 Penr. & W. 67; 23 Am. Dec. 62; Bartlett v. Glascock, 4 Mo. 62, 66; Epley v. Witherow, 7 Watts, 163, 167; Jaques v. Weeks, 7 Watts, 261, 274; Buttrick v. Holden, 13 Met. 355, 357; Curtis v. Blair, 26 Miss. 309, 328; 59 Am. Dec. 257; Hull v. Noble, 40 Me. 459, 480; Warren v. Swett, 31 N. H. 332, 341; Tillinghast v. Champlin, 4 R. I. 173, 215; 67 Am. Dec. 510; Buck v. Paine, 50 Miss. 648, 655; Carter v. City of Portland, 4 Or. 339, 350; Pringle v. Dunn, 37 Wis. 449, 460, 461, 465; 19 Am. Rep. 772; Parker v. Kane, 4 Wis. 1; 65 Am. Dec. 283; Shotwell v. Harrison, 30 Mich. 179; Munroe v. Eastman, 31 Mich. 283;

(b) Quoted in Knapp v. Bailey, 79 Me. 195, 9 Atl. 122, 1 Am. St. Rep. 295.

cerning notice inferred from circumstances will show that in a large proportion of them the notice was actual, and not constructive; and that one or the other of the following questions was in reality considered and determined by the court: 1. It being shown that the party had been informed of certain facts, and it further appearing that he had, notwithstanding such information, and without making any inquiry respecting its truth, gone on and completed the transaction, whether the court or jury were warranted in in-

Eck v. Hatcher, 58 Mo. 235; Maupin v. Emmons, 47 Mo. 304, 306, 307; Parker v. Foy, 43 Miss. 260, 266; 55 Am. Rep. 484; Wailes v. Cooper, 24 Miss. 208, 228.

In the recent and very instructive case of Brinkman v. Jones, 44 Wis. 498, the question was, whether a grantee had sufficient notice of a prior unrecorded deed to defeat his own recorded conveyance. The court were called upon to interpret the Wisconsin statute, which requires "actual notice" under such circumstances; and it discussed in a very full and accurate manner the true meaning and operation of actual notice. Taylor, J., said (p. 519): "The actual notice required by the statute is not synonymous with *actual knowledge*. We think the true rule is, that notice must be held to be actual when the subsequent purchaser has actual knowledge of such facts as would put a prudent man upon inquiry which, if prosecuted with ordinary diligence, would lead to actual notice of the right or title in conflict with that which he is about to purchase. When the subsequent purchaser has knowledge of such facts, it becomes his duty to make inquiry, and he is guilty of bad faith if he neglects to do so, and consequently he will be charged with the actual notice he would have received if he had made the inquiry. We are aware that this construction of the statute is in conflict with the later decisions in Massachusetts and Indiana, and with the definition given to the term by Story in his Equity Jurisprudence, section 399: Parker v. Osgood, 3 Allen, 487; Dooley v. Wolcott, 4 Allen, 406; Sibley v. Lefflingwell, 8 Allen, 584; White v. Foster, 102 Mass. 375; Lamb v. Pierce, 113 Mass. 72; Crasson v. Swoveland, 22 Ind. 428, 434. . . . . These cases all proceed upon the theory that actual notice and actual knowledge mean the same thing." The court also cites decisions from many other states by which the same interpretation is given to similar statutes, and the same meaning attributed to "actual notice." It is admitted, however, that no mere "constructive notice" to the subsequent purchaser would avail, under such a statute, to defeat his rights under an instrument first recorded. In the following cases substantially the same test is laid down, namely: "A knowledge of such facts and circumstances as would put an ordinarily prudent man upon an inquiry." It is true that in some of these opinions the language of the court *appears* to connect this test with constructive notice only; but a closer examination will show that, whatever be the language used, the judge really has in mind and is speaking of those instances

ferring as a legitimate conclusion from the evidence that he had *also* received that direct, personal information concerning the existence of a prior conflicting claim which the law calls "actual notice." 2. It being shown that the party had been informed of certain facts, and it further appearing that he had thereupon made inquiry respecting the truth of such information before he completed the transaction, whether the court or jury were warranted in inferring as a legitimate conclusion from the whole evidence, either that

of actual notice which are inferred from circumstantial evidence. See Lambert v. Newman, 56 Ala. 623; Helms v. Chadbourne, 45 Wis. 60; Chicago etc. R. R. Co. v. Kennedy, 70 Ill. 350; Shepardson v. Stevens, 71 Ill. 646; Loughridge v. Bowland, 52 Miss. 546; Barnes v. McClinton, 3 Penr. & W. 67; 23 Am. Dec. 62; Warren v. Swett, 31 N. H. 332; Buttrick v. Holden, 13 Met. 355,— all of which are cited *supra*. In the recent case of Brown v. Volkening, 64 N. Y. 76, the kind and amount of notice required to defeat the precedence obtained by the first recording of a subsequent conveyance was discussed. The statute of New York does not in express terms require the notice to be actual. The notice relied upon was constructive, arising from the fact of possession by a third person; and the precise point decided was confined to the kind, nature, purposes, and extent of the possession necessary under such circumstances to raise a legal presumption and to constitute a sufficient constructive notice. In the course of his opinion, however, Allen, J., speaks of actual notice in the following language, which fully corroborates the positions of the text (p. 82): "Actual notice of a prior unrecorded conveyance, or of any title, legal or equitable, to the premises, or knowledge or notice of any facts which should put a prudent man upon inquiry, impeaches the good faith of the subsequent purchaser. There should be proof of actual notice of prior title or prior equities, or *circumstances tending to prove* such prior rights, which affect the conscience of the subsequent purchaser. Actual notice of itself impeaches the subsequent conveyance. Proof of circumstances short of actual notice, which should put a prudent man upon inquiry, authorizes the court or jury to infer and find actual notice." This passage of Mr. Justice Allen's opinion exactly adopts the reasoning and conclusions as given in the text. It declares that when a court or jury find notice as a conclusion of fact from circumstances tending to show it, which should put a prudent man upon inquiry, such notice is actual as truly as though it was proved by direct evidence. It is actual, and not constructive, because, although inferred from circumstances, it is inferred by mere process of argument, and not by means of any legal presumptions. If the party thus put upon inquiry neglects to prosecute the inquiry, the conclusion of fact is then absolute, since the circumstances are left unexplained and the natural inference from them is left unanswered and unweakened. To the same effect as Brinkman v. Jones, 44 Wis. 498, is Maupin v. Emmons, 47 Mo. 304, 306, 307.

he had or had not received that direct personal information which constitutes actual notice.[4]

§ 597. **What Constitutes It: Rumors; Putting on Inquiry, etc.**— A purchaser, or person obtaining any right in specific property, is not affected by vague rumors, hearsay statements, and the like, concerning prior and conflicting claims upon the same property; and the reason is, that such kind of reports and statements do not furnish him with any positive information, any tangible clew, by the aid of which he may commence and successfully prosecute an inquiry, and thus discover the real truth; his conscience is therefore not bound.[1][a] On the other hand, the proposition is established by an absolute unanimity of authority, and is equally true both in its application to constructive notice, and to actual notice not proved by direct evidence but inferred from circumstances, that if the party obtains knowledge or information of facts tending to show the existence of a prior right in conflict with the interest which he is seeking to obtain, and which are sufficient to put a reasonably prudent man upon inquiry, then it may be a legitimate, and perhaps even necessary, inference that he acquired the further information which constitutes actual notice. This inference is not, in case of actual notice, a presumption, much less a conclusive presumption, of law; it may be defeated by proper evidence. If the party shows that he made the inquiry, and prosecuted it with reasonable diligence, but still failed to discover the conflicting claim, he thereby overcomes and destroys the inference. If, however, it appears that the party obtains knowledge or information of such facts, which are sufficient

[4] See the cases cited in the last preceding and in the next following notes.

[1] Woodworth v. Paige, 5 Ohio St. 70; Lamont v. Stimson, 5 Wis. 443; Shepard v. Shepard, 36 Miss. 173; Doyle v. Teas, 4 Scam. 202; Butler v. Stevens, 26 Me. 484; Jaques v. Weeks, 7 Watts, 261, 267; Wilson v. McCullough, 23 Pa. St. 440; 62 Am. Dec. 347; Jolland v. Stainbridge, 3 Ves. 478.

(a) See, also, Satterfield v. Malone, 35 Fed. 445; Raymond v. Flavel, 27 Oreg. 219, 40 Pac. 158 (citing this section); and *post*, § 602.

to put a prudent man upon inquiry, and which are of such a nature that the inquiry, *if prosecuted with reasonable diligence, would certainly lead to a discovery of the conflicting claim,*[b] then the inference that he acquired the information constituting actual notice is necessary and absolute; for this is only another mode of stating that the party was put upon inquiry; that he made the inquiry and arrived at the truth. Finally, if it appears that the party has knowledge or information of such facts sufficient to put a prudent man upon inquiry, and that he wholly neglects to make any inquiry, or having begun it fails to prosecute it in a reasonable manner, then, also, the inference of actual notice is necessary and absolute. These three propositions substantially embrace all instances of actual notice proved by circumstantial evidence, and they are illustrated by a vast number of decisions, each depending upon its own particular circumstances.[2] [c]

[2] Spofford v. Weston, 29 Me. 140; Warren v. Swett, 31 N. H. 332, 341; Nute v. Nute, 41 N. H. 60; Blaisdell v. Stevens, 16 Vt. 179, 186; Stafford v. Ballou, 17 Vt. 329; McDaniels v. Flower Brook etc. M. Co., 22 Vt. 274; Stevens v. Goodenough, 26 Vt. 676; Blatchley v. Osborn, 33 Conn. 226, 233; Sigourney v. Munn, 7 Conn. 324; Peters v. Goodrich, 3 Conn. 146; Raritan Water etc. Co. v. Veghte, 21 N. J. Eq. 463, 478; Hoy v. Bramhall, 19 N. J. Eq. 563; 97 Am. Dec. 687; Williamson v. Brown, 15 N. Y. 354, 362; Swarthout v. Curtis, 5 N. Y. 301; 55 Am. Dec. 345; Pendleton v. Fay, 2 Paige, 202; Danforth v. Dart, 4 Duer, 101; Jackson v. Caldwell, 1 Cow. 622; Hawley v. Cramer, 4 Cow. 717; Parrish v. Brooks, 4 Brewst. 154; Kerns v. Swope, 2 Watts, 75; Jaques v. Weeks, 7 Watts, 261, 274; Epley v. Witherow, 7 Watts, 163, 167; Bellas v. McCarthy, 10 Watts, 13; Randall v. Silverthorne, 4 Pa. St. 173; Trefts v. King, 18 Pa. St. 157, 160; Ringgold v. Bryan, 3 Md. Ch. 488; Stockett v. Taylor, 3 Md. Ch. 537; Bunting v. Ricks, 2

(b) Quoted in dissenting opinion in Bell v. Solomons, (Cal.) 75 Pac. 649. That the facts must be of such a nature as to lead to the discovery of the conflicting claim, see College Park Electric Belt Line v. Ide, 15 Tex. Civ. App. 273, 40 S. W. 64; Fischer v. Lee, 98 Va. 159, 35 S. E. 441; and cases cited at the end of this paragraph.

(c) In addition to the recent cases cited in the notes to the foregoing and the following sections, see these recent cases: Smith v. Ayer, 101 U. S. 320; Spence v. Mobile & M. R. Co., 79 Ala. 576; Woodall v. Kelly, 85 Ala. 368, 7 Am. St. Rep. 57, 5 South. 164; Montgomery v. Keppel, 75 Cal. 128, 7 Am. St. Rep. 125, 19 Pac. 178; Leake v. Watson, 58 Conn. 332, 18

§ 598. Special Rules.— The general rules formulated in the foregoing paragraphs apply to all species of actual notice. The inquiry next presents itself, whether any more particular rules have been established which determine the existence or non-existence of actual notice under special conditions of fact. Since actual notice is, by its very definition, a conclusion of fact inferred from evidence more or

Dev. & B. Eq. 130; 32 Am. Dec. 699; Gibbes v. Cobb, 7 Rich. Eq. 54; Maybin v. Kirby, 4 Rich. Eq. 105; Center v. Bank, 22 Ala. 743; McGehee v. Gindrat, 20 Ala. 95; Ringgold v. Waggoner, 14 Ark. 69; Bartlett v. Glascock, 4 Mo. 62, 66; Doyle v. Teas, 4 Scam. 202; Hoxie v. Carr, 1 Sum. 193; Hinde v. Vattier, 1 McLean, 110; 7 Pet. 252; Lambert v. Newman, 56 Ala. 623, 625; Helms v. Chadbourne, 45 Wis. 60, 70; Brinkman v. Jones, 44 Wis. 498, 519; Chicago etc. R. R. v. Kennedy, 70 Ill. 350, 361; Shepardson v. Stevens, 71 Ill. 646; Erickson v. Rafferty, 79 Ill. 209, 212; Reynolds v. Ruckman, 35 Mich. 80; Loughridge v. Bowland, 52 Miss. 546, 555; Brown v. Volkening, 64 N. Y. 76, 82; Chicago v. Witt, 75 Ill. 211; Buck v. Paine, 50 Miss. 648, 655; McLeod v. First Nat. Bank, 42 Miss. 99, 112; Parker v. Foy, 43 Miss. 260; 55 Am. Rep. 484; Carter v. City of Portland, 4 Or. 339, 350, per McArthur, J. (a very clear and accurate statement of the doctrine); Pringle v. Dunn, 37 Wis. 449, 465; 19 Am. Rep. 772; Shotwell v. Harrison, 30 Mich. 179; Munroe v. Eastman, 31 Mich. 283; Eck v. Hatcher, 58 Mo. 235; Maul v. Rider, 59 Pa. St. 167, 171, 172; Lawton v. Gordon, 37 Cal. 202, 205.

Am. St. Rep. 270, 20 Atl. 343; Gale v. Hardy, 20 Fla. 171; Urquhart v. Leverett, 69 Ga. 92; Hunt v. Dunn, 74 Ga. 124; Stokes v. Riley, 121 Ill. 166, 11 N. E. 877; Wishard v. Hansen, 99 Iowa, 307, 61 Am. St. Rep. 238, 88 N. W. 691; Schnavely v. Bishop, 8 Kan. App. 301, 55 Pac. 667 (notice to purchaser of mortgaged chattels); Knapp v. Bailey, 79 Me. 195, 1 Am. St. Rep. 295, 9 Atl. 122; Bradley v. Merrill, 88 Me. 319, 34 Atl. 160; Marbury v. Ehlers, 72 Md. 206, 20 Am. St. Rep. 467, 19 Atl. 648; Kent v. Mellus, 69 Mich. 71, 37 N. W. 48; Hains v. Hains, 69 Mich. 581, 37 N. W. 563; Mercantile Nat. Bank v. Parsons, 54 Minn. 56, 40 Am. St. Rep. 299, 55 N. W. 825; Sensenderfer v. Kempf, 83 Mo. 581, citing this section; Connecticut Mut. L. Ins. Co. v. Smith, 117 Mo. 261, 38 Am. St. Rep. 656, 22 S. W. 623, citing §§ 596–600 of the text; Werner v. Litzinger, 45 Mo. App. 106 (notice need not be of the exact nature of the lien); Hurley v. O'Neill, 26 Mont. 269, 67 Pac. 626; Frerking v. Thomas, 64 Nebr. 193, 89 N. W. 1005; Lang Syne Gold Mining Co. v. Ross, 20 Nev. 127, 19 Am. St. Rep. 337, 18 Pac. 358; Kline v. Grannis, 61 N. J. Eq. 397, 48 Atl. 566; Hodge v. United States Steel Corporation, (N. J. Eq.) 54 Atl. 1; Ellis v. Horrman, 90 N. Y. 466; McDougal v. Lame, 39 Oreg. 212, 64 Pac. 864, and cases cited; Morgan's Appeal, 126 Pa. St. 500, 17 Atl. 666 (notice to assignee of mortgage); Toland v. Corey, 6 Utah, 392, 24 Pac. 190, citing this and the following sections; Neponset Land & L. Co. v. Dixon, 10 Utah, 334, 37 Pac. 573, citing this section; Town of Woodbury

less convincing, it is plain that each case must, to a great extent, depend upon its own circumstances; and the results collected and arranged from the decisions must therefore be regarded as *illustrations* of the general doctrines heretofore described, rather than as additional and more definite rules. It is possible, however, to reach some conclusions from a comparison and classification of judicial opinions, which

v. Bruce, 59 Vt. 624, 11 Atl. 52; Roanoke Brick & L. Co. v. Simmons, (Va.) 20 S. E. 955, citing §§ 595–597 of the text; Cain v. Cox, 23 W. Va. 594; Farley v. Bateman, 40 W. Va. 540, 22 S. E. 72 (notice of undocketed judgment).

The doctrine as to actual notice inferred from circumstances is well illustrated by innumerable cases of conveyances or transfers in fraud of creditors, where the purchaser from the fraudulent debtor is charged, or sought to be charged, with notice of the fraudulent intent; see Shauer v. Alterton, 151 U. S. 607, 14 Sup. Ct. 442; Simms v. Morse, 2 Fed. 325 (purchaser not affected by mere suspicion); Singer v. Jacobs, 11 Fed. 559; The Holladay Case, 27 Fed. 849; Walker v. Collins, 50 Fed. 737, 1 C. C. A. 642, 4 U. S. App. 406, and cases cited; Brittain v. Crowther, 54 Fed. 295, 4 C. C. A. 341, 12 U. S. App. 148; Batavia v. Wallace, 102 Fed. 240, 42 C. C. A. 310, and cases cited; Montgomery v. Bayliss, 96 Ala. 342, 11 South. 198, and cases cited; Chipman v. Glennon, 98 Ala. 263, 13 South. 822; Simmons v. Shelton, 112 Ala. 284, 57 Am. St. Rep. 39, 21 South. 309; Dyer v. Taylor, 50 Ark. 314, 7 S. W. 258; Adler-Goldman Commission Co. v. Hathcock, 55 Ark. 579, 18 S. W. 1048; Ballou v. Andrews Bkg. Co., 128 Cal. 562, 61 Pac. 102; Knower v. Clothing Co., 57 Conn. 202, 221, 17 Atl. 580; Reagan v. First Nat. Bk., 157 Ind. 623, 61 N. E. 575, 62 N. E. 701; Jones v. Hetherington, 45 Iowa, 681; Gamet v. Simmons, 103 Iowa, 163, 72 N. W. 444; Gollober v. Martin, 33 Kan. 252, 6 Pac. 267; Martin v. Marshall, 54 Kan. 147, 37 Pac. 977; Richolson v. Freeman, 56 Kan. 463, 43 Pac. 772; Haskett v. Auhl, 3 Kan. App. 744, 45 Pac. 608 (circumstances out of the usual course of business, and such as to excite the suspicions of a reasonably prudent man); Biddinger v. Wyland, 67 Md. 359, 10 Atl. 202; Smith v. Pattison, 84 Md. 341, 35 Atl. 963; Carroll v. Hayward, 124 Mass. 120; Hastings Malting Co. v. Heller, 47 Minn. 71, 49 N. W. 400; Dow v. Sutphin, 47 Minn. 479, 50 N. W. 604; Tuteur v. Chase, 66 Miss. 476, 14 Am. St. Rep. 577, 6 South. 241, 4 L. R. A. 832 (mere suspicion not sufficient); State v. Purcell, 131 Mo. 312, 33 S. W. 13; Reid, Murdock & Co. v. Lloyd, 52 Mo. App. 278; Sammons v. O'Neill, 60 Mo. App. 530; Hearn v. Due, 79 Mo. App. 322; Parker v. Conner, 93 N. Y. 118, 124, 45 Am. Rep. 178; Fluegel v. Henschel, 7 N. Dak. 276, 66 Am. St. Rep. 642, 74 N. W. 996, and cases cited; Tantum v. Green, 21 N. J. Eq. 364; Coolidge v. Heneky, 11 Oreg. 327, 8 Pac. 281; Dodd v. Gaines, 82 Tex. 429, 18 S. W. 618; Anderson v. Mossy Creek Woolen Mills Co., 100 Va. 420, 41 S. E. 854; McMasters v. Edgar, 22 W. Va. 673; Keneweg Co. v. Schilansky, 47 W. Va. 287, 34 S. E. 773; Wilson v. Carrico, 50 W. Va. 336, 40 S. E. 439; Rindskopt v. Myers, 87 Wis. 80, 57 N. W. 967.

will afford great practical aid in applying these general rules to particular cases. The whole inquiry is reduced to the examination of two entirely distinct questions, which should not be confounded, namely: What kind of information personally communicated to a party constitutes the actual notice proved by direct evidence? What facts are sufficient to put a party upon an inquiry, so that, if not overcome by contrary proofs, they would constitute the actual notice inferred from circumstantial evidence?

§ 599. Same — Kind and Amount of Information Necessary. — In the first of these two inquiries, it is assumed that some information is shown by direct evidence to have been personally communicated to the party, and the sole question is, What kind or amount of such information will constitute actual notice, and so bind his conscience? Whenever A is dealing concerning certain property with B, who acts as owner, grantor, vendor, or mortgagor, as the case may be, a definite statement made to A by a third person, C, that he has or claims some conflicting interest or right, legal or equitable, in the subject-matter, is a sufficient actual notice to affect A's conscience. The statement need not be so full and detailed that it communicates to A complete knowledge of the opposing interest or right; it is enough that it is so definite as to assert the existence of an interest or right as a fact.[1] [a] Under the same circumstances, if A is informed by the grantor or vendor, B, that the subject-matter is encumbered, or is subject to an outstanding lien or equitable claim, or that he himself has not for any reason a title free and perfect, such information is actual notice; it need not state all the particulars, nor impart complete knowledge of the

[1] Epley v. Witherow, 7 Watts, 163, 167; Jaques v. Weeks, 7 Watts, 261, 274; Barnes v. McClinton, 3 Penr. & W. 67; 23 Am. Dec. 62; Bartlett v. Glascock, 4 Mo. 62, 66; Nelson v. Sims, 6 Miss. 383, 388; 57 Am. Dec. 144; Blatchley v. Osborn, 33 Conn. 226, 233; Reynolds v. Ruckman, 35 Mich. 80 (a case in which it was held that no notice had been given); Ponder v. Scott, 44 Ala. 241, 244, 245 (case in which no notice was held to have been given).

(a) See, also, Fry v. Warfield etc. Co., 105 Iowa, 559, 75 N. W. 485.

conflicting interest, encumbrance, or right; it is enough that A is reasonably informed, and has reasonable grounds to believe, that the conflicting right exists as a fact.[2 b] Of course the statement by B may be so vague and uncertain, or it may be so accompanied by additional explanatory or contradictory matter, that it does not affect the conscience of the purchaser, A, and does not amount to an actual notice.[3 d] Wherever, under the circumstances above described, information given by the grantor or vendor with whom the purchaser is dealing, or by the holder of the conflicting claim or right, would constitute an actual notice, the same information may be communicated by a relative or friend of either of these persons, and would then operate in like manner as actual notice, provided the party so represented was prevented by absence, sickness, or other disability from making the communication in his own person and on his own behalf.[4]

[2] Hudson v. Warner, 2 Har. & G. 415; Price v. McDonald, 1 Md. 403; 54 Am. Dec. 657; Russell v. Petree, 10 B. Mon. 184, 186; Reynolds v. Ruckman, 35 Mich. 80 (example of no notice); Chicago v. Witt, 75 Ill. 211 (ditto, no notice); Ponder v. Scott, 44 Ala. 241, 244, 245 (notice merely of an intention to execute a deed is not notice of the contents of the deed afterwards executed). Definite information of a conflicting claim communicated by a third person, neither the claimant nor the party with whom the purchaser is dealing, who speaks from his own positive knowledge, *may* amount to the knowledge which supersedes and takes the place of a mere notice. This question is fully examined in a subsequent paragraph. See Butcher v. Yocum, 61 Pa. St. 168, 171; 100 Am. Dec. 625; Lawton v. Gordon, 37 Cal. 202, 205, 206.c

[3] Buttrick v. Holden, 13 Met. 355, 357; Curtis v. Blair, 9 Miss. 309, 328; 59 Am. Dec. 257; Chicago v. Witt, 75 Ill. 211; Ponder v. Scott, 44 Ala. 241, 244, 245; and see *post*, § 601, where the question is more fully examined.

[4] Butcher v. Yocum, 61 Pa. St. 168, 171; 100 Am. Dec. 625; Mulliken v. Graham, 72 Pa. St. 484; Ripple v. Ripple, 1 Rawle, 386. In Butcher v. Yocum, 61 Pa. St. 168, 100 Am. Dec. 625, it was said not to be *essential* that notice of an equitable interest should come from the party interested or his agent; it may come *aliunde*, provided it be of a character likely to gain credit.

(b) Jackson v. Waldstein, (Tex. Civ. App.) 27 S. W. 26 (vendor told vendee that he did not know whether he owned the property or not).

(c) Woodall v. Kelly, 85 Ala. 368, 5 South. 164, 7 Am. St. Rep. 57.

(d) Satterfield v. Malone, 35 Fed. 445, 1 L. R. A. 35.

§ 600. Same — What Circumstances Sufficient.— The second question is, What facts are sufficient to put the party upon an inquiry, so that he may thereby be charged with the actual notice inferred from circumstantial evidence? Among the facts to which, as evidence, such force has been attributed are: Close relationship, personal intimacy, or business connections existing between the purchaser and the party with whom he is dealing, or between him and the holder of the adverse claim;[1] great inadequacy of the price, which may arouse the purchaser's suspicion, and put him upon an inquiry as to the reasons for selling the property at less than its apparent value;[2 b] the sight or knowledge of

A person about to purchase land from a widow in whom the legal title was vested was informed by the grandfather of her minor children that the equitable title had been in her deceased husband, and was then in his heirs. The grandfather was held a proper person to give notice, and the purchaser was bound by it as an actual notice. In Ripple v. Ripple, 1 Rawle, 386, a notice was given by an uncle of the person interested. But *per contra*, see Woods v. Farmere, 7 Watts, 382, 387; 32 Am. Dec. 772, per Gibson, C. J.; Jolland v. Stainbridge, 3 Ves. 478, per Lord Loughborough.[e]

1 It is hardly to be supposed, however, that notice could be inferred from *mere* relationship or intimacy, without *any* other circumstances:[a] Tillinghast v. Champlin, 4 R. I. 173, 204, 215; 67 Am. Dec. 510; Spurlock v. Sullivan, 36 Tex. 511; Trefts v. King, 18 Pa. St. 157, 160; Phillips v. Bank of Lewistown, 18 Pa. St. 394, 404; Hoxie v. Carr, 1 Sum. 173, 192; Flagg v. Mann, 2 Sum. 486; Dubois v. Barker, 4 Hun, 80, 86; 6 Thomp. & C. 349 (*mere* relationship of grantee to grantor, without any other evidence, not sufficient ground from which to infer notice of a conflicting equitable claim); Reynolds v. Ruckman, 35 Mich. 80 (knowledge of a partnership existing between a grantor and another held not sufficient to charge grantee with notice).

2 Peabody v. Fenton, 3 Barb. Ch. 451; Hoppin v. Doty, 25 Wis. 573; Beadles v. Miller, 9 Bush, 405 (case in which inadequacy of price was held not suffi-

(e) In John v. Battle, 58 Tex. 591, public notice given at a bankrupt sale that the wife of the bankrupt "claimed an interest" in the estate, was held sufficient to charge purchasers at the sale.

(a) So held, in cases of conveyances in fraud of creditors, with respect to the grantee's notice of the fraudulent intent: Johnson v. Jones, 16 Colo. 138, 26 Pac. 584; Fraser v. Passage, 63 Mich. 551, 30 N. W. 334; Fluegel v. Henschel, 7 N. Dak. 276, 66 Am. St. Rep. 642, 74 N. W. 996.

(b) See, also, Dunn v. Barnum, 51 Fed. 355, 10 U. S. App. 86, 2 C. C. A. 265; Barstow v. Beckett, 122 Fed. 140; Gaines v. Saunders, 50 Ark. 322, 7 S. W. 301; Mason v. Mullahey, 145 Ill. 383, 34 N. E. 36; Hume v. Franzen, 73 Iowa, 25, 34 N. W. 490; Allen v. Stingel, 95 Mich. 195, 54 N.

visible material objects upon or connected with the subject-matter, which may reasonably suggest the existence of some easement or other similar right.[3] The irregular, defective,

cient notice of grantor's fraudulent design, so as to invalidate a conveyance as against the grantor's creditors); Eck v. Hatcher, 58 Mo. 235 (case in which inadequacy of price and other circumstances were held a sufficient notice of grantor's fraud, etc.); Hoppin v. Doty, 25 Wis. 573, 591 (a grantee bought for one hundred dollars land which he knew to be worth two thousand dollars; held a notice of the grantor's defects of title, fraudulent intent in conveying, etc.).

3 Thus structures upon land distinctly visible to the purchaser have been held sufficient to put him on an inquiry, and to constitute notice to him of an existing easement: Raritan Water Power Co. v. Veghte, 21 N. J. Eq. 463, 478; Hoy v. Bramhall, 19 N. J. Eq. 563; Randall v. Silverthorn, 4 Pa. St. 173.c The fact that there were fourteen chimney-pots on the top of a house, but only twelve flues in the house, was held to be notice to the purchaser of an easement for the passage of smoke, held by an adjoining owner: Hervey v. Smith, 22 Beav. 299; and see Davies v. Sear, L. R. 7 Eq. 427; Blatchley v. Osborn, 33 Conn. 226, 233. In Paul v. Connersville etc. R. R., 51 Ind. 527, 530, it was held that a grantee of land with a graded railroad track openly across it, having embankments and excavations plainly to be seen by the purchaser, takes with actual notice of all the rights in the land possessed by

W. 880; Connecticut Mut. Life Ins. Co. v. Smith, 117 Mo. 261, 38 Am. St. Rep. 656, 22 S. W. 623, citing this section; Durant v. Crowell, 97 N. C. 367, 2 S. E. 541; Jackson v. Waldstein, (Tex. Civ. App.) 27 S. W. 26; Hume v. Ware, 87 Tex. 380, 28 S. W. 935. The fact that a conveyance by a husband to his wife was voluntary is sufficient to put a subsequent purchaser on inquiry as to whether the conveyance was in fraud of the grantor's creditors: Milholland v. Tiffany, 64 Md. 455, 2 Atl. 831; and see New England Loan & T. Co. v. Avery, (Tex. Civ. App.) 41 S. W. 673. In the following cases the inadequacy of price was held not sufficiently great to put the purchaser upon inquiry: Fish v. Benson, 71 Cal. 428, 12 Pac. 454; Thomas v. Van Meter, 164 Ill. 304, 45 N. E. 405; Anderson v. Blood, 152 N. Y. 285, 46 N. E. 493, 57 Am. St. Rep. 515 (purchaser not affected by mere suspicion); Wilmerding v. Jarmulowsky, 85 Hun, 285, 32 N. Y. Suppl. 983. As to inadequacy of the consideration destroying the *bona fides* of the purchase, see *post*, § 747, and cases cited.

(c) See, also, Atlantic City v. New Auditorium Pier Co., 63 N. J. Eq. 644, 53 Atl. 99; Bradley v. Walker, 138 N. Y. 291, 33 N. E. 1079, citing this chapter (fact that houses are set back eight feet from the street is not notice of an equitable easement); McDougal v. Lame, 39 Oreg. 212, 64 Pac. 864 (easement in ditch on land purchased); Joseph v. Wild, 146 Ind. 249, 45 N. E. 467 (easement in stairway over vacant lot from adjoining building). Similarly, where the shape and location of lots on a map suggested their intended use as a public park, the purchaser was put on inquiry: Commonwealth v. Calhoun, 184 Pa. St. 629, 39 Atl. 563.

or improper recording of an instrument, although clearly not a constructive notice under the statute, may be sufficient to put a purchaser upon inquiry, and so constitute an actual notice; and the inspection, perusal, or knowledge of a writing which purported to be a certified or official copy of the instrument thus defectively or improperly recorded should produce the same effect, although upon this particular point there seems to be some conflict of judicial opinion. It has even been held that, under special circumstances, a jury or court might assume as an inference of fact, in the absence of any positive evidence, that a purchaser examined the public records, and thus obtained information amounting to an

the railroad company; and a warranty deed from his grantor cannot affect those rights.[d]

(d) For further instances of notice of easements in favor of railroads from the existence of tracks or grades upon the land, see Indiana, B. & W. R. Co. v. McBroom, 114 Ind. 198, 15 N. E. 831; Kamer v. Bryant, 103 Ky. 723, 46 S. W. 14; Chicago & E. I. R. Co. v. Wright, 153 Ill. 307, 38 N. E. 1062 (purchaser knew name of the railroad company, and by inquiry of its officers could have learned of an unrecorded deed of the right of way).

Other circumstances putting on inquiry.— One who has knowledge that the purchase-money of land was unpaid, wholly or in part, at the time of the passing of title, is bound to inquire as to the existence and extent of a vendor's lien on the land and the manner in which payment of it was secured: Briscoe v. Minah Consolidated Min. Co., 82 Fed. 952; Woodall v. Kelly, 85 Ala. 368, 7 Am. St. Rep. 57, 5 South. 164; Ellis v. Horrman, 90 N. Y. 466; see, also, *post*, § 1253, note. That the assignee of a mortgage is bound to make inquiries of the mortgagor, or else is chargeable with the equities in his favor, see Morgan's Appeal, 126 Pa. St. 500, 17 Atl. 666; and *post*, § 733. An execution purchaser who knows that the judgment was procured by fraud is put on inquiry as to the rights of the defendant against whom the judgment was rendered: Lang Syne Gold Mining Co. v. Ross, 20 Nev. 127, 18 Pac. 358, 19 Am. St. Rep. 337. Knowledge that there was a water right connected with the land purchased puts the purchaser on inquiry as to its terms: Fresno C. & I. Co. v. Russell, 80 Cal. 114, 22 Pac. 53, 13 Am. St. Rep. 112. It has been suggested that publication of a fact in a newspaper habitually read by a party or his agent tends in some degree to show actual notice of the fact; but this appears to be doubtful and unsupported by authority: American Fire Ins. Co. v. Landfare, 56 Nebr. 482, 76 N. W. 1068. In general, knowledge of the existence of a debt does not put one dealing with the debtor on inquiry to ascertain whether it is secured: Johnson v. Valido Marble Co., 64 Vt. 337, 25 Atl. 441. That knowledge of the trust character of property is notice of the terms of the trust, see *post*, § 630.

actual notice from a conveyance imperfectly recorded, or improperly recorded, through some defect.[4] [e]

§ 601. Same — Effect of Explaining or Contradicting the Information Given.— In concluding this branch of the discussion, the important question remains to be considered, How far may a party rely upon the whole of the information given or statement made to him in a case of actual notice? In other words, when information is given or a statement is made to a purchaser which, standing alone, would be actual notice, or at least would be sufficient to put him upon an inquiry, but this is accompanied by further explanatory or contradictory declarations which tend to nullify or destroy the effect of the former language, how far may the purchaser accept and act upon the entire communication? or how far is he affected by that portion which tends to show the existence of a prior, outstanding, and conflicting claim? If the

[4] Kerns v. Swope, 2 Watts, 75; Hastings v. Cutler, 24 N. H. 481. In Kerns v. Swope, 2 Watts, 75, a deed of land lying in two counties was recorded in only one of these counties, so that the record was not a constructive notice with respect to the portion of land situate in the other county. The court held, in an elaborate opinion by Chief Justice Gibson, that a jury might infer, as a conclusion of fact, that the purchaser examined the records, and so became acquainted with the prior conveyance affecting the title to the whole land in both counties. The court further held that an inspection by the purchaser of a paper which purported to be a certified or official copy of a deed improperly recorded on account of a defective acknowledgment, where the copy disclosed this defect, was not a fact from which actual notice could be inferred, because it was not sufficient to put the purchaser on an inquiry. This decision seems to be unsound; at least, its correctness is very doubtful; it seems to misinterpret the nature of facts sufficient to put a purchaser upon inquiry, and to confound them with absolute and complete knowledge. Hastings v. Cutler, 24 N. H. 481, holds, much more consistently, as it seems to me, that the inspection of a writing which purports to be a certified copy of a recorded deed, although it shows that the record was improperly made, because the deed was defectively acknowledged, is a fact sufficient to put the purchaser on an inquiry, so that if he neglected to make a proper inquiry, the inference of actual notice would be necessary. See Pringle v. Dunn, 37 Wis. 449, 461–464, 19 Am. Rep. 772, and Partridge v. Smith, 2 Biss. 183, 185, 186, as to the notice given by a defective record.

(e) Woods v. Garnett, 72 Miss. 78, 16 South. 390 (one who purchases after seeing on records an unacknowledged deed is not a *bona fide* purchaser).

only information given to the purchaser concerning the existence of an outstanding claim, contract, or equity affecting the property is communicated by a third person,— a stranger having no interest in the matter,— and this person also states that such contract has been rescinded, or such claim or equity has been abandoned or discharged, and no longer exists, the purchaser, it seems, may rely on the whole communication; it is not sufficient, in the absence of special reasons for believing the former part and rejecting the latter, to put him upon an inquiry, and does not therefore amount to an actual notice. This conclusion results from the obvious fact that such an informant has no personal interest to deceive the purchaser by misrepresenting or concealing the truth.[1] When, however, the grantor, vendor, or mortgagor admits that his title was defective or encumbered, or that there was some outstanding claim upon or equity in the property, or makes any other communication which, unexplained, would constitute an actual notice, but adds a further declaration to the effect that such defect has been cured, or encumbrance removed, or claim or equity rescinded and destroyed, the purchaser, according to the weight of authority, is not warranted in accepting and relying upon this explanation or contradiction; the information obtained under such circumstances and from such a source is sufficient to put a prudent man upon an inquiry. The reason of this is plain. The informant is under a strong personal interest to misrepresent or conceal the real facts. While the former branch of his communication is made against his interest,

[1] In re Bright's Trusts, 21 Beav. 430; Buttrick v. Holden, 13 Met. 355, 357; Curtis v. Blair, 26 Miss. 309, 328; 59 Am. Dec. 257; Rogers v. Wiley, 14 Ill. 65; 56 Am. Dec. 491; Williamson v. Brown, 15 N. Y. 354, 360. In Pringle v. Dunn, 37 Wis. 449, 465, 467, 19 Am. Rep. 772, one purchaser "had heard that there was a defective railroad mortgage on the premises, but did not look for it, because his abstract did not show it." Another purchaser of a parcel of the land "knew by report" that there was such a mortgage, etc. Both were held charged with actual notice; but it does not appear in the report of the case *from whom* the purchasers obtained the information.

and is therefore more likely to be true, the latter part is in conformity with his personal interest, and is essentially untrustworthy.[2][a] Finally, a purchaser is fully warranted in accepting and acting upon the statements or conduct of the person who holds or asserts a conflicting interest, claim, or right, if he, when interrogated upon the subject, either keeps silence, or denies the existence of any claim, or affirmatively declares it to be of a certain kind and amount; such a person, even if not absolutely estopped from afterwards setting up any claim, or a claim different from his representations, would certainly be debarred from afterwards alleging that the purchaser was put upon an inquiry, and was charged

2 Hudson v. Warner, 2 Har. & G. 415; Price v. McDonald, 1 Md. 403; 54 Am. Dec. 657; Russell v. Petree, 10 B. Mon. 184; Bunting v. Ricks, 2 Dev. & B. Eq. 130; 32 Am. Dec. 699; Littleton v. Giddings, 47 Tex. 109. This rule, however, is not pushed so far by the courts as to work real injustice to innocent purchasers who have been manifestly deceived and misled. See Jones v. Smith, 1 Hare, 43; Rogers v. Jones, 8 N. H. 264; Curtis v. Blair, 26 Miss. 309, 328; 59 Am. Dec. 257. In Chicago v. Witt, 75 Ill. 211, a grantee, some time before the conveyance was executed, was told by the grantor that he was not *then* able to make a good title, but that in a short time he would be able. It was held that no notice of an adverse unrecorded deed of the same land could be inferred: Ponder v. Scott, 44 Ala. 241, 244, 245.[b]

(b) In the very instructive case of Simpson v. Hinson, 88 Ala. 527, 7 South. 264, a second mortgagee was held not chargeable with notice of a prior unrecorded mortgage on the same property, solely on evidence that on making inquiry of the mortgagor whether the first mortgagee did not hold a mortgage against him, he was informed that he did, but that it was on other property only; relying on the closely analogous case of Jones v. Smith, 1 Hare, 43, and the distinction there made: "Undoubtedly, when a party has notice of a deed which, from the nature of it, must affect the property, or is told at the time that it does affect it, he is considered to have notice of the contents of that deed, and of all other deeds to which it refers; but, where a party has notice of a deed which does not necessarily — which may or may not — affect the property, and is told that in fact it does not affect it, but relates to some other property, and the party acts fairly in the transaction, and believes the representation to be true, there is no decision that goes the length of saying that if he is misled he is fixed with notice of the instrument." See, also, *post*, § 631, and notes.

(a) Manasses v. Dent, 89 Ala. 565, 8 South. 108, citing this paragraph of the text: Overall v. Taylor, 99 Ala. 12, 11 South. 738, citing this paragraph of the text.

with notice.[3] [c] If a purchaser, having been put upon an inquiry, prosecutes it with reasonable and due diligence, without discovering any adverse right, the inference of an actual notice received by him is overcome and destroyed.[4] [d] What is a due inquiry in these instances of actual notice inferred from circumstantial evidence must, to a great extent, depend upon the particular facts of each case. It is well settled, however, that mere examination of the record, and finding no adverse title or claim recorded, is not due inquiry by one who has been put upon inquiry by circumstances tending to show the existence of a conflicting title, claim, or right.[5] [e]

[3] McGehee v. Gindrat, 20 Ala. 95; Massie v. Greenhow's Ex'rs, 2 Pat. & H. 255; and see the following English authorities: Ibbotson v. Rhodes, 2 Vern. 554; Pearson v. Morgan, 2 Brown Ch. 388; Bridge v. Beadon, L. R. 3 Eq. 664; Lee v. Howlett, 2 Kay & J. 531; Burrowes v. Locke, 10 Ves. 470; Slim v. Croucher, 1 De Gex, F. & J. 518; Barry v. Croskey, 2 Johns. & H. 1, 21; 1 Dart on Vendors, c. 3, sec. 1, pp. 88, 89.

[4] See cases cited *ante*, under §§ 596, 597.

[5] In Shotwell v. Harrison, 30 Mich. 179, and Munroe v. Eastman, 31 Mich. 283, it was held that a purchaser who has such notice of a prior unrecorded deed cannot rely upon a mere search of the records without any other inquiry; the case of Barnard v. Campau, 29 Mich. 162, was distinguished. In Pringle v. Dunn, 37 Wis. 449, 465, 467, 19 Am. Rep. 772, a purchaser "who had heard that there was a defective railroad mortgage on the premises, but did not look for it, because his abstract did not show it," and another, who "knew

(c) See, also, Barrett v. Baker, 136 Mo. 512, 37 S. W. 130 (purchaser justified in relying on written statement of owner of note that debt was paid and trust-deed satisfied); Thompson v. Lapsley, (Minn.) 96 N. W. 788 (former owner's false assertion of a title in fee does not put purchaser from his grantee on inquiry as to an unrecorded purchase-money mortgage); Rutherford Land & Improvement Co. v. Sanntrock, (N. J. Eq.) 44 Atl. 938; Dickey v. Henarie, 15 Oreg. 351, 15 Pac. 464; Miller v. Merine, 43 Fed. 261. That the committee of a lunatic has no power to bind him by a declaration, in answer to a purchaser's inquiry, that he has no interest in the land, see Jennings v. Bloomfield, 199 Pa. St. 638, 49 Atl. 135.

(d) See Mercantile Nat. Bank v. Parsons, 54 Minn. 56, 40 Am. St. Rep. 299, 55 N. W. 825.

(e) See, also, Griffin v. Missouri, K. & E. Ry. Co., 82 Mo. App. 93 (one having notice of unrecorded deed does not satisfy requirement of good faith by examining the records, but should inquire of grantor and reputed grantee); Stokes v. Riley, 121 Ill. 166, 11 N. E. 877 (investigation not conducted in the way most likely to lead to knowledge of the facts); Baltimore High Grade Brick Co. v. Amos, 95 Md. 571, 52 Atl. 582, 53 Atl. 148 (advice of counsel does not relieve from duty of making inquiry).

§ 602. **Same — By Whom and when Information must be Given.**[a]— Such being its general nature, it is impossible to define by a single formula what will amount to an actual notice sufficient to affect the conscience of the party receiving it, and courts have not attempted to lay down any such criterion; each case must, to a considerable extent, depend upon its own particular circumstances. The following ancillary rules, however, bearing upon the question, have been well settled. Where an actual notice is relied upon, in order to be binding it must come from some person interested in the property to be affected by it; and it is said that it must be given and received in the course of the very transaction itself concerning the property in which the parties are then engaged. As a necessary consequence, no mere vague reports from strangers, nor mere general statements by individuals not interested in the property, that some other person claims a prior right or title, will amount to an actual notice so as to bind the conscience of the party; nor will he be bound by a notice given in some previous and distinct transaction, which he might have forgotten.[1] [b] It should be

by report" that there was such a mortgage, but made no further examination, were both held charged with actual notice: Brinkman v. Jones, 44 Wis. 498, 519. Littleton v. Giddings, 47 Tex. 109, holds that looking at the records and inquiring of the grantor is not enough, when an inquiry among the neighbors would have led to the truth; also, that a notice given to a person who was actually interested in the purchase, although not named as a grantee in the conveyance, is notice to the grantee himself.

[1] See Sugden on Vendors and Purchasers, 755; Barnhart v. Greenshields, 9 Moore P. C. C. 18, 36; Natal Land etc. Co. v. Good. L. R. 2 P. C. 121, 129; Butcher v. Stapely, 1 Vern. 363; Jolland v. Stainbridge, 3 Ves. 478; Fry v. Porter, 1 Mod. 300; Wildgoose v. Wayland, Goulds. 147, pl. 67. That

(a) This section is cited in Raymond v. Flavel, 27 Oreg. 219, 40 Pac. 158.

(b) Thus, it has been held that an announcement at an execution sale that certain lots did not belong to the debtor is not sufficient to put a purchaser on inquiry as to a dedication to the public, when the announcement did not disclose the name of the adverse claimant, nor the nature of his claim: Commonwealth v. Calhoun, 184 Pa. St. 629, 39 Atl. 563. Where an intending purchaser was told by a third person that if he bought the land he would "have trouble" with certain persons, and that his vendor had "stolen" the land, he is not put

most carefully observed that the decisions here referred to, and the rules which they sustain, are dealing exclusively with the artificial conception of an actual *notice,* which is regarded as affecting the conscience of the party, and producing results upon his rights in the same manner and to the

mere vague statements, rumors, and reports coming from third persons not interested in the transaction, or from any other unauthentic source, and even vague, uncertain, and wholly general statements, coming from a person interested in the subject-matter, such as the vendor or the claimant himself, will not amount to an actual notice, and will not bind the conscience of a purchaser, is decided or laid down by way of a *dictum* in a multitude of cases: Chicago v. Witt, 75 Ill. 211 (insufficient statement from a grantor to the purchaser); Loughridge v. Bowland, 52 Miss. 546, 555 (rumors, suspicions, etc.); Reynolds v. Ruckman, 35 Mich. 80 (facts not amounting to notice); Lambert v. Newman, 56 Ala. 623, 625, 626 (vague evidence of conversations); Parker v. Foy, 43 Miss. 260, 266; 55 Am. Rep. 484; Wailes v. Cooper, 24 Miss. 208 (rumors); Buttrick v. Holden, 13 Met. 355, 357; Curtis v. Blair, 26 Miss. 309, 328; 59 Am. Dec. 257; Peebles v. Reading, 8 Serg. & R. 484; Miller v. Cresson, 5 Watts & S. 284; Epley v. Witherow, 7 Watts, 163, 167; Jaques v. Weeks, 7 Watts, 261, 267, 274; Woods v. Farmere, 7 Watts, 382, 387; 32 Am. Dec. 772; Hood v. Fahnestock, 1 Pa. St. 470; 44 Am. Dec. 147; Churcher v. Guernsey, 39 Pa. St. 84; Wilson v. McCullough, 23 Pa. St. 440; 62 Am. Dec. 347; Van Duyne v. Vreeland, 12 N. J. Eq. 142, 155; Butler v. Stevens, 26 Me. 484; Lamont v. Stimson, 5 Wis. 443; Rogers v. Haskings, 14 Ga. 166; Maul v. Rider, 59 Pa. St. 167, 171, 172 (general rumors); but as to notice not coming from the party interested, see Curtis v. Mundy, 3 Met. 405; Mulliken v. Graham, 72 Pa. St. 484, 490. That an actual notice given in a prior transaction is not notice in a subsequent and different one, see Lowther v. Carlton, 2 Atk. 242; Fuller v. Benett, 2 Hare, 394, 404; Boggs v. Varner, 6 Watts & S. 460; Meehan v. Williams, 48 Pa. St. 238; Bank of Louisville v. Curren, 36 Iowa, 555.

on inquiry; such rumors and insinuations "do not furnish any positive information, any tangible clew, by the aid of which he may commence and successfully pursue an inquiry, and thus discover the real truth;" Raymond v. Flavel, 27 Oreg. 219, 40 Pac. 158, citing this section of the text. See, also, Hall v. Livingston, 3 Del. Ch. 348, 402–406, and cases cited. In general, that the facts relied on to prove notice must be something more than would excite the suspicion of a cautious and wary person, see Crossen v. Oliver, 37 Oreg. 514, 61 Pac. 885; Green v. Morgan, (N. J. Eq.) 21 Atl. 857; Newberry v. Bank of Princeton, 98 Va. 471, 36 S. E. 515; Fischer v. Lee, 98 Va. 159, 35 S. E. 441; Arbuckle v. Gates, 95 Va. 802, 30 S. E. 496 (proof of actual notice "must be such as to affect the conscience of the purchaser, and must be so strong and clear as to fix upon him the imputation of *mala fides*").

same extent as though it amounted to full knowledge, although it may perhaps fall far short of such a consummation. The question as to the consequences of such knowledge acquired in some other manner or from some other source is therefore left untouched.

§ 603. **Effect of Knowledge.**— What, then, is the effect of actual knowledge of the prior fact, interest, claim, or right, acquired previously, or in an entirely different transaction, or from a stranger or person having no interest in the property, or even in an accidental and fortuitous manner? The answer, on principle, is very clear and certain. It was shown in a former paragraph that the conception of notice was introduced, and the rules concerning it were established, from considerations of policy and expediency based upon the common experience of mankind. Notice, even when actual, is not necessarily equivalent to knowledge; but the same effects must be attributed to it which would naturally flow from knowledge. It is treated as a representative of, or substitute for, actual knowledge, and is therefore in its essential nature inferior to knowledge. It necessarily follows that whenever a party has obtained a full knowledge, although not in accordance with the rules which define the nature of notice, and regulate the mode of its being given and received, there is no longer any need of invoking the legal conception of notice; the rules concerning it no longer apply; the very fact for which it is intended as a substitute has been more perfectly accomplished in another manner. To sum up in one statement, if the party has in any way obtained the full knowledge, those same results must necessarily, and even in a higher degree, be attributed to it — the very substance itself — which are, from motives of general policy, attributed to notice as its representative and substitute. The conclusion thus reached, upon principle, is supported by the weight of judicial authority, and it will reconcile much, if not all, of the apparent confusion and con-

flict of opinion upon this subject to be found in some of the decisions.[1] Of course the knowledge here spoken of must be something more than the mental condition produced by rumors, casual conversations, and the like,— more than any constructive notice,— more even than the *mere* actual notice defined and permitted by the rules. It must appear that the mind of the party charged with the knowledge has been brought thereby to an intelligent apprehension of the nature of the prior fact, interest, claim, or right, so that a reasonable man, or an ordinary man of business, would act upon the information, and would regulate his conduct by it in the transaction or dealing in which he is engaged.[2] In accordance with principle, and as a conclusion from the decided cases, the following proposition may be formulated: If it can be shown that the party has in any way, from any person or source, by any means or method, for any purpose, although not in pursuance of the rules which regulate the giving of notice, obtained or derived actual and full *knowledge* of the kind above described, concerning the prior fact, interest, claim, or right,— that is, a knowledge which would operate upon the mind of any rational man, or man of business, and make him act with reference to the knowledge he has so acquired in the transaction or dealing in which he is engaged,— then the same results must follow from the knowledge so obtained which would follow from an actual notice communicated in the manner required by the rules governing notice; in other words, the conscience of the party having the knowledge is affected by it in the same manner

[1] It cannot be claimed that the views contained in the text are expressly adopted by all the decided cases. There is unfortunately a great lack of precision and accuracy in the language of too many judicial opinions; actual and constructive notice are sometimes not discriminated; notice and the evidence by which it is shown are often confounded; knowledge and notice are used interchangeably, as though they were exactly equivalent. However great an *appearance* of conflict there may be, the reasoning and conclusions of the text will, in my opinion, produce a consistent and harmonious system. See the cases cited in the next following note but one under this paragraph.

[2] Lloyd v. Banks, L. R. 3 Ch. 488, 490, per Lord Cairns.

and to the same extent as it would be affected by an actual notice.[3 a] It sometimes happens that by a positive rule of the law an actual and technical notice is necessary, in order to put a person in default, or to perfect some legal right, and then knowledge, however complete, will not supersede

[3] Lloyd v. Banks, L. R. 3 Ch. 488, 490, per Lord Cairns; Matter of Leiman, 32 Md. 225, 244; Price v. McDonald, 1 Md. 403; 54 Am. Dec. 657; Winchester v. Baltimore etc. R. R., 4 Md. 231; Johns v. Scott, 5 Md. 81 (actual knowledge of a prior unrecorded deed); Brown v. Wells, 44 Ga. 573, 575 (grantee's actual knowledge that his grantor was a mere squatter without color of title defeated his own title, although he had continued in possession under it for seven years); Pringle v. Dunn, 37 Wis. 449, 465–467; 19 Am. Rep. 772 (the premises being encumbered by a prior unrecorded mortgage; one subsequent purchaser of a portion of them "had heard that there was a defective railroad mortgage upon the premises, but did not look for it, because his abstract did not show it"; another purchaser of a different portion "knew by report" that there was such a mortgage; both were held charged as though they had received an actual notice); Jones v. Lapham, 15 Kan. 540, 545, 546 (purchaser of the legal estate with full knowledge of an outstanding equitable interest, claim, or lien); Virgin v. Wingfield, 54 Ga. 451, 454, and cases cited (full knowledge has the effect of notice, and is evidence of fraud on the part of the grantee or purchaser); Blatchley v. Osborn, 33 Conn. 226, 233 (actual knowledge of an existing easement); Butcher v. Yokum, 61 Pa. St. 168, 171; 100 Am. Dec. 625 (it is not essential that information should come from the party or his agent; it may come *aliunde*, provided it be of a character likely to obtain credit; knowledge was obtained from the grandfather of the equitable title belonging to infant heirs, by a purchaser of the legal title from the widow); Lawton v. Gordon, 37 Cal. 202, 205, 206 (a person about to purchase land was told by the re-

(a) The rule that actual notice must be obtained in the course of the transaction or dealing respecting the property is inapplicable to knowledge of facts as the equivalent or substitute for actual notice: Manasses v. Dent, 89 Ala. 565, 8 South. 108, citing this section. Information amounting to knowledge may come from any source: see Jaeger v. Hardy, 48 Ohio St. 335, 27 N. E. 863. One who has knowledge that another has a contract to purchase the land must inquire of him as to the terms of the contract: Hains v. Hains, 69 Mich. 581, 37 N. W. 563. And a prior mortgagee who, pending the negotiations for his mortgage, acquires knowledge that the property offered as security belongs to a third person, and was to be purchased by the mortgagor, and that negotiations for its purchase were then pending, is charged with notice of the terms upon which the purchase is to be made; and when such terms involve the execution by the purchaser of a mortgage to the vendor to secure the purchase price, the later mortgage, although subsequently recorded, takes priority: Montgomery v. Keppel, 75 Cal. 128, 7 Am. St. Rep. 125, 19 Pac. 178.

or take the place of the notice. Actual knowledge, however, will generally have the same effect as notice in controversies concerning priority; but it is especially important in determining the existence of good faith; it is often a most essential element in making out a fraudulent intent, where a mere technical notice would not be sufficient.

§ 604. Constructive Notice.— Constructive notice assumes that no information concerning the prior fact, claim, or right has been directly and personally communicated to the party; at least, such information is not shown by evidence, but is only *inferred by operation of legal presumptions.* It embraces all those instances, widely differing in their external features, in which, either from certain extraneous facts, or from certain acts or omissions of the party himself, disclosed by the evidence, the information is *conclusively presumed* to have been given to or received by him, or is inferred by a *prima facie* presumption of the law in the absence of contrary proof.[1] There is a marked inconsistency

corder that the intended grantor had already given a deed of the property to another person, which had been filed for record, but afterwards taken away from the office before recording. Held, a sufficient knowledge; *such* information need not come from a person interested in the property. The court expressly placed the decision upon the distinction, as laid down in the text, between actual knowledge obtained in any authentic manner, and the technical, actual notice). See also Dickerson v. Campbell, 32 Mo. 544 (where a clerk of a court obtained knowledge of prior equities through his familiarity with the records); Curtis v. Mundy, 3 Met. 405, 407, per Putnam, J.; Stevens v. Goodenough, 26 Vt. 676; Mulliken v. Graham, 72 Pa. St. 484, 490; Henry v. Raiman, 25 Pa. St. 354; 64 Am. Dec. 703; Phillipps v. Bank of Lewistown, 18 Pa. St. 394, 404; McKinney v. Brights, 16 Pa. St. 399; 55 Am. Dec. 512; Van Duyne v. Vreeland, 12 N. J. Eq. 142, 155; Rupert v. Mark, 15 Ill. 540; Cox v. Milner, 23 Ill. 476; Hankinson v. Barbour, 29 Ill. 80.

[1] In the often-quoted case of Espin v. Pemberton, 3 De Gex & J. 547, 554, Lord Chancellor Chelmsford made some observations concerning constructive notice. The case was one of notice to a party's attorney. The lord chancellor, admitting that it was treated as a species of constructive notice, thought that it had better be classed under the head of actual notice. "If a person employs a solicitor, who either knows or has imparted to him in the course of his employment some fact which affects the transaction, the principal is bound by the fact, whether it is communicated to or concealed from him." He then adds: "Constructive notice properly so called is the knowledge [information?] which the courts impute to a person upon a presumption so strong of the existence of the knowl-

in the treatment of constructive notice by even the most eminent judges and text-writers. It has often been defined as knowledge or information inferred from certain circumstances, by a legal presumption of so high and conclusive a nature that the party is not allowed to overcome the inference by any contrary evidence showing that in fact he had no knowledge nor information.[2] Notwithstanding this definition, writers and judges who adopt it have admitted into the class of constructive notice, and have treated as instances thereof, all those cases in which it is settled that the presumption of information being received is merely *prima facie,* and that the inference may be overcome by contrary evidence. The essential element of constructive as distinguished from actual notice certainly is the *legal presump-*

edge that it cannot be allowed to be rebutted, either from his knowing something which ought to have put him upon further inquiry, or from his willfully abstaining from inquiry to avoid notice. I should therefore prefer calling the knowledge which a person has, either by himself or through his agent, actual knowledge; or if it is necessary to make a distinction between the knowledge which a person possesses himself and that which is known to his agent, the latter might be called *imputed* knowledge." The entire view of the chancellor in this extract is lacking in accuracy of thought, from his confusion of *information* with knowledge. Some necessary criticism upon his description of "constructive notice" will be found in the text and in the next following note.

2 Thus the English editor of the Leading Cases in Equity says: "Constructive notice is defined to be in its nature no more than evidence of notice the presumption of which is so violent that the court will not even allow of its being controverted"; citing Eyre, C. B., in Plumb v. Fluitt, 2 Anstr. 438; Kennedy v. Green, 3 Mylne & K. 699, 719; 2 Lead. Cas. Eq., 4th Am. ed., 121. Judge Story gives exactly the same definition: 1 Story's Eq. Jur., sec. 399. A recent editor of Judge Story's treatise adopts the same view, in nearly the same language: "Constructive notice is thus a conclusive presumption": 1 Story's Eq. Jur., sec. 410 a. In Hewitt v. Loosemore, 9 Hare, 449, 455, Turner, V. C., said: "Constructive notice is knowledge which the court imputes to a party upon a presumption, so strong that it cannot be allowed to be rebutted, that the knowledge must have been communicated." The American editor of the Leading Cases in Equity says: "Constructive notice is a legal inference from established facts, and, like other legal presumptions, does not admit of dispute": 2 Lead. Cas. Eq., 4th Am. ed., 157. With respect to this last citation, it certainly cannot be said of *all* legal presumptions that they "do not admit of dispute." "Legal presumptions" are sometimes conclusive, and sometimes rebuttable.

tion that information has been communicated to or acquired by the party; but it is equally certain that this legal presumption may be conclusive and may be rebuttable.[3]

§ 605. Opinion of Wigram, V. C., in Jones v. Smith.— It would be very difficult to formulate any statement which should embrace within its general terms all instances of constructive notice. The most important species, however, have been sufficiently settled by the decisions, and will be described in the subsequent paragraphs. The most comprehensive and accurate generalization ever attempted by any judge or text-writer was made by Vice-Chancellor Wigram, in the following passage, which is well worthy of being quoted in full: "It is indeed scarcely possible to declare *a priori* what shall be deemed constructive notice, because, unquestionably, what would not affect one man may be abundantly sufficient to affect another. But I believe I may, with sufficient accuracy, and without danger, assert that the cases in which constructive notice has been established resolve themselves into two classes: 1. Cases in which the party charged has had actual notice that the property in dispute was in fact charged, encumbered, or in some way affected, and the court has thereupon bound him with constructive notice of facts and instruments, to a knowledge of which he would have been led by an inquiry after [i. e.,

[3] This view renders the classification simple, comprehensive, and certain. "Actual" and "constructive" notice, as defined in the text, are separated by a broad, clear, and natural line of distinction. Additional subdivisions into "constructive," "implied," "imputed" notice, and the like, are, as it seems to me, equally unnecessary and confusing. The explanation given by Lord Brougham in Kennedy v. Green, 3 Mylne & K. 699, 719, is, in my opinion, very forcible and accurate, since while admitting a legal presumption as the basis, it does not assert that the presumption is always conclusive. He says: "The doctrine of constructive notice depends upon two considerations: first, that certain things existing in the relation or conduct of parties, or in the case between them, beget a presumption so strong of actual knowledge, that the law holds the knowledge to exist, because it is highly improbable it should not; and next, that policy, and the safety of the public, forbid a person to deny knowledge while he is so dealing as to keep himself ignorant, or so as that he may keep himself ignorant, and yet all the while let his agent know, and himself, perhaps, profit by that knowledge."

concerning] the charge, encumbrance, or other circumstance affecting the property of which he had actual notice; and 2. Cases in which the court has been satisfied from the evidence before it that the party charged had designedly abstained from inquiry for the very purpose of avoiding notice. How reluctantly the court has applied, and within what strict limits it has confined, the latter class of cases, I shall presently consider. The proposition of law upon which the former class of cases proceeds is, not that the party charged had notice of a fact or instrument which in truth related to the subject in dispute without his knowing that such was the case, but that he had actual notice that it did so relate. The proposition of law upon which the second class of cases proceeds is, not that the party charged had incautiously neglected to make inquiries, but that he had designedly abstained from making such inquiries for the purpose of avoiding knowledge,— a purpose which, if proved, would clearly show that he had a suspicion of the truth, and a fraudulent determination not to learn it. If, in short, there is not actual notice that the property is in some way affected, and no fraudulent turning away from a knowledge of facts which the *res gestæ* would suggest to a prudent mind,— if mere want of caution as distinguished from fraudulent and willful blindness is all that can be imputed to a purchaser,— then the doctrine of constructive notice will not apply; then the purchaser will in equity be considered, as in fact he is, a *bona fide* purchaser without notice."[1] I would remark in

[1] Jones v. Smith, 1 Hare, 43, 55, 56. The vice-chancellor quoted as examples of his two classes the following cases: 1. *Of the first class:* Ferrars v. Cherry, 2 Vern. 383; Jackson v. Rowe, 2 Sim. & St. 472; Kennedy v. Green, 3 Mylne & K. 699; Taylor v. Baker, 5 Price, 306; Coppin v. Fernyhough, 2 Brown Ch. 291; Davies v. Thomas, 2 Younge & C. 234; Eyre v. Dolphin, 2 Ball & B. 290; Malpas v. Ackland, 3 Russ. 273; Bisco v. Earl of Banbury, 1 Cas. Ch. 257; Allen v. Anthony, 1 Mer. 282; Daniels v. Davison, 17 Ves. 433; Taylor v. Stibbert, 2 Ves. 437. 2. *Of the second class:* Illustrations of and limitations on the doctrine: Whitbread v. Jordan, 1 Younge & C. 303; Birch v. Ellames, 2 Anstr. 427; Hiern v. Mill, 13 Ves. 114; Miles v. Langley, 1 Russ. & M. 39; Hanbury v. Litchfield, 2 Mylne & K. 629; Hine v. Dodd, 2 Atk. 275; Plumb v. Fluitt, 2 Anstr. 432; Evans v. Bicknell, 6 Ves. 174; Cothay v. Sydenham, 2 Brown Ch. 391.

passing that the constructive notice to subsequent purchasers and encumbrancers resulting from the registration of a prior deed, mortgage, or other instrument, under the recording statutes of this country, does not seem to fall within either of Vice-Chancellor Wigram's two classes, since it does not depend upon information or knowledge concerning any fact affecting the property sufficient to put the party upon an inquiry, which is the criterion of the first class, nor upon the party's willfully abstaining from seeking information, which is the test of the second class. In short, this species of constructive notice is wholly of statutory origin, and is not the result or application of any general doctrine.

§ 606. When the Presumption is Rebuttable.[a]— Since constructive notice, as heretofore defined, includes all the instances in which information concerning a prior fact, claim, or right is inferred either by a conclusive or by a rebuttable presumption of law, it would be a most important aid in the further discussion if we could discover a general criterion for distinguishing these two classes, and determining in what cases the presumption is conclusive, and in what it is only *prima facie* and rebuttable. It may not be possible to lay down a rule which is absolutely universal in its operation, and which furnishes a certain test for every case; but a rule may be formulated which is quite general in its application, and which gives a practical test sufficient for many instances differing widely in their external features.[1] Wher-

[1] Williamson v. Brown, 15 N. Y. 354, has been uniformly treated as an important and leading case. The controversy was concerning the priority between the plaintiff, who held under a subsequent conveyance of the land which was duly recorded, and the defendant, who held a prior *unrecorded* mortgage. The defendant claimed that plaintiff took his deed with notice of the prior mortgage. On this issue the referee found that the plaintiff, when he took his deed, did not have actual notice of the prior mortgage, but that he had sufficient information or belief of the existence of said mortgage to put him upon inquiry, and that he pursued such inquiry to the extent of his information and belief, and failed to discover that

(a) This section is cited in National Cash Register Co. v. New Columbus Watch Co., (C. C. A.) 129 Fed. 114.

ever a party has information or knowledge of certain extraneous facts, *which do not of themselves constitute actual notice* of an existing interest, claim, or right in or to the subject-matter, but which are sufficient to put him upon an inquiry concerning the existence of a conflicting interest, claim, or right, then he is charged with constructive notice, because a presumption of law arises. This proposition is settled by an overwhelming weight of authority, English and American. A large number of particular instances or species of constructive notice are referable to and embraced within the general terms of this description. It should be carefully observed that the facts of which the party receives

any such mortgage actually existed. This finding the court interpreted to mean that the plaintiff made all the inquiry which it became his duty to make upon the information he had received; upon this interpretation the court made its decision, and laid down certain general rules. It was held that upon the finding of fact no constructive notice had been given; the *prima facie* presumption was overcome. It will be observed that the finding does not specify the particulars nor nature of the information, which was enough to put the plaintiff upon an inquiry, nor does it state the particulars of the inquiry which he made. The conclusions reached by the court, and rules laid down by them, are therefore general, and apply to all cases which could be properly described by this finding of facts. S. L. Selden, J., holds, first, that constructive notice, as well as actual notice, will defeat the priority obtained under the recording statute by a previous record. Passing to the question now under consideration, he quotes the definition of actual and of constructive notice, given in Story's treatise (Story's Eq. Jur., sec. 309); he gives a recorded deed and notice to an agent as examples of constructive notice; because in each case the presumption is conclusive, and the party would not be allowed to show that he actually received no information. He adds some remarks concerning the various and inaccurate modes in which the terms "actual" and "constructive" have sometimes been used. The learned judge then proceeds (p. 360): "The phraseology uniformly used, as descriptive of the kind of notice in question, 'sufficient to put the party upon inquiry,' would seem to imply that if the party is faithful in making inquiries, but fails to discover the conveyance, he will be protected. The import of the terms is, that it becomes the duty of the party to inquire. If, then, he performs that duty, is he still to be bound, without any actual notice? The presumption of notice which arises from proof of that degree of knowledge which will put a party upon inquiry is, I apprehend, not a presumption of law, but of fact, and may therefore be controverted by evidence." I must remark at this point that the mistake in the last sentence is inexplicable. Judge Selden has, in other opinions, described in the most clear and accurate

information or has knowledge *do not directly tend to show* the existence of any conflicting interest or claim, and are therefore not *actual* notice; but they are sufficient, whatever be their nature and form, to put the party, as a reasonable man, upon further inquiry. As an illustration, if a party is negotiating for the purchase of certain land, and sees or learns that the land is not in the intended grantor's possession, but is possessed and occupied by a third person, a stranger, this fact of possession is sufficient to put the expected grantee upon an inquiry concerning the nature of the occupant's interest. The information or knowledge of such extraneous facts which are sufficient to put the party upon

manner, excelled in fact by no other judge, the true nature of legal presumptions, the distinctions between those which are conclusive and those which are *prima facie*, and that argumentative conclusions of fact *are not presumptions at all;* that the term "presumption of fact" is a misnomer; that a presumption "may be controverted by evidence," is not the test of a presumption being one of fact, and not of law. The inference which is drawn from "information or knowledge of facts sufficient to put the party upon an inquiry" is, under every correct definition, a presumption of law, and not a mere argumentative deduction which a jury may or may not make; the only question is, whether it is a conclusive or a rebuttable presumption. Judge Selden, in support of his position that the presumption under these circumstances may be rebutted by evidence, then cites and quotes from the opinions in Whitbread v. Boulnois, 1 Younge & C. 303, per Alderson, B.; Jones v. Smith, 1 Hare, 43; Hanbury v. Litchfield, 2 Mylne & K. 629; Flagg v. Mann, 2 Sum. 486, 554, per Story, J.; and Rogers v. Jones, 8 N. H. 264, per Parker, J. In conclusion, he states the general rule as follows (p. 362): "If these authorities are to be relied upon, and I see no reason to doubt their correctness, the true doctrine on this subject is, that where a purchaser has knowledge of any fact sufficient to put him on inquiry as to the existence of some right or title in conflict with that he is about to purchase, he is presumed either to have made the inquiry and ascertained the extent of such prior right, or to have been guilty of a degree of negligence equally fatal to his claim to be considered as a *bona fide* purchaser. This presumption, however, [is a mere inference of fact, and] may be repelled by proof that the purchaser failed to discover the prior right, notwithstanding the exercise of proper diligence on his part." The general conclusion thus formulated, both as to the extent of the presumption,— what is presumed,— and its *prima facie* or rebuttable nature, is beyond a doubt correct. The *dictum* by which it is asserted to be "a mere inference of fact" is as clearly erroneous. Another opinion was also delivered by Mr. Justice Paige, which arrived at the same result, by substantially the same reasoning: Reed v. Gannon, 50 N. Y. 345, 349, 350.

an inquiry constitutes a constructive notice of the conflicting claim or interest which *does* exist, because a presumption thence arises. Another instance is much more common in England than in this country. If a person loans money upon the security of a mortgage or other equitable lien given upon land belonging to the borrower, and learns that the title deeds are not in the possession of the borrower, but are in the possession of some third person, this is a constructive notice of any claim or interest in the land held by such third person, because the lender is put upon an inquiry, and a legal presumption arises from the facts. This presumption, in all cases of this class, is really a double one. The party is either presumed to have made the inquiry, and to have carried it out until he obtained full knowledge of the outstanding conflicting interest, claim, or right, or else to have intentionally and deliberately refrained from making the inquiry or following it up in a reasonable and proper manner for the very purpose of avoiding the knowledge which he might have acquired. The presumption is clearly one of law, and not a mere inference of fact; because upon the bare proof that the party had the information of facts sufficient to put him upon an inquiry, the inference is at once made, without any further evidence in its support, and in the absence of all contrary evidence it is absolute and conclusive.[2]

[2] Ratcliffe v. Barnard, L. R. 6 Ch. 652, 654; Maxfield v. Burton, L. R. 17 Eq. 15, 18; Rolland v. Hart, L. R. 6 Ch. 678, 681, 682; Broadbent v. Barlow, 3 De Gex, F. & J. 570, 581; Hunt v. Elmes, 2 De Gex, F. & J. 578, 587, 588; Perry v. Holl, 2 De Gex, F. & J. 38; Espin v. Pemberton, 3 De Gex & J. 547, 554, 555; Roberts v. Croft, 2 De Gex & J. 1, 5, 6; Atterbury v. Wallis, 8 De Gex, M. & G. 454; Ware v. Lord Egmont, 4 De Gex, M. & G. 460, 473, 474; Penny v. Watts, 1 Macn. & G. 150, 167; Jackson v. Rowe, 2 Sim. & St. 472; Hewitt v. Loosemore, 9 Hare, 449, 456, 458. In several of these later English cases a very strong disposition has been shown to limit and restrict the effect of the constructive notice which arises from the existence of facts and circumstances sufficient to put the party on an inquiry. This limitation is applied both where the party made some inquiry and relied upon what he had learned thereby, and where he made no inquiry at all. The criterion to which I refer was fully stated in Ware v. Lord Egmont, 4 De Gex, M. & G. 460, 473, by Lord Cranworth, as follows: "I must not part with this case without expressing my entire concurrence in what has

§ 607. Same — Rebutted by Due Inquiry.— It may be stated as a general proposition that in all instances of constructive notice belonging to this class, where it arises from information of some extraneous facts, not of themselves

on many occasions of late years fallen from judges of great eminence on the subject of constructive notice, namely, that it is highly inexpedient for courts of equity to extend the doctrine,— to attempt to apply it to cases to which it has not hitherto been held applicable. Where a person has not *actual* notice, he ought not to be treated as if he had notice, unless the circumstances are such as enable the court to say, not only that he might have acquired, but also that he *ought* to have acquired, the notice with which it is sought to affect him; that he would have acquired it but for his gross negligence in the conduct of the business in question. The question, when it is sought to affect a purchaser with constructive notice, is, not whether he had the means of obtaining, and might by prudent caution have obtained, the knowledge in question, but whether the not obtaining it was an act of gross or culpable negligence. It is obvious that no definite rule as to what will amount to gross or culpable negligence, so as to meet every case, can possibly be laid down." The first and leading case in which this restricted view was laid down, and which other decisions have followed and approved, was Hewitt v. Loosemore, 9 Hare, 449, decided by Turner, V. C.; and see Woodworth v. Paige, 5 Ohio St. 70, 76. On the other hand, in Broadbent v. Barlow, 3 De Gex, F. & J. 570, Lord Chancellor Campbell said: "By 'the means of knowledge' by which any one is to be affected, must be understood means of knowledge which are practically within reach, and of which a prudent man might have been expected to avail himself." It is plain that the criterion, as established by these most recent English cases, is no longer the mere want of that reasonable care and diligence in making an inquiry which would be used by a prudent man; the failure to prosecute or to make the inquiry must, under the circumstances, amount to gross or culpable negligence. It should be observed, however, that this rule is confined, and is intended to be confined, to that class of constructive notices in which the legal presumption is rebuttable.[b]

The American courts do not appear to have adopted this most recent English rule; they seem to have adhered with great unanimity to the doctrine

(b) The criterion of Ware v. Lord Egmont was followed in the recent English cases of Oliver v. Hinton, [1899] 2 Ch. 264, 68 Law J. Ch. 583, 81 Law T. (N. S.) 212, 48 Wkly. Rep. 3; Bailey v. Barnes, [1894] 1 Ch. 25, 7 Reports, 9 (knowledge that the land had been sold for less than its value under a power of sale in a mortgage does not charge a purchaser from the vendee at such sale with constructive notice of fraud in the conduct of the sale). In the opinion in this case it is observed: "Gross or culpable negligence does not import any breach of a legal duty. It includes wilful departure by a purchaser from the 'usual course of business' in order to avoid acquiring a knowledge of his vendor's title."

tending to show an actual notice of the conflicting right, but sufficient to put a prudent man upon an inquiry, the constructive notice is not absolute; the legal presumption arising under the circumstances is only *prima facie;* it may be overcome by evidence, and the resulting notice may thereby be destroyed. Whenever, therefore, a party has merely

contained in the *dictum* above quoted from Lord Campbell.[c] Wherever the facts and circumstances do not tend to show actual notice,— in other words, where the facts and circumstances are not simply the circumstantial evidence of an actual notice,— the test of constructive notice generally applied by the American courts has been, whether such facts are sufficient to put a prudent man upon an inquiry, and whether an inquiry has been prosecuted with reasonable care and diligence: Rogers v. Jones, 8 N. H. 264; Griffith v. Griffith, 1 Hoff. Ch. 153; Hull v. Noble, 40 Me. 459, 480; Warren v. Swett, 31 N. H. 332, 341, 342; Briggs v. Taylor, 28 Vt. 180; Littleton v. Giddings, 47 Tex. 109; Allen v. Poole, 54 Miss. 323; Wood v. Krebbs, 30 Gratt. 708; Cordova v. Hood, 17 Wall. 1, per Strong, J.; Brush v. Ware, 15 Pet. 93, 112; Helms v. Chadbourne, 45 Wis. 60, 70, 71, 73; Chicago etc. R. R. Co. v. Kennedy, 70 Ill. 350, 361, 362; Blanchard v. Wave, 43 Iowa, 530; 37 Iowa, 305; Loughridge v. Bowland, 52 Miss. 546, 553–555; Deason v. Taylor, 53 Miss. 697, 701; Brown v. Volkening, 64 N. Y. 76, 82; Cambridge Valley Bank v. Delano, 48 N. Y. 326, 336, 339; Bennett v. Buchan, 61 N. Y. 222, 225; Kellogg v. Smith, 26 N. Y. 18; Baker v. Bliss, 39 N. Y. 70, 74, 78; Reed v. Gannon, 50 N. Y. 345; Pendleton v. Fay, 2 Paige, 202, 205; Edwards v. Thompson, 71 N. C. 177, 179; Major v. Bukley, 51 Mo. 227, 231; Russell v. Sweezey, 22 Mich. 235, 239; O'Rourke v. O'Connor, 39 Cal. 442, 446; Dutton v. Warschauer, 21 Cal. 609; 82 Am. Dec. 765; Pell v. McElroy, 36 Cal. 268; Witter v. Dudley, 42 Ala. 616, 621, 625;[d] and many other cases cited in the preceding and the subsequent notes. It is sometimes difficult to distinguish a case of constructive notice arising from extraneous facts sufficient to put the party upon an inquiry from a case of mere actual notice depending upon circumstantial evidence; and the two have occasionally been confounded by the decisions themselves. The criterion as given in the text will, I think, render the distinction sufficiently plain and practical.

(c) See, however, expressions tending to support the English rule, in Grundies v. Reid, 107 Ill. 304.

(d) See, also, Bright v. Buckman, 39 Fed. 243, citing this section; Tillman v. Thomas, 87 Ala. 321, 13 Am. St. Rep. 42, 6 South. 151; Montgomery v. Keppel, 75 Cal. 128, 7 Am. St. Rep. 125, 19 Pac. 178; Washburn v. Huntington, 78 Cal. 573, 21 Pac. 305; Fresno C. & I. Co. v. Rowell, 80 Cal. 114, 13 Am. St. Rep. 112, 22 Pac. 53; Anthony v. Wheeler, 130 Ill. 128, 17 Am. St. Rep. 281, 22 N. E. 494; Janvrin v. Janvrin, 60 N. H. 169; Gale v. Morris, 30 N. J. Eq. 289; Vredenburgh v. Burnet, 31 N. J. Eq. 232; Jaffray v. Tower, 63 N. J. Eq. 530, 53 Atl. 182, citing this and the preceding section of the text; Lamar's Ex'r v. Hale, 79 Va. 147.

received information, or has knowledge of such facts sufficient to put him on an inquiry, and this constitutes the sole foundation for inferring a constructive notice, he is allowed to rebut the *prima facie* presumption thence arising by evidence; and if he shows by convincing evidence that he did make the inquiry, and did prosecute it with all the care and diligence required of a reasonably prudent man, and that he failed to discover the existence of, or to obtain knowledge of, any conflicting claim, interest, or right, then the presumption of knowledge which had arisen against him will be completely overcome; the information of facts and circumstances which he had received will not amount to a constructive notice. What will amount to a due inquiry must largely depend upon the circumstances of each case.[1]

[1] The different species of constructive notice in which the legal presumption may thus be overcome seem to be the following: 1. That derived wholly from mere extraneous facts and circumstances which are said to put a party on an inquiry, which are matters *in pais*, and which generally consist of fraud, concealments, neglects, mistakes, and the like, by third persons; 2. That derived from the possession or tenancy of the property by some third person; and 3. To a partial extent, that derived from the pendency of an action affecting the property. In the following species the constructive notice seems to be absolute and the presumption conclusive: 1. That derived from a statutory recording or registration in the United States;[a] 2. That derived from the statutory *lis pendens;* 3. That derived from a definite recital or reference in an instrument forming an essential part of a party's chain of title; and 4. That affecting a principal, where an actual or a constructive notice has been duly given to his proper agent. That the presumption *may* be overcome in the classes of cases first above mentioned is either directly or inferentially held by the following decisions, among others: Williamson v. Brown, 15 N. Y. 354, 360; Flagg v. Mann, 2 Sum. 486, 554, per Story, J.; Rogers v. Jones, 8 N. H. 264, per Parker, J.; Whitbread v. Boulnois, 1 Younge & C. 303, per Alderson, J.; Jones v. Smith, 1 Hare, 43, per Wigram, V. C.; Hanbury v. Litchfield, 2 Mylne & K. 629; Hunt v. Elmes, 2 De Gex, F. & J. 578; Espin v. Pemberton, 3 De Gex & J. 547; Roberts v. Croft, 2 De Gex & J. 1; Ware v. Lord Egmont, 4 De Gex, M. & G. 460; Hewitt v. Loosemore, 9 Hare, 449; Griffith v. Griffith, 1 Hoff. Ch. 153.[b]

Whenever a party has, by means of information concerning extraneous matters, been put upon inquiry, how this inquiry should be made, and how

(a) The text is cited to this effect in Johnson v. Hess, 126 Ind. 298, 25 N. E. 445, 9 L. R. A. 471.

(b) See, also, Anthony v. Wheeler, 130 Ill. 128, 17 Am. St. Rep. 281, 22 N. E. 494.

If, on the other hand, he fail to make any inquiry, or to prosecute one with due diligence to the end, the presumption remains operative, and the conclusion of a notice is abso-

far it should be prosecuted, in order that the legal presumption may be overcome, and the constructive notice defeated, although the party may still have failed to ascertain the real truth, must largely depend upon the particular circumstances of each case; no universal rule is possible. Much help, however, may be derived from a comparison of the decisions, which I have arranged according to their general subject-matter.

1. *Examination of the Records.*— Examination of the records is always necessary, and there could hardly be a "due inquiry" without it. If the information given points to the existence of some interest or claim which, if it exists at all, must necessarily appear upon the record, then a search of the proper record, and a discovery that no such claim appeared therein, would generally be sufficient; the "due inquiry" would have been prosecuted: Barnard v. Campau, 29 Mich. 162; Jackson v. Van Valkenburg, 8 Cow. 260; Bellas v. McCarthy, 10 Watts, 13, 28; Van Keuren v. Cent. R. R., 38 N. J. L. 165, 167 (when a grantor remains in possession after conveyance, a purchaser from his *grantee* held not bound to inquire further than the record of his conveyance; the record of his deed sufficient; but see, *per contra*, Illinois Cent. R. R. v. McCullough, 59 Ill. 166); Reynolds v. Ruckman, 35 Mich. 80.

In general, an examination of the records by such a party is not sufficient. If the information which puts him on an inquiry points to the existence of some matter *in pais*, some interest *dehors* the records, or which would not necessarily be shown by the records, then a search of the records alone is not "due inquiry,"— if, for example, the supposed claim was an easement, or a grantor's lien for purchase price, and the like: Wilson v. Hunter, 30 Ind. 466, 472; Russell v. Sweezey, 22 Mich. 235, 239; Shotwell v. Harrison, 30 Mich. 179; Munroe v. Eastman, 31 Mich. 283; Deason v. Taylor, 53 Miss. 697, 701; Littleton v. Giddings, 47 Tex. 109; Baker v. Bliss, 39 N. Y. 70; Randall v. Silverthorn, 4 Pa. St. 173.

2. *Inquiry from the Grantor or Vendor.*— A purchaser who had been put on an inquiry should seek information from his grantor or vendor, and a failure to do so would generally show a lack of the due care and diligence in making the inquiry. There are cases which go to the length of holding that such a purchaser, who neglects to question his grantor or vendor, will be charged with notice of all he could have learned: Sergeant v. Ingersoll, 7 Pa. St. 340; 15 Pa. St. 343, 348, 349.[c] Under some circumstances it is possible that the information sought and obtained from the grantor or vendor would satisfy the requirements of the rule, and constitute the due inquiry: See Espin v. Pemberton, 3 De Gex & J. 547, 556.

3. *Inquiry from Third Persons.*— Under many circumstances, an examination of the records and a questioning of the vendor would not be sufficient,

(c) See, also, Hickman v. Green, 123 Mo. 165, 22 S. W. 455, 27 S. W. 440, 29 L. R. A. 39, dissenting opinion of Sherwood, J., citing this note.

lute.[e] The criterion thus laid down will serve to determine the *prima facie* nature of the presumption in a very large number of the instances which are properly referable to the class of "constructive notice."

§ 608. When Conclusive.— It should be added, for the purpose of concluding this general description, that the doctrine determining what constitutes a constructive notice under such circumstances may be formulated, in somewhat different terms, as follows: Whenever a party has information or knowledge of certain extraneous facts, which of themselves do not amount to, nor tend to show, an *actual* notice, but which are sufficient to put a reasonably prudent man upon an inquiry respecting a conflicting interest, claim, or right, *and the circumstances are such that the inquiry, if made and followed up with reasonable care and diligence, would lead to a discovery of the truth,* to a knowledge of the interest, claim, or right which really exists, then the party is absolutely charged with a constructive notice of such interest, claim, or right. The presumption of

unless the inquiry were further prosecuted among third persons from whom information could probably be obtained; a neglect to make such inquiry would not overcome the presumption. Thus an omission to seek information from a third person who was in possession, or from a third person who was said or claimed to hold some lien or encumbrance thereon, would generally be a failure to prosecute the inquiry with due diligence. The cases on this particular subject are very numerous, depending upon a great diversity of facts: Littleton v. Giddings, 47 Tex. 109; Russell v. Sweezey, 22 Mich. 235, 239; Witter v. Dudley, 42 Ala. 616, 621, 625.[d] The following recent English cases are illustrations of a failure to make "due inquiry," whereby the party remained charged with constructive notice: Hopgood v. Ernest, 3 De Gex, J. & S. 116, 121; Broadbent v. Barlow, 3 De Gex, F. & J. 570, 581; Atterbury v. Wallis, 8 De Gex, M. & G. 454; Penny v. Watts, 1 Macn. & G. 150, 165; Hewitt v. Loosemore, 9 Hare, 449, 456, 458; Maxfield v. Burton, L. R. 17 Eq. 15, 18; Pitcher v. Rawlins, L. R. 11 Eq. 53; Briggs v. Jones, L. R. 10 Eq. 92. In the following recent English cases it was held that the inquiry was sufficient, and the party was not affected with notice: Green-

(d) See, also, Hickman v. Green, 123 Mo. 165, 22 S. W. 455, 27 S. W. 440, 29 L. R. A. 39, dissenting opinion of Sherwood, J., citing this note.

(e) This passage is quoted in Hill v. Moore, 85 Tex. 335, 19 S. W. 162; cited, Hickman v. Green, 123 Mo. 165, 22 S. W. 455, 27 S. W. 440, 29 L. R. A. 39, dissenting opinion of Sherwood, J.

knowledge is then conclusive.[a] There is plainly nothing contradictory between this statement and the criterion laid down in the preceding paragraph; both are phases of the same doctrine. Since the facts are assumed to be such that an inquiry properly conducted would result in arriving at the truth, it would be impossible for the party to show by any evidence that he had duly prosecuted the inquiry, and had nevertheless failed to acquire the knowledge. If the facts of a particular case bring it within this description, the legal presumption becomes conclusive, and the constructive notice is absolute in its effects.[1]

field v. Edwards, 2 De Gex, J. & S. 582; Cory v. Eyre, 1 De Gex, J. & S. 149, 168, 169; Hunt v. Elmes, 2 De Gex, F. & J. 578, 588; Perry v. Holl, 2 De Gex, F. & J. 38, 53, 54; Espin v. Pemberton, 3 De Gex & J. 547, 556; Roberts v. Croft, 2 De Gex & J. 1, 5, 6; Ware v. Lord Egmont, 4 De Gex, M. & G. 460, 473, 474; Hewitt v. Loosemore, 9 Hare, 449, 456, 458; Credland v. Potter, L. R. 10 Ch. 8; Ratcliffe v. Barnard, L. R. 6 Ch. 652, 654; see also Epley v. Witherow, 7 Watts, 163, 167; McGehee v. Gindrat, 20 Ala. 95; Wilson v. McCullough, 23 Pa. St. 440; 62 Am. Dec. 347.

1 It is in pursuance of this general proposition that the constructive notice from recitals contained in a deed forming a necessary link in a party's chain of title, and that chargeable upon a principal when given to an agent, and that derived from a *lis pendens* and from registration, are absolute in their effects, the legal presumptions being conclusive. In support of the general rule as given in the text, see the following cases, among others: Helms v. Chadbourne, 45 Wis. 60, 70, 71; Chicago etc. R. R. Co. v. Kennedy, 70 Ill. 350, 361; Loughridge v. Bowland, 52 Miss. 546, 553; Maul v. Rider, 59 Pa. St. 167, 171; Mullison's Estate, 68 Pa. St. 212; Kennedy v. Green, 3 Mylne & K. 699.[b]

(a) This passage is quoted in Lang Syne Gold Mining Co. v. Ross, 20 Nev. 127, 19 Am. St. Rep. 337, 18 Pac. 358; Kernohan v. Durham, 48 Ohio St. 1, 26 N. E. 982, 12 L. R. A. 41. The text is cited in Wittkowsky v. Gedney, 124 N. C. 437, 32 S. E. 731; Cooke v. Caswell, 81 Tex. 678, 17 S. W. 385.

(b) It appears that a person who is put on inquiry is conclusively charged with notice of such a fact as dedication to the public, notwithstanding that his inquiries led him to a wrong conclusion: Attorney-General v. Abbott, 154 Mass. 323, 28 N. E. 346, 13 L. R. A. 251. That a purchaser at a guardian's sale is presumed to have notice of the proceedings authorizing the sale, see In re Axtell's Petition, 95 Mich. 244, 54 N. W. 889, citing this note. In Gulf, C. & S. F. R. Co. v. Gill, 5 Tex. Civ. App. 496, 23 S. W. 142, citing §§ 604 and 606 of the text, the author's classification of constructive notice is approved, but notice from recitals is treated as of the second class.

§ 609. **Species of Constructive Notice.**—Having thus explained the nature of constructive notice, and discussed the general doctrines concerning it, I shall now describe its various kinds or species, and state the particular rules applicable to each. The following subdivision is accurate and sufficient; it is based upon natural lines of separation, and embraces every definite species recognized by the courts. These various kinds of constructive notice are: 1. That by extraneous facts, or matters *in pais,* generally involving acts of fraud or negligence; 2. That by possession or tenancy; 3. That by recital or reference in instruments of title; 4. That by *lis pendens,* including the statutory notice of a pending action; 5. That by judgments; 6. That by registration or recording of instruments; 7. That between a principal and his agent. These seven species will be examined in the order thus given.

§ 610. **1. By Extraneous Facts, Generally Acts of Fraud, Negligence, or Mistake.**—The criterion in all instances of this species is, that the party had knowledge or information of certain matters *in pais,* which, although not directly tending to show the existence of a prior conflicting right, are sufficient to put him, as a prudent man, upon an inquiry; and he is charged with constructive notice of all that he might have learned by an inquiry prosecuted with reasonable diligence; a legal presumption arises that he *has* obtained information of what he might thus have learned. In every such case the first question is, whether the facts of which the party has information *are* sufficient to put him upon an inquiry, so as to raise the *prima facie* presumption; the further question is then presented, whether he has made a due inquiry without discovering the truth, so as to overcome the presumption and defeat the notice, or whether he has so neglected this duty that the presumption remains unshaken and the notice effective. A third question might be suggested, whether he had made an inquiry and had ascertained the whole truth concerning the prior conflicting right, so that the constructive notice would in reality be turned

into actual knowledge or actual notice. I would remark that in many of the decisions involving this species of notice it will be seen upon a careful examination that the point actually determined by the court was, not whether the party had made a due and reasonable inquiry, but whether the facts were sufficient to put him upon *any* inquiry, so that his failure to inquire would be a fatal neglect. It is plain from the discussions of the preceding paragraphs that in all instances belonging to this species the legal presumption upon which constructive notice always rests is only *prima facie,* and may be overcome by evidence clearly showing that the inquiry was duly prosecuted without success. Before describing the particular cases falling under this head, it is proper to mention the difficulty, which may sometimes exist, of distinguishing this kind of constructive notice from those instances of actual notice which are established merely by circumstantial evidence. In fact, there are decisions which make no attempt to distinguish them; the terms " constructive notice " and " actual notice " have been applied indiscriminately to the same condition of circumstances. The distinction, however, exists, and is fundamental. Whatever may be the language of judicial *dicta,* it is settled beyond a doubt that in one case the actual notice is argumentatively inferred as a conclusion of fact, by the jury or other tribunal, from the circumstances which put the party upon an inquiry; and in the other case the constructive notice is inferred by the court as a presumption or conclusion of law from the same kind of circumstances, in the absence of contrary evidence.[1] I shall now mention the most

[1] These propositions are so fully examined in the preceding paragraphs that no further citation of authorities in their support is necessary. Cases belonging to this first species of constructive notice are much more common in England than in the United States; indeed, a very large proportion of the English decisions concerning constructive notice must be referred to this head. The reason is obvious. In England, the absence of any general system of recording renders it possible for titles to be affected in a vast number of modes by matters *in pais,* by matters resting in the knowledge of particular individuals, and which can only be ascertained by a special inquiry. The universal system of recording in this country largely diminishes the possibility of titles being thus affected by extraneous matters.

important instances which properly belong to this branch of constructive notice.

§ 611. Visible Objects and Structures.— If a purchaser sees or has knowledge of, or by the ordinary use of his senses might see or know of, visible material objects or structures upon or connected with the land or other subject-matter concerning which he is dealing, he may, and generally will, be charged with a constructive notice of any easement or other similar right the existence of which would be reasonably suggested to him by the appearance of such material object. He is put upon an inquiry, and is presumed to have ascertained whatever he might have learned by prosecuting the inquiry in a due and reasonable manner.[1] [a]

[1] Hervey v. Smith, 22 Beav. 299; Davies v. Sear, L. R. 7 Eq. 427, 432, 433; Morland v. Cook, L. R. 6 Eq. 252, 263, 265; Raritan Water P. Co. v. Veghte, 21 N. J. Eq. 463, 478; Hoy v. Bramhall, 19 N. J. Eq. 563; 97 Am. Dec. 687; Randall v. Silverthorn, 4 Pa. St. 173; Paul v. Connersville etc. R. R., 51 Ind. 527, 530. In Hervey v. Smith, 22 Beav. 299, there were fourteen chimney-pots visible on the roof of a house, but only twelve flues in the house; and the purchaser was held charged with constructive notice of an easement for the passage of smoke in favor of an adjoining dwelling. This decision has been criticised. In Davies v. Sear, L. R. 7 Eq. 427, an open archway in a house visible to the purchaser was held constructive notice of a right of way through the premises enjoyed by a neighboring owner. In Morland v. Cook, L. R. 6 Eq. 252. lands on the coast were purchased which were below the level of the sea, and which, together with a larger extent of adjacent land, were protected by a sea-wall. The purchaser was held to be charged with constructive notice of a covenant providing for the maintenance of the sea-wall which constituted an equitable charge upon the land so bought. In Raritan etc. Co. v. Veghte, 21 N. J. Eq. 463, a mill race and dam were held constructive notice of easements for the use of water rights encumbering the property; while in Paul v. Connersville etc. R. R., 51 Ind. 527, a graded railway track across a farm was held notice of all the rights of the railroad. See also Allen v. Seckham, L. R. 11 Ch. Div. 790, 794; Suffield v. Brown, 9 Jur., N. S., 999; 33 L. J. Ch. 249, per Lord Romilly, M. R., and 10 Jur., N. S., 111; 33 L. J. Ch. 256, per Lord Westbury; Pyer v. Carter, 1 Hurl. & N. 916; Ewart v. Cochrane, 4 Macq. 117; Dann v. Spurrier, 7 Ves. 231; Clements v. Welles, L. R. 1 Eq. 200; Wilson v. Hart, L. R. 1 Ch. 463. Exactly the same question *in principle* sometimes arises in suits for the specific performance of contracts. where the vendee, being familiar with the premises, or having seen them shortly before entering into the contract, is held charged with construct-

(a) For recent cases illustrative of this section see *ante*, § 600, note.

§ 612. **Absence of Title Deeds.**— The case belonging to this head which most frequently occurs in England is that arising from the absence of the title deeds, or their non-production by the owner of land with whom an intended purchaser or encumbrancer is dealing. From the peculiar system of conveyancing and land titles prevailing in England, the owner of a *legal* estate in fee or for life is entitled and is presumed to have the title deeds and other muniments of title constituting the written evidence of his estate in his own possession or under his personal and immediate control. The inability to produce the title deeds, and especially their possession by a stranger, would indicate that some equitable or perhaps legal interest, mortgage, or lien had been created and was outstanding.[1] The three following general rules may be considered as definitely settled by a strong preponderance of authority, and especially by the more recent and carefully considered decisions of the English courts. It should be observed that they are given as *general* rules; their application must largely depend upon and vary with the changing circumstances of particular cases. If a purchaser or encumbrancer dealing with the apparent owner of an estate learns or is informed that the title deeds are in the possession of a third person, this will, in general, be a constructive notice of any interest in or claim upon the estate held by such person; and will certainly be a

ive notice of easements, and other similar rights affecting the land, which are reasonably suggested by the visible appearance of material structures or of modes in which the premises are used and occupied. See Shackleton v. Sutcliffe, 1 De Gex & S. 609; Grant v. Munt, Coop. 173; Pope v. Garland, 4 Younge & C. 394; Bowles v. Round, 5 Ves. 508; Dyer v. Hargrave, 10 Ves. 506.

[1] In fact, the possession, by the apparent owner of the legal estate, of *all* the title deeds is quite analogous to, though not of course exactly identical with, a perfect record title in the United States. A purchaser dealing with the legal owner in England, and finding him in possession of *all* the title deeds, is in a position quite similar to that of a purchaser in this country who has made a search and finds the owner's title on the records clear and unencumbered. While in neither case is such purchaser *absolutely* secure against unknown outstanding claims, in both he stands in a like position of advantage and protection.

notice, if the party thus receiving the information intentionally omits to make any inquiry into the nature and objects of the stranger's possession.[2] On the other hand, it is now thoroughly settled that the *mere* absence or non-production of the title deeds is not of itself a constructive notice to a purchaser or encumbrancer, if he in good faith inquires for them, and a reasonable excuse for their non-appearance is given. His omission to make further inquiry is not the "culpable neglect" which the English courts now require, under such circumstances, in order to charge the party with notice. Exactly the same rule has been applied by several of the cases to a somewhat different state of facts. If deeds *are* produced and delivered to the purchaser or encumbancer, which are represented to be all of the muniments of title, while in fact they are not all, but some of the deeds affecting the title are in possession of a third person, his omission to examine the deeds thus delivered to him and to discover the defect is not the culpable neglect which renders him chargeable with notice.[3] Finally, if a purchaser or encumbrancer fails to make any inquiries

2 Dryden v. Frost, 3 Mylne & C. 670, 673, per Lord Cottenham; Hiern v. Mill, 13 Ves. 114; Birch v. Ellames, 2 Anstr. 427; Bradley v. Riches, L. R. 9 Ch. Div. 189, 195, 196; Maxfield v. Burton, L. R. 17 Eq. 15, 18 (the purchaser was informed that the deeds were in the possession of a third person, and simply neglected to make any inquiry; it did not appear that his neglect was intentional or willful). Upon substantially the same grounds it was held, in Kellogg v. Smith, 26 N. Y. 18, 23, that the purchaser of a bond and mortgage who fails to require the production of the bond, it being in fact not produced, is charged with notice of any defects in his assignor's title.

3 Dixon v. Muckleston, L. R. 8 Ch. 155, 158, 161; Ratcliffe v. Barnard, L. R. 6 Ch. 652, 654; Hunt v. Elmes, 2 De Gex, F. & J. 578, 588; 28 Beav. 631; Perry v. Holl, 2 De Gex, F. & J. 38, 53, 54; Espin v. Pemberton, 3 De Gex & J. 547, 556; 4 Drew. 333; Roberts v. Croft, 2 De Gex & J. 1, 5, 6; 24 Beav. 223; Hewitt v. Loosemore, 9 Hare, 449, 456, 458; Colyer v. Finch, 5 H. L. Cas. 905; Finch v. Shaw, 19 Beav. 500; Dowle v. Saunders, 2 Hem. & M. 242; Hipkins v. Amery, 2 Giff. 292; Farrow v. Rees, 4 Beav. 18; Evans v. Bicknell, 6 Ves. 174; Plumb v. Fluitt, 2 Anstr. 432; and see Ware v. Lord Egmont, 4 De Gex, M. & G. 460, 473, 474; Greenfield v. Edwards, 2 De Gex, J. & S. 582; Cory v. Eyre, 1 De Gex, J. & S. 149, 168, 169; Perry Herrick v. Attwood, 2 De Gex & J. 21, 37.

concerning the title deeds of the property for which he is dealing, this is, under the English system, a "culpable negligence," and he is thereby charged with constructive notice of all the facts which he might have learned by means of a due inquiry.[4 a]

§ 613. Other Matters in Pais.— As might be supposed from our wholly different system of conveyancing and titles, instances of constructive notice by the absence or non-production of title deeds seldom, if ever, arise in this country. The same general rule, however, is applied by our courts in all analogous cases. If a purchaser or encumbrancer, dealing concerning property of which the record title appears to be complete and perfect, has information of extraneous facts or matters *in pais,* sufficient to put him on inquiry respecting some unrecorded conveyance, mortgage, or encumbrance, or respecting some outstanding interest, claim, or right which is not the subject of record, and he omits to make a proper inquiry, he will be charged with constructive notice of all the facts which he might have learned by means of a due and reasonable inquiry.[1 a]

[4] Such conduct is the willful shutting one's eyes to the truth, and omitting to inquire for the very purpose of avoiding information, spoken of by Vice-Chancellor Wigram in the passage quoted in a preceding paragraph: Hewitt v. Loosemore, 9 Hare, 449, 458; Hopgood v. Ernest, 3 De Gex, J. & S. 116, 121; Atterbury v. Wallis, 8 De Gex, M. & G. 454, 466; Maxfield v. Burton, L. R. 17 Eq. 15, 18; Bradley v. Riches, L. R. 9 Ch. Div. 189, 195, 196; Finch v. Shaw, 19 Beav. 500, 511; Jones v. Williams, 24 Beav. 47; Peto v. Hammond, 30 Beav. 495; Allen v. Knight, 5 Hare, 272; Jones v. Smith, 1 Hare, 43; 1 Phill. Ch. 244; Worthington v. Morgan, 16 Sim. 547; Jackson v. Rowe, 2 Sim. & St. 472.

[1] This inquiry, as has been shown, sometimes should be made of the grantor or vendor, and sometimes of third persons, according to the circumstances of each case: Epley v. Witherow, 7 Watts, 163, 167; Jaques v. Weeks, 7

§ 612, (a) So, where a general inquiry was made about the title deeds, but no endeavor was made to ascertain what they consisted of or to have them produced, the purchaser was culpably negligent: Oliver v. Hinton, [1899] 2 Ch. 264, 68 Law J. Ch. 583, 81 Law T. (N. S.) 212, 48 Wkly. Rep. 3.

§ 613, (a) See, also, Kirsch v. Tozier, 143 N. Y. 390, 38 N. E. 375, 42 Am. St. Rep. 729; Petrain v. Kiernan, 23 Oreg. 455, 32 Pac. 158, quoting this passage of the text: Curry v. Williams, (Tenn. Ch. App.) 38 S. W. 278, citing this section.

§ 614. 2. **By Possession or Tenancy.**[a]—The general rule is well settled in England that a purchaser or encumbrancer of an estate who knows or is properly informed that it is in the possession of a person other than the vendor or mortgagor with whom he is dealing is thereby charged with a constructive notice of all the interests, rights, and equities which such possessor may have in the land. He is put upon an inquiry concerning the grounds and reasons of the stranger's occupation, and is presumed to have knowledge of all that he might have learned by means of an inquiry duly and reasonably prosecuted. If he neglects to make any inquiry, or to make it with due diligence, the presumption and notice, of course, remain absolute.[1][b] The same

Watts, 261, 274; Buttrick v. Holden, 13 Met. 355, 357; Sergeant v. Ingersoll, 7 Pa. St. 340; 15 Pa. St. 343, 348, 349; Warren v. Swett, 31 N. H. 332, 341; Littleton v. Giddings, 47 Tex. 109; Helms v. Chadbourne, 45 Wis. 60, 70; Shepardson v. Stevens, 71 Ill. 646; Erickson v. Rafferty, 79 Ill. 209, 212; Buck v. Payne, 50 Miss. 648, 655; Maul v. Rider, 59 Pa. St. 167, 171; Stearns v. Gage, 79 N. Y. 102, 107; Baker v. Bliss, 39 N. Y. 70.

1 Taylor v. Stibbert, 2 Ves. 437, 440, per Lord Rosslyn; Holmes v. Powell, 8 De Gex, M. & G. 572, 580, 581; Penny v. Watts, 1 Macn. & G. 150, 165. The general rule was so clearly and accurately stated by Knight Bruce, L. J., in the recent case of Holmes v. Powell, 8 De Gex, M. & G. 572, that I shall quote a passage of his opinion (p. 580): "I apprehend that by the law of England when a man is *of right* and *de facto* in possession of a corporeal hereditament, he is entitled to impute knowledge of that possession to all who deal for any interest in the property, conflicting or inconsistent with the title or alleged title under which he is in possession, or which he has a right to connect with his possession of the property. It is equally a part of the law of the country, as I understand it, that a man who *knows*, or who *cannot be heard to deny that he knows*, another to be in possession of certain property cannot for any civil purpose, as against him at least, be heard to deny having thereby notice of the title or alleged title under which or in respect of which the former is and claims to be in that possession. Lord Eldon's language in Allen v. Anthony, 1 Mer. 282, 284, recognizes, as I understand it, both rules. But possession of a corporeal hereditament, to be effectual, need not be continually visible or without cessation actively asserted. If a man has once received rightful and actual possession of land, he may go to any distance from it without authorizing any servant, or agent, or other person to enter upon it or look after it; he may leave it for years

(a) §§ 614–625 are cited in Roll v. Rea, 50 N. J. Law, 264, 12 Atl. 905.

(b) This passage of the text is quoted in Curry v. Williams, (Tenn Ch. App.) 38 S. W. 278.

general rule, based upon the same motives and reasons, has been established in the United States by a very great number of decisions and judicial *dicta*.[2] [c] In by far the larger

uncultivated and unused; he may set no mark of ownership upon it,— and his possession may nevertheless still continue, at least until his conduct afford evidence of intentional abandonment, which such conduct as I have mentioned would not necessarily do. Suppose, for example, a purchase of a tract of woodland, and the purchaser, after possession given him, to leave it wholly neglected, uninhabited, untouched, unvisited, unseen, for years, the possession is not thus lost. . . . It is unnecessary for me to repeat that I have uniformly been using the word 'possession' as meaning 'occupation,' and not as including that kind of possession of a corporeal hereditament which a man has by receiving compensation or remuneration for the occupation of it by another." The judge, in support of these conclusions, referred to the following decisions: Hardy v. Reeves, 5 Ves. 426; Taylor v. Stibbert, 2 Ves. 437; Daniels v. Davison, 16 Ves. 249; 17 Ves. 433; Norway v. Rowe, 19 Ves. 144; Gordon v. Gordon, 3 Swanst. 400; Miles v. Langley, 1 Russ. & M. 39; White v. Wakefield, 7 Sim. 401; Oxwith v. Plummer, 2 Vern. 636.

2 Rogers v. Jones, 8 N. H. 264; Hull v. Noble, 40 Me. 459, 480; Johnson v. Clarke, 18 Kan. 157, 164; School Dist. v. Taylor, 19 Kan. 287; Tankard v. Tankard, 79 N. C. 54, 56; Edward v. Thompson, 71 N. C. 177; Noyes v. Hall, 97 U. S. 34, 38; Cabeen v. Breckenridge, 48 Ill. 91; Truesdale v. Ford, 37 Ill. 210; Dunlap v. Wilson, 32 Ill. 517; Strickland v. Kirk, 51 Miss. 795, 797; Loughridge v. Bowland, 52 Miss. 546, 553; Moss v. Atkinson, 44 Cal. 3, 17; Killey v. Wilson, 33 Cal. 690; Russell v. Sweezey, 22 Mich. 235, 239; Sears v. Munson, 23 Iowa, 380; Phillips v. Costley, 40 Ala. 486; McKinzie v. Perrill, 15 Ohio St. 162; Perkins v. Swank, 43 Miss. 349; Glidewell v. Spaugh, 26 Ind. 319; Warren v. Richmond, 53 Ill. 52; Reeves v. Ayers, 38 Ill. 418; Keys v. Test, 33 Ill. 316; Bank of Orleans v. Flagg, 3 Barb. Ch. 316; Diehl v. Page, 3 N. J. Eq. 143; Baldwin v. Johnson, 1 N. J. Eq. 441; Woods v. Farmere, 7 Watts, 382; 32 Am. Dec. 772; Sailor v. Hertzog, 4 Whart. 259; Ringgold v. Bryan, 3 Md. Ch. 488; Baynard v. Norris, 5 Gill, 468; 46 Am. Dec. 647; Webber v. Taylor, 2 Jones Eq. 9.

(c) This section of the text is cited in Kirby v. Tallmadge, 160 U. S. 379, 16 Sup. Ct. 349; Carr v. Maltby, 165 N. Y. 557, 59 N. E. 291; Chapman v. Chapman, 91 Va. 397, 21 S. E. 813, 50 Am. St. Rep. 846. In addition to the cases cited under the following sections, illustrating various phases of the doctrine, see, in general, the following: Landes v. Brandt, 10 How. 348, 375; Lea v. Polk Co. Copper Co., 21 How. 493, 498; Simmons Creek Coal Co. v. Doran, 142 U. S. 417, 12 Sup. Ct. 239; Van Gunden v. Virginia Coal & Iron Co., 52 Fed. 838, 850, 3 C. C. A. 294, 8 U. S. App. 229; Reynolds v. Kirk, 105 Ala. 446, 17 South. 95; Kent v. Dean, 128 Ala. 600, 30 South. 543; Bryan v. Ramirez, 8 Cal. 461, 68 Am. Dec. 340 (possession by holder of an equity that cannot be recorded); Stonesifer v. Kilburn, 122 Cal. 659, 55 Pac. 587; Smith v. Brittenham, 109 Ill. 540; Chicago, B. & Q. R. Co. v. Boyd, 118 Ill. 73, 7 N. E. 487; Blair v. Whit-

portion of English cases, the possession has been that of a tenant or lessee, while in this country the instances of notice by mere tenancy are comparatively few. I shall therefore treat the effect of tenancy as a particular application of the more general doctrine concerning notice by possession. In discussing the entire subject, I shall endeavor,— 1. To define with accuracy and precision the general rules which have been settled in the United States, with their limitations and exceptions; 2. To determine the extent of the notice, of what rights belonging to the occupant his possession is notice, and the effects thereof on the rights of the one receiving the notice; 3. To ascertain what kind, amount, and length of possession is necessary or sufficient in various classes of cases; 4. To inquire whether the presumption arising from the possession is conclusive or rebuttable; and 5. To consider the case of possession by a tenant or lessee, and the particular rules connected therewith.

§ 615. General Rules.— Two leading and entirely distinct rules have been settled in the United States as well as in England, and the failure to recognize this fact has, as it seems to me, sometimes produced confusion and uncertainty in dealing with the general subject. In the first place, it is

aker, (Ind. App.) 69 N. E. 182; Jones v. Wilkinson, 2 Kan. App. 361, 42 Pac. 735; Phœnix Mut. Life Ins. Co. v. Beaman, 5 Kan. App. 772, 48 Pac. 1007 (notice of possessor's equitable homestead rights); Du Val v. Wilmer, 88 Md. 66, 41 Atl. 122; Miner v. Wilson, 107 Mich. 57, 64 N. W. 874; Jones v. Breinzer, 70 Minn. 525, 73 N. W. 255; Thompson v. Borg, (Minn.) 95 N. W. 896; Stovall v. Judah, 74 Miss. 747, 21 South. 614; Taylor v. Moseley, 57 Miss. 544; Pleasants v. Blodgett, 39 Nebr. 741, 58 N. W. 423, 42 Am. St. Rep. 624; Stillings v. Stillings, (N. H.) 42 Atl. 271; Salvage v. Haydock, 68 N. H. 484, 44 Atl. 696; Ferron v. Errol, 59 N. H. 234; Essex Co. Bank v. Harrison, 51 N. J. Eq. 91, 40 Atl. 209, and cases cited; Manufacturing Co. v. Hendricks, 106 N. C. 485, 11 S. E. 568; Ross v. Hendrix, 110 N. C. 403, 15 S. E. 4 (possession as notice of resulting trust); Mayo v. Leggett, 96 N. C. 242, 1 S. E. 622; Cooper v. Thomason, 30 Oreg. 161, 45 Pac. 296; Hawley v. Geer, (Tex.) 17 S. W. 914 (possession puts on inquiry as to resulting trust); Snyder v. Botkin, 37 W. Va. 355, 16 S. E. 591 (possession under unrecorded mortgage notice to subsequent judgment creditor of mortgagor); Lowther Oil Co. v. Miller-Sibley Oil Co., (W. Va.) 44 S. E. 433; Lamoreux v. Huntley, 68 Wis. 24, 31 N. W. 331.

clearly established by many decisions of the highest authority that an actual, open, visible, and exclusive possession of a definite tract of land by one rightfully in possession or holding under a valid title is a constructive notice to subsequent purchasers and encumbrancers of whatever estate or interest in the land is held by the occupant, equivalent in its extent and effects to the notice given by the recording or registration of his title. The constructive notice thus described, like that arising from a record or registration, does not seem to require nor to depend upon any actual knowledge or information of the possession communicated to or had by the subsequent purchaser, since he is held to be charged with notice, even though he is a resident of another state.[1] [a] This rule is plainly the same as the

[1] This rule seems to have its special and most usual application between prior grantees of land whose deeds have not been put on record, and subsequent grantees or encumbrancers whose deeds or mortgages *have* been recorded. The *rightful* possession under such circumstances is held to produce the same effect as that produced by a record: Noyes v. Hall, 97 U. S. 34, 38; Cabeen v. Breckenridge, 48 Ill. 91; Truesdale v. Ford, 37 Ill. 210; Brown v. Gaffney, 28 Ill. 157; Dunlap v. Wilson, 32 Ill. 517; Bradley v. Snyder, 14 Ill. 263; 58 Am. Dec. 564; Tankard v. Tankard, 79 N. C. 54, 56; Edwards v. Thompson, 71 N. C. 177, 179; Webber v. Taylor, 2 Jones Eq. 9; Taylor v. Kelly, 3 Jones Eq. 240 (in Edwards v. Thompson, 71 N. C. 177, it was said that the purchaser was thus charged with notice, although he lived in another state); School District v. Taylor, 19 Kan. 287; Emmons v. Murray, 16 N. H. 385; Farmers' L. & T. Co. v. Maltby, 8 Paige, 361; Doyle v. Stevens, 4 Mich. 87.

(a) This rule is supported by the language or decision of the following additional cases: Kirby v. Tallmadge, 160 U. S. 379, 16 Sup. Ct. 349 (the notice is independent of knowledge of the possession); Morgan v. Morgan, 3 Stew. (Ala.) 383, 21 Am. Dec. 638; Sawyer v. Baker, 72 Ala. 49; Rankin Manuf. Co. v. Bishop, 137 Ala. 271, 34 South. 991; Carter v. Challen, 83 Ala. 135, 3 South. 313; Josey v. Davis's Admr., 55 Ark. 318, 18 S. W. 185; Beattie v. Crewdson, 124 Cal. 577, 57 Pac. 463 (purchaser is bound to know who is in possession); Scheerer v. Cuddy, 85 Cal. 271, 24 Pac. 713 (immaterial whether knowledge of possession); Tate v. Pensacola, G. L. & D. Co., 37 Fla. 439, 20 South. 542, 53 Am. St. Rep. 251 (the notice is not dependent on knowledge of the possession); Georgia Code, 1895, § 3931; Neal v. Jones, 100 Ga. 765, 28 S. E. 427; Georgia State B. & L. Assn. v. Faison, 114 Ga. 655, 40 S. E. 760; Baldwin v. Sherwood, 117 Ga. 827, 45 S. E. 216; Tillotson v. Mitchell, 111 Ill. 518; Higgins v. White, 118 Ill. 619, 8 N. E. 808; Morrison v. Morrison, 140 Ill. 560, 30 N.

first one laid down by Lord Justice Knight Bruce, in the opinion quoted under the last preceding paragraph.[2] The *rationale* seems to be, that as the occupant's title is a good one, and as his possession is notorious and exclusive, a purchaser would certainly arrive at the truth upon making any due inquiry. The purchaser cannot say, and cannot be allowed to say, that he made a proper inquiry, and failed to ascertain the truth. The notice, therefore, upon the same motives of expediency, is made as absolute as in the case of a registration. The second of the two rules is undoubtedy the one which is sustained by the greatest number of decisions. It must not be supposed, however, that there is any

[2] Holmes v. Powell, 8 De Gex, M. & G. 572, 580.

E. 768; Rock Island & P. R. Co. v. Dimick, 144 Ill. 628, 32 N. E. 291, 19 L. R. A. 105; Carr v. Brennan, 166 Ill. 108, 47 N. E. 721, 57 Am. St. Rep. 119; Joiner v. Duncan, 174 Ill. 252, 51 N. E. 323; Adam v. Joiner, 77 Ill. App. 179; Kirkham v. Moore, 30 Ind. App. 549, 65 N. E. 1042; Rothschild v. Leonhard, (Ind. App.) 71 N. E. 673; Bowman v. Anderson, 82 Iowa, 210, 47 N. W. 1087, 31 Am. St. Rep. 473 (the notice is independent of knowledge of the possession); Hannan v. Seidentopf, 113 Iowa 658, 86 N. W. 44; Kansas City Inv. Co. v. Fulton, 4 Kan. App. 115, 46 Pac. 188; Gray v. Zelmer, 66 Kan. 514, 72 Pac. 228; Knox v. Thomson, 1 Litt. (Ky.) 350, 13 Am. Dec. 246; Mullins v. Butte Hardware Co., 25 Mont. 525, 65 Pac. 1004, 87 Am. St. Rep. 430 (quoting this passage of the text); Scharman v. Scharman, 38 Nebr. 39, 56 N. W. 704; Monroe v. Hanson, 47 Nebr. 30, 66 N. W. 12; Best v. Zutavern, 53 Nebr. 604, 74 N. W. 64; Pritchard v. Brown, 4 N. H. 397, 17 Am. Dec. 431 (possession by a *cestui que trust*); Galley v. Ward, 60 N. H. 331 (the notice is independent of knowledge of possession); Hodge v. Amerman, 40 N. J. Eq. 99, 2 Atl. 257; Sanders v. Riedinger, 51 N. Y. Suppl. 937, 30 App. Div. 277, affirmed, 164 N. Y. 564, 58 N. E. 1092; Tankard v. Tankard, 84 N. C. 286; Ranney v. Hardy, 43 Ohio St. 157, 1 N. E. 523; Sweatman v. Edmunds, 28 S. C. 62, 5 S. E. 165; Shearn v. Robinson, 22 S. C. 32 (quoting this section of the text); Biemann v. White, 23 S. C. 490 (citing this section of the text); Daniel v. Hester, 29 S. C. 147, 7 S. E. 65 (citing this section of the text); Woodson v. Collins, 56 Tex. 168; Smith v. James, 22 Tex. Civ. App. 154, 54 S. W. 41; Ramirez v. Smith, 94 Tex. 184, 59 S. W. 258, 56 S. W. 254 (citing this section); Neponset L. & L. Co. v. Dixon, 10 Utah, 334, 37 Pac. 573; Stahn v. Hall, 10 Utah, 400, 37 Pac. 585; Chapman v. Chapman, 91 Va. 397, 21 S. E. 813, 50 Am. St. Rep. 846; Peery v. Elliott, (Va.) 44 S. E. 919; Ellison v. Torpin, 44 W. Va. 414, 30 S. E. 183 (opinion of Brannon, P., citing this section); Lowther Oil Co. v. Miller-Sibley Oil Co., 53 W. Va. 501, 44 S. E. 433, 97 Am. St. Rep. 1027.

conflict between them, nor that the same court might not, under proper circumstances, adopt both. Whenever a party, dealing as purchaser or encumbrancer with respect to a parcel of land, is informed or knows, or is in a condition which prevents him from denying that he knows, that the premises are in the possession of a third person, other than the one with whom he is dealing as owner, he is thereby put upon an inquiry, and is charged with constructive notice of all the facts concerning the occupant's right, title, and interest which he might have ascertained by means of a due inquiry.[b] A legal presumption arises that he possesses all the knowledge which he could have acquired by such an inquiry.[3] [c] It

[3] Rogers v. Jones, 8 N. H. 264; Hull v. Noble, 40 Me. 459, 480; Johnson v. Clark, 18 Kan. 157, 164; Mullins v. Wimberly, 50 Tex. 457, 464; Watkins v. Edwards, 23 Tex. 443; Strickland v. Kirk, 51 Miss. 795, 797; Loughridge v. Bowland, 52 Miss. 546, 553, 554; Brown v. Volkening, 64 N. Y. 76, 82, 83; Van Kueren v. Cent. R. R., 38 N. J. L. 165, 167; Moss v. Atkinson, 44 Cal. 3, 17; Killey v. Wilson, 33 Cal. 690; Rogers v. Hussey, 36 Iowa, 664; Illinois Cent. R. R. v. McCullough, 59 Ill. 166; Tunison v. Chamblin, 88 Ill. 378, 390; Warren v. Richmond, 53 Ill. 52; Russell v. Sweezey, 22 Mich. 235, 239; Perkins v. Swank, 43 Miss. 349, 361; O'Rourke v. O'Connor, 39 Cal. 442, 446; Pell v. McElroy, 36 Cal. 268; Dutton v. Warschauer, 21 Cal. 609; 82 Am. Dec. 765; Smith v. Gibson, 15 Minn. 89, 99; Bogue v. Williams, 48 Ill. 371; and see cases *ante*, under § 614.

(b) This passage of the text is quoted in Petrain v. Kiernan, 23 Oreg. 455, 32 Pac. 158. The text is cited to this effect in Alliance Trust Co. v. O'Brien, 32 Oreg. 333, 50 Pac. 801, 51 Pac. 640.

(c) In the following recent cases the possession is spoken of as putting the subsequent purchaser or encumbrancer on inquiry: Sisk v. Almon, 34 Ark. 391; Hyde v. Mangan, 88 Cal. 319, 26 Pac. 180; Bank of Mendocino v. Baker, 82 Cal. 114, 22 Pac. 103, 6 L. R. A. 833; Dreyfus v. Hirt, 82 Cal. 621, 23 Pac. 193; Crooks v. Jenkins, (Iowa) 100 N. W. 82; Border State Sav. Inst. v. Wilcox, 63 Md. 525; Weisberger v. Wisner, 55 Mich. 246, 21 N. W. 331; Allen v. Cadwell, 55 Mich. 8, 20 N. W. 692; Seymour v. McKinstry, 106 N. Y. 230, 12 N. E. 348, 14 N. E. 94; Abbey v. Taber, 58 Hun, 602, 11 N. Y. Suppl. 548, affirmed, 134 N. Y. 615, 32 N. E. 649 (where there is "notice" of the possession); Staton v. Davenport, 95 N. C. 11; Smith v. Phillips, 9 Okl. 297, 60 Pac. 117 (while possession not constructive notice, it may, with other circumstances, put upon inquiry); Rayburn v. Davisson, 22 Oreg. 242, 29 Pac. 738 (where the possession is known); Alliance Trust Co. v. O'Brien, 51 Pac. 640, 50 Pac. 801, 32 Oreg. 333 (presumption fails where inquiry would not elicit the truth); Ambrose v. Huntington, 34 Oreg. 484, 56 Pac. 513 (subsequent

follows, as a necessary consequence of these rules, that when a grantee or a vendee whose deed or contract is not recorded is in actual possession of the land conveyed or agreed to be conveyed to him, his possession is constructive notice to a subsequent grantee of the same premises whose deed *is* put upon record, and his title takes precedence of such subsequent but recorded deed.[4] [d]

[4] Strickland v. Kirk, 51 Miss. 795, 797; Moss v. Atkinson, 44 Cal. 3, 17 (the vendee may enforce his contract against such subsequent grantee); Killey v. Wilson, 33 Cal. 690; Tunison v. Chamblin, 88 Ill. 378, 390 (if the second grantee takes possession equity will cancel his deed as a cloud upon the first grantee's title, and will restore possession to the first grantee); Russell v. Sweezey, 22 Mich. 235, 239; Warren v. Richmond, 53 Ill. 52; Doolittle v. Cook, 75 Ill. 354; Cabeen v. Breckenridge, 48 Ill. 91, 93; Perkins v. Swank, 43 Miss. 349, 361; Dixon v. Lacoste, 1 Smedes & M. 107; Bank of Orleans v. Flagg, 3 Barb. Ch. 316; Braman v. Wilkinson, 3 Barb. 151 (possession by a vendee). It will be seen that there is an exception to this particular rule in some states, where actual notice of a prior unrecorded instrument is necessary, and mere possession is held not to be such actual notice: See *post*, § 646, subdivision on recording.

purchaser knows of the possession); Scott v. Lewis, 40 Oreg. 37, 66 Pac. 299 (same); Hawley v. Hawley, (Oreg.) 73 Pac. 3 (same); Jamison v. Dimock, 95 Pa. St. 52; Hottenstein v. Lerch, 104 Pa. St. 454; Rowe v. Ream, 105 Pa. St. 543; Holmes v. Caden, 57 Vt. 111; Rorer Iron Co. v. Trout, 83 Va. 397, 419, 2 S. E. 713, 5 Am. St. Rep. 285; Dennis v. Northern Pac. R. Co., 20 Wash. 320, 55 Pac. 210; Peterson v. Philadelphia Mort. & T. Co., (Wash.) 74 Pac. 585; Coe v. Manseau, 62 Wis. 81, 22 N. W. 155; Mateskey v. Feldman, 75 Wis. 103, 43 N. W. 733.

(d) See, also, Morgan v. Morgan, (Ala.) 3 Stew. 383, 21 Am. Dec. 638; Sisk v. Almon, 34 Ark. 391; Peasley v. McFadden, 68 Cal. 611, 10 Pac. 179; Bank of Mendocino v. Baker, 82 Cal. 114, 22 Pac. 1037, 6 L. R. A. 833 (possession under unrecorded deed); McAdow v. Wachob, (Fla.) 33 South. 702; Burr v. Toomer, 103 Ga. 159, 29 S. E. 692 (possession of vendee under contract); Finch v. Beal, 68 Ga. 594 (possession under bond for title); White v. White, 105 Ill. 313; Heppe v. Szczepanski, (Ill.) 70 N. E. 737; Corey v. Smalley, 106 Mich. 257, 64 N. W. 13, 58 Am. St. Rep. 474 (possession of vendee under contract); Jones v. Breinzer, (Minn.) 73 N. W. 255; Stovall v. Judah, 74 Miss. 747, 21 South. 614; Bolton v. Roebuck, 77 Miss. 710, 27 South. 630 (possession under contract of purchase); Lipp v. Land Syndicate, 24 Neb. 692, 40 N. W. 129; Lipp v. Hunt, 25 Neb. 91, 41 N. W. 143; Salvage v. Haydock, 68 N. H. 484, 44 Atl. 696; Galley v. Ward, 60 N. H. 331; Day v. R. R. Co., 41 Ohio St. 392; Hawley v. Hawley, 43 Oreg. 352, 73 Pac. 3 (possession under contract of purchase); Daniel v. Hester, 29 S. C. 147, 7 S. E. 65 (the rule is not confined to equitable

§ 616. **Extent and Effect of the Notice.**— There appears to be some disagreement among the American decisions concerning the question of what rights and interests held by the occupant his possession is a constructive notice. It is firmly settled in England that the possession of a tenant or lessee is not only notice of all rights and interests connected with or growing out of the tenancy itself or the lease, but is also notice of all interests acquired by collateral and even subsequent agreements. If, for example, a tenant should enter under his lease alone, and should afterwards make an agreement for the purchase of the land, his possession would be notice to a subsequent purchaser of his rights as vendee, as well as of those belonging to him as lessee.[1] It would seem that the principle of these decisions extended to all persons in possession, whether as lessees, vendees, mortgagees, or otherwise. It has accordingly been adopted and followed by some of the American cases, which hold that a possession originally acquired by one right or in one manner is notice of all other rights subsequently and differently obtained and held by the occupant, unless there is something in the circumstances of the case which has actu-

[1] Daniels v. Davison, 16 Ves. 249; 17 Ves. 433; Taylor v. Stibbert, 2 Ves. 437; Allen v. Anthony, 1 Mer. 282; Meux v. Maltby, 2 Swanst. 281; Crofton v. Ormsby, 2 Schoales & L. 583; Powell v. Dillon, 2 Ball & B. 416; Lewis v. Bond, 18 Beav. 85; Wilbraham v. Livesey, 18 Beav. 206; Moreland v. Richardson, 24 Beav. 33; Bailey v. Richardson, 9 Hare, 734; Barnhart v. Greenshields, 9 Moore P. C. C. 33, 34; and for limitations on the rule, see Hanbury v. Litchfield, 2 Mylne & K. 629, 633, per Lord Cottenham; Jones v. Smith, 1 Hare, 43, 62.

titles); Barnett v. Vincent, 69 Tex. 685, 7 S. W. 525, 5 Am. St. Rep. 98 (a case of possession by a vendee under a parol contract of sale); Kuteman v. Carroll, (Tex. Civ. App.) 80 S. W. 842 (notice of right to specific performance); Frame v. Frame, 32 W. Va. 463, 9 S. E. 901, 5 L. R. A. 223; Snyder v. Botkin, 37 W. Va. 355, 16 S. E. 591 (possession under parol contract of purchase); Houzik v. Delaglise, 65 Wis. 494, 27 N. W. 171, 56 Am. Rep. 642 (possession under parol contract). This rule is not changed by reason of the great inconvenience to which a purchaser would be put in making inquiries of all persons in a large tenement house: Phelan v. Brady, 119 N. Y. 587, 23 N. E. 1109.

ally misled the purchaser who is to be affected by the notice.[2] [a] Exactly the opposite conclusion has, however, been

2 In my opinion, these decisions are much more in harmony with the general doctrine than those others which have speculated and drawn refined distinctions upon the amount of notice derived from the occupant's original right to the possession. The reasons upon which the whole doctrine rests seem to be conclusive. The possession of a third person is said to put a purchaser upon an inquiry; and he is charged with notice of all that he might have learned by a due and reasonable inquiry. Clearly a purchaser who is thus put upon inquiry is bound to inquire of the occupant with respect to *every* ground, source, and right of his possession; anything short of this would clearly fail to be the "due and reasonable inquiry": See Kerr v. Day, 14 Pa. St. 112; 53 Am. Dec. 526; Woods v. Farmere, 7 Watts, 382; 32 Am. Dec. 772; Matthews v. Demerritt, 22 Me. 312; McKecknie v. Hoskins, 23 Me. 230; Rogers v. Jones, 8 N. H. 264; Daubenspeck v. Platt, 22 Cal. 330.

(a) See, also, Morrison v. Herrick, 130 Ill. 631, 22 N. E. 537 (possession is notice of agreement to renew lease); Carr v. Brennan, 166 Ill. 108, 47 N. E. 721, 57 Am. St. Rep. 119 (possession under the unrecorded conveyance was a continuance of a previous possession); Haworth v. Taylor, 108 Ill. 275 (tenant's possession is notice of landlord's rights at time of purchase, and not merely of rights at time of making lease); Chesterman v. Gardner, 5 Johns. 29, 9 Am. Dec. 265 (possession of tenant is notice of whole extent of his interest); Phelan v. Brady, 119 N. Y. 587, 23 N. E. 1109, 8 L. R. A. 211; Anderson v. Brinser, 129 Pa. St. 376, 11 Atl. 809, 18 Atl. 520, 6 L. R. A. 205 (subsequent purchaser chargeable with notice of contract to purchase by lessee in possession, whether he had knowledge of the lease or not; overruling Leach v. Ansbacher, 55 Pa. St. 85); Smith v. James, 22 Tex. Civ. App. 154, 54 S. W. 41 (unrecorded deed to grantor's tenant in possession); Allen v. Gates, 73 Vt. 222, 50 Atl. 1092. The author's note 2 is quoted in Bright v. Buckman, 39 Fed. 243.

Possession of Tenant in Common.—It has accordingly been held that the possession of the entire premises by one of two or more co-tenants is sufficient to put a purchaser from a co-tenant out of possession upon inquiry as to the interests claimed by the possessor, by purchase of his co-tenant's shares, etc.: Peck v. Williams, 113 Ind. 256, 15 N. E. 270; Kirkham v. Moore, 39 Ind. App. 549, 65 N. E. 1042; Farmers' Nat. Bank v. Sperling, 113 Ill. 373 (as against a judgment creditor); Collum v. Sanger Bros., (Tex.) 82 S. W. 459. In Weisberger v. Wisner, 55 Mich. 246, 21 N. W. 331, the court in discussing this rule said:—"It is true, as complainant says, that the possession was not apparently inconsistent with the record title; but this may be said in any case. It is possible that any possession may be that of a licensee or otherwise subordinate to the record title; and if that were sufficient reason for holding that the possession is no notice of actual rights, the principle on which decisions have been made, giving protection to occupants, would have very limited application." Other cases hold that such sole occupancy is not notice, since it could be referred to the occupant's former title as tenant in common: Schumacher v. Truman, 134 Cal. 430, 66 Pac. 591,

reached by cases which hold that a possession begun under one kind of right is not notice of any other or different interest subsequently obtained by the occupant, unless there was something special in the circumstances which might draw the purchaser's attention to the change of title, and thus operate rather as an actual than a constructive notice.[3 b] The decisions may be regarded as agreeing upon the conclusion, which also seems to be in perfect harmony with sound principle, that where *a* title under which the occupant holds has been put on record, and his possession is consistent with what thus appears of record, it shall not be a constructive notice of any additional or different title or interest to a purchaser who has relied upon the record, and has had no actual notice beyond what is thereby disclosed.[4 c]

[3] McMechan v. Griffing, 3 Pick. 154; 15 Am. Dec. 189; Kendall v. Lawrence, 22 Pick. 542; Bush v. Golden, 17 Conn. 594, 602; Williams v. Sprigg, 6 Ohio St. 585; Matthews v. Demerritt, 22 Me. 312, 313; Dawson v. Danbury Bank, 15 Mich. 489.

[4] Plumer v. Robertson, 6 Serg. & R. 184, per Tilghman, C. J.; Woods v. Farmere, 7 Watts, 382, 388; 32 Am. Dec. 772; Great Falls Co. v. Worster, 15 N. H. 412; Smith v. Yule, 31 Cal. 180; and see White v. Wakefield, 7

Hurley v. O'Neill, 26 Mont. 269, 67 Pac. 626; Mullins v. Butte Hardware Co., 25 Mont. 525, 65 Pac. 1004, 87 Am. St. Rep. 430; Wilcox v. Leominster Nat. Bank, 43 Minn. 541, 45 N. W. 1136, 19 Am. St. Rep. 259; Dutton v. McReynolds, 31 Minn. 66; Martin v. Thomas, (W. Va.) 49 S. E. 118, citing this paragraph of the text. Thus, in Plumer v. Robertson, 6 Serg. & R. 179, it was held that occupancy by one of three former tenants in common alone is not notice of a transfer to him of the interests of the other two, as his sole occupancy could be referred to his former title.

(b) See also Hodges v. Winston, 94 Ala. 576, 10 South. 535 (a vendor's possession of part of the tract conveyed, which part he has acquired by repurchase, is referred to the repurchase, and imparts no notice of a vendor's lien on the remainder of the tract); Aden v. City of Vallejo, 139 Cal. 165, 72 Pac. 905 (possession under a franchise from a city not notice of an unrecorded deed); Garrard v. Hull, 92 Ga. 787, 20 S. E. 357 (possession referable to a tenancy); Red River Val. L. & I. Co. v. Smith, 7 N. Dak. 236, 74 N. W. 194 (possession under lease of which the purchaser knows is attributable thereto); Brown v. Roland, 11 Tex. Civ. App. 648, 33 S. W. 273 (possession by tenant not constructive notice of independent right claimed by him); Smith v. Miller, 63 Tex. 72. See also the group of cases last cited in note (a) to this section.

(c) Quoted, Kirby v. Tallmadge, 160 U. S. 379, 16 Sup. Ct. 349; Mullins v. Butte Hardware Co., 25 Mont. 525, 65 Pac. 1004, 87 Am. St. Rep. 430; Ellison v. Torpin, 44 W. Va.

§ 617. Grantor Remaining in Possession.— The last-mentioned rule has frequently been invoked where a grantor, having executed a deed absolute on its face, which is put upon record, remains in possession of the land by virtue

Sim. 401; Rice v. Rice, 2 Drew. 1; Muir v. Jolly, 26 Beav. 143; Staples v. Fenton, 5 Hun, 172; and see Bell v. Twilight, 18 N. H. 159; 45 Am. Dec. 367. Where A gives a mortgage by absolute deed with defeasance to B, and the deed is recorded, but the defeasance is not, and A remains in possession, his possession, if known by them, has been held a sufficient notice to grantees from B: Daubenspeck v. Platt, 22 Cal. 330; but *per contra*, Crassen v. Swoveland, 22 Ind. 427; Newhall v. Pierce, 5 Pick. 450; and see Corpman v. Baccastow, 84 Pa. St. 363.

414, 30 S. E. 183. See, also, Aden v. City of Vallejo, 139 Cal. 165, 72 Pac. 905; McNeil v. Polk, 57 Cal. 323; May v. Sturdivant, 75 Iowa, 118, 39 N. W. 221, 9 Am. St. Rep. 463; Commonwealth v. Lakeman, 4 Cush. 597; Wilcox v. Leominster Nat. Bank, 43 Minn. 541, 45 N. W. 1136, 19 Am. St. Rep. 259; Dutton v. McReynolds, 31 Minn. 66; Red River Val. L. & I. Co. v. Smith, 7 N. Dak. 236, 74 N. W. 194; Lance v. Gorman, 136 Pa. St. 200, 20 Atl. 792, 20 Am. St. Rep. 914; Harding v. Seeley, 148 Pa. St. 20, 23 Atl. 1118; Stewart v. Crosby, (Tex. Civ. App.) 26 S. W. 138; Watkins v. Sproull, 8 Tex. Civ. App. 427, 28 S. W. 356; Hamilton v. Ingram, 13 Tex. Civ. App. 604, 35 S. W. 748 (lease is on record); *contra*, see Toland v. Corey, 6 Utah, 392, 24 Pac. 190. Thus, where the record shows title in tenants in common, the sole possession of one of them, being attributable to his recorded title, is not notice of any additional title or interest in him: Schumacher v. Truman, 134 Cal. 430, 66 Pac. 591; Hurley v. O'Neill, 26 Mont. 269, 67 Pac. 626; Stortlez v. Chapline, (Ark.) 70 S. W. 465; Martin v. Thomas, (W. Va.) 49 S. E. 118; *contra*, see Collum v. Sanger Bros., (Tex.) 82 S. W. 459. But this rule does not apply to defeat the effect, as notice, of the possession of a tenant in common under an equitable title, where the record shows title in his co-tenant only, and not in the occupant: Ramirez v. Smith, (Tex.) 59 S. W. 258, reversing (Tex. Civ. App.), 56 S. W. 254 (the very recent case of Collum v. Sanger Bros., (Tex.) 82 S. W. 459, reversing 78 S. W. 401, contains language which seems to reject entirely the rule stated in the text); nor does it apply where the purchaser had actual knowledge of facts and circumstances which rendered the co-tenant's possession adverse: Laraway v. Larue, 63 Iowa, 407, 19 N. W. 242. The possession and use of land by a firm has been held not notice that the property is partnership assets, where the record shows that it is held by the partners as tenants in common: Hammond v. Paxton, 58 Mich. 393, 25 N. W. 321. If the land is occupied jointly by two persons, and there is a record title in one of them, such joint occupation is not notice of an unrecorded title in the other: Kirby v. Tallmadge, 160 U. S. 379, 16 Sup. Ct. 349.

It has been suggested that the rule of the text should be confined to cases where one is in possession under two rights derived from the *same person*,

of some arrangement or relation between himself and his grantee *dehors* the deed and the record, which entitles him to the possession, such as a collateral agreement which really turns the deed into a mortgage, a lien for the unpaid purchase price, an unrecorded mortgage, and the like. In England, if a grantor has signed the usual receipt for the whole purchase-money indorsed upon his conveyance, his continued possession is not a constructive notice of any lien he may have for the unpaid price. The receipt in such a case is analogous to the record of the deed in the United States, and a subsequent purchaser from the grantee has a right to rely upon it.[1] There has been a direct conflict of opinion among the American courts in applying the rule to the condition of facts above described. In one group of decisions the possession of the grantor is held not to be a constructive notice of any right or interest he may have antagonistic to his deed which has been put upon record; a subsequent purchaser, it is said, has a right to rely upon

1 White v. Wakefield, 7 Sim. 401; Rice v. Rice, 2 Drew. 1; Muir v. Jolly, 26 Beav. 143.

and should not apply where the sole occupant has purchased from two tenants in common, and has recorded the deed of one and left the other unrecorded: Ellison v. Torpin, 44 W. Va. 414, 30 S. E. 183, opinion of Brannon, P.

The reason of the rule of the text is clearly stated by Gibson, C. J., in the often cited case of Woods v. Farmere, 7 Watts, 382, 32 Am. Dec. 732: "In Pennsylvania every written title may be registered, and, where an occupant announces but one of his titles, he does an act which for its tendency to mislead ought to postpone the other. By exhibiting a conveyance to which, by his own showing, his possession may be referred, he does what he can to turn a purchaser from the direct path of inquiry. The party for whose protection registration is intended would be more misled by the use of it than if the occupant had pointed to his possession alone, as that would have led him to a particular examination of it; and when the occupant, therefore, points the attention of the public to a particular conveyance by the register he abandons every other index."

Of course where the possession is inconsistent with the record, the rule does not apply. Thus, in Dreyfus v. Hirt, 82 Cal. 621, 23 Pac. 193, possession of one parcel was taken under a recorded lease, and subsequently open and notorious possession was taken of an adjoining parcel. It was held that a purchaser was put on inquiry.

the information derived, or which would be derived, from the record, and to assume that the grantor's continued possession is merely by sufferance.[2] [a] Another group reaches

2 Van Keuren v. Cent. R. R., 38 N. J. L. 165, 167. This case, while admitting that, in general, possession is constructive notice, holds in the most emphatic manner that this does not apply to a grantor remaining in possession after his conveyance. A purchaser from his grantee is not thereby bound to inquire whether he retained any interest; his deed absolute in form is conclusive, and the purchaser can safely rely on it: Bloomer v. Henderson, 8 Mich. 395, 404, 405; 77 Am. Dec. 453; Scott v. Gallagher, 14 Serg. & R. 333, 334; 16 Am. Dec. 508; Newhall v. Pierce, 5 Pick. 450; and see also, for *dicta* or reasoning pointing to the same conclusion, New York Life Ins. Co. v. Cutler, 3 Sand. Ch. 176, 179; Woods v. Farmere, 7 Watts, 382; 32

(a) See, also, Bragg v. Lamport, 96 Fed. 630, 38 C. C. A. 467; Malette v. Wright, (Ga.) 48 S. E. 229; Dodge v. Davis, 85 Iowa, 77, 52 N. W. 2; May v. Sturdivant, 75 Iowa, 118, 39 N. W. 221, 9 Am. St. Rep. 463; McNeil v. Jordan, 28 Kan. 7, 16; Hockman v. Thuma, (Kan.) 75 Pac. 486; Exon v. Dancke, 24 Oreg. 110, 32 Pac. 1045 (knowledge of grantor's possession does not put on inquiry; statute requires "actual" notice); Rowe v. Ream, 105 Pa. St. 543; Curry v. Williams, (Tenn. Ch. App.) 38 S. W. 278, citing the text; Smith v. Miller, 63 Tex. 72; Love v. Breedlove, 75 Tex. 652, 13 S. W. 222; Eylar v. Eylar, 60 Tex. 315; Hickman v. Hoffman, (Tex. Civ. App.) 33 S. W. 257. In Bumpas v. Zachary, (Tex. Civ. App.) 34 S. W. 672, following Mullins v. Wimberly, 50 Tex. 457, the distinction is made, that the continued possession of the grantor, while not notice of secret trusts and other matters which should have been made to appear of record, is notice of matters wherein there is no omission of duty on the part of the grantor, as where by mistake the wrong parcel was conveyed. In Rock Island & P. R. Co. v. Dimick, 144 Ill. 628, 32 N. E. 291, 19 L. R. A. 105, it is said that the rule does not apply to the reservation of an easement or right of way or passage in the land conveyed, when the grantor retains title to adjacent lands, and the easement or right of way is appurtenant to, and essential to the full enjoyment of, the adjacent premises, the title to which remains in the grantor. In Randall v. Lingwall, 43 Oreg. 383, 73 Pac. 1, it was held that the rule does not apply where the grantor, after retaining possession for some time, delivers possession to his tenant, whose occupation is notice of his landlord's title. In Mateskey v. Feldman, 75 Wis. 103, 43 N. W. 733, the rule was applied to a case where a conveyance of land was induced by fraud, and the grantor, without knowledge of the fraud, continued in possession under an agreement with the grantee, and it was held that such possession was not constructive notice of his equities arising out of the fraud to one claiming under a mortgage from the grantee. See also Carr v. Maltby, 165 N. Y. 557, 59 N. E. 291, *post*, § 618, last note. In Rankin v. Coar, 46 N. J. Eq. 566, 22 Atl. 177, 11 L. R. A. 661 (a case where a mother, after conveying a house to her son, continued in the occupancy of a part of it, the son appearing by the records as the sole owner), it was

a conclusion directly the contrary to this, and holds that a purchaser is put upon an inquiry and is affected by a constructive notice in the same manner as in any other case of possession by a third person.[3] [c]

Am. Dec. 772; and the opinions in Jaques v. Weeks, 7 Watts, 261, 272, 287. As to possession of a mortgagor after foreclosure sale, see Dawson v. Danbury Bank, 15 Mich. 489; Cook v. Travis, 20 N. Y. 400; Reed v. Gannon, 50 N. Y. 345, 350.[b]

3 Illinois Cent. R. R. v. McCullough, 59 Ill. 166. This case lays down the rule generally that when a grantor continues in possession, this is constructive notice to a subsequent purchaser from his grantee of all his rights

held that the mother's occupancy was not sufficient to give notice to a mortgagee of the son of any equities she may have had. This section of the text was cited.

The argument in support of the rule of the text is thus summed up in Turman v. Bell, 54 Ark. 273, 15 S. W. 886, 26 Am. St. Rep. 35: "On the other side, it is said that the execution of a warranty deed, without reservation, is a most solemn declaration by the grantor that he has parted with all his rights in the property, and directly negatives the reservation of any right; that those who see the deed are warranted upon relying upon such declaration as much as if it had been made to them orally upon an inquiry; and that if they acquire interests in faith of such reliance, the grantor in possession will be estopped to assert any right secretly reserved from the grant; that as the grantor has declared that he parted with his entire estate, strangers about to deal with the property would reasonably refer his continuous possession to the sufferance of the grantee, and would not reasonably think to refer it to a reserved right;" citing cases. Similar reasoning was used in Hafter v. Strange, 65 Miss. 323, 3 South. 190, 7 Am. St. Rep. 659. In Rankin v. Coar, 46 N. J. Eq. 566, 22 Atl. 177, 11 L. R. A. 661, the doctrine was put on the ground that the vendor was estopped from impeaching his own deed by proof of an undisclosed arrangement impairing its force. In Sprague v. White, 73 Iowa, 670, 35 N. W. 751, it was held that by the deed the grantor voluntarily relinquished all interest in the property, and the record thereof was notice to the world of such relinquishment. In Eylar v. Eylar, 60 Tex. 315, it was held that possession merely puts on inquiry, and that inquiry is prosecuted sufficiently when the purchaser examines the records and finds a deed from the party in possession. On the other hand, it is held that if no inquiry is made and no examination of the records is attempted, the possession is sufficient to charge with notice of all the grantor's rights: Jinks v. Moppin, (Tex. Civ. App.) 80 S. W. 390; Ramirez v. Smith, 94 Tex. 191, 59 S. W. 258.

(b) That possession after an adverse decree is presumed to be in subordination to the party in whose favor the decree was rendered, see Harms v. Coryell, 177 Ill. 496, 53 N. E. 87.

(c) Ford v. Marcall, 107 Ill. 136; Rock Island & P. R. Co. v. Dimick, 144 Ill. 628, 32 N. E. 291, 19 L. R. A. 105; Springfield Homestead Assn. v. Roll, 137 Ill. 205, 27 N. E. 184, 31

§ 618. Tenant's Possession, how Far Notice of Lessor's Title. — Whether possession by a tenant is constructive notice of his landlord's title, is also a question upon which the de-

and equities in the land. It was applied to a grantor whose deed, having been delivered as an escrow until the price had been paid by the grantee, was put upon record in violation of this arrangement: Metropolitan Bank v. Godfrey, 23 Ill. 579, 607, and cases cited; Pell v. McElroy, 36 Cal. 268, 278; Wright v. Bates, 13 Vt. 341, 350; Grimstone v. Carter, 3 Paige, 421, 439; 24 Am. Dec. 230; Hopkins v. Garrard, 7 B. Mon. 312; Webster v. Maddox, 6 Me. 256; McKecknie v. Hoskins, 23 Me. 230; Jaques v. Weeks, 7 Watts, 261.

Am. St. Rep. 358; Ronan v. Bluhm, 173 Ill. 277, 50 N. E. 694; Stevenson v. Campbell, 185 Ill. 527, 57 N. E. 414; Rea v. Croessman, 95 Ill. App. 70; Coppage v. Murphy, 24 Ky. Law Rep. 257, 68 S. W. 416 (though deed recited that consideration was paid); Groff v. State Bank, 50 Minn. 234, 52 N. W. 651, 36 Am. St. Rep. 640; Kahre v. Rundle, 38 Nebr. 315, 56 N. W. 888 (where the conveyance was procured by fraud, and the subsequent purchaser knew of grantor's possession); Smith v. Myers, 56 Nebr. 503, 76 N. W. 1084; O'Toole v. Omlie, 8 N. Dak. 444, 79 N. W. 849 (deed intended as mortgage); Dennis v. Northern Pac. R. Co., 20 Wash. 320, 55 Pac. 210. In Austin v. Pulschen, 112 Cal. 528, 44 Pac. 788, citing this paragraph of the text, the question was not decided, but it was intimated that the courts of that state would probably feel themselves bound to hold that the grantor's continued possession puts on inquiry. It was held, however, that it does not have that effect upon one taking a mortgage from the grantee, where the act of taking the mortgage was, practically, simultaneous with the execution and delivery of the deed. Some cases assert a variation of the rule to the effect that possession of the grantor, if continued for a considerable length of time, imparts notice: Turman v. Bell, 54 Ark. 273, 15 S. W. 886, 26 Am. St. Rep. 35.

The argument in favor of the rule is thus stated in Groff v. State Bank, *supra:* "But it seems to us that, inasmuch as the law allows possession to have the effect of notice, there is no good reason for making a distinction between possession by a stranger to the record title and possession by a grantor after delivery of his deed. In either case the possession is a fact inconsistent with the record title, and, if possession by the stranger is sufficient to make it obligatory upon a purchaser to ascertain his right, possession by the grantor is a circumstance entitled to equal consideration. An absolute deed divests the grantor of the right of possession as well as of the legal title, and when he is found in possession after delivery of his deed it is a fact inconsistent with the legal effect of the deed, and is suggestive that he still retains some interest in the premises. Under such circumstances, a purchaser has no right 'to give controlling prominence to the legal effect of the deed,' in disregard of the other 'notorious antagonistic fact,' that the grantor remains in possession just as if he had not conveyed. To say that the grantor is estopped by his deed is begging the question: for, if his possession is notice to third parties of

cisions are in direct conflict. In England it seems to be settled that the possession by a tenant, or notice of a tenancy, will not affect a purchaser with constructive notice of the landlord's title.[1] [a] The same view has been adopted by several American decisions.[2] In the greater number of American cases, however, it is held that a purchaser is bound to make inquiry from the tenant in possession with respect to *all* the rights and interests which he claims to have, and under which he occupies, and is presumed to know all the facts which he might have learned by such an inquiry; he must pursue his inquiry to the final source of the tenant's right, and is thus affected with a constructive notice of the landlord's title and estate.[3] [b]

[1] The rule is so stated by the English editor of Leading Cases in Equity: 2 Lead Cas. Eq., 4th Am. ed., 133; Jones v. Smith, 1 Hare, 43, 63, per Wigram, V. C.; Barnhart v. Greenshields, 9 Moore P. C. C. 36. And it is held that where the tenant in possession holds under a derivative lease, his possession is not a notice to a purchaser of the covenants contained in the original lease: Hanbury v. Litchfield, 2 Mylne & K. 629, 633.

[2] Flagg v. Mann, 2 Sum. 486, 557; Beattie v. Butler, 21 Mo. 313; 64 Am. Dec. 234; and see Veazie v. Parker, 23 Mo. 170; Jaques v. Weeks, 7 Watts, 261, 272, per Sergeant, J.

[3] Edwards v. Thompson, 71 N. C. 177, 179 (possession by a tenant is the same, with respect to notice, as possession by his landlord); O'Rourke v. O'Connor, 39 Cal. 442, 446; Cunningham v. Pattee, 99 Mass. 248, 252; Kerr v. Day, 14 Pa. St. 112; 53 Am. Dec. 526; and see *post*, § 625.

his rights, there is no principle of estoppel that would prevent him from asserting against purchasers or creditors any claim to the premises which he might assert against his grantee."

(a) Hunt v. Luck, [1901] 1 Ch. 45, 70 Law J. (Ch.) 30, 83 Law T. (N. S.) 479, 49 Wkly. Rep. 155; affirmed on appeal, [1902] 1 Ch. 428, overruling *dictum* to the contrary of Jessel, M. R., in Mumford v. Stohwasser, L. R. 18 Eq. 556, 562. Actual knowledge by a purchaser that rents are paid to some person whose receipt of them is inconsistent with the vendor's title is constructive notice of that person's title; but mere knowledge that the rents are paid to an estate agent affects the purchaser with no notice at all: Hunt v. Luck, *supra*.

(b) Crawford v. Chicago, etc., R. R. Co., 112 Ill. 314; Haworth v. Taylor, 108 Ill. 275; Mallette v. Kaehler, 141 Ill. 70, 30 N. E 549; A. R. Beck Lumber Co. v. Rupp, 188 Ill. 562, 80 Am. St. Rep. 190, 59 N. E. 429; Rea v. Crossman, 95 Ill. App. 70; Bowman v. Anderson, 82 Iowa, 210, 47 N. W. 1087, 31 Am. St. Rep. 473; Hannan v. Seidentopf, 113 Iowa, 658, 86 N. W. 44; O'Neill v. Wilcox, 115 Iowa, 15, 87 N. W. 742; Townsend v. Blanchard, 117 Iowa, 36, 90 N. W.

§ 619. Nature and Time of the Possession.— Under this head, the kind, extent, and time of the possession necessary or sufficient to constitute a constructive notice will be ex-

519; Wilkins v. Bevier, 43 Minn. 213, 19 Am. St. Rep. 238, 45 N. W. 157 (*dictum*, citing this section of the text); Wolf v. Zabel, 44 Minn. 90, 46 N. W. 81; Northwestern Land Co. v. Dewey, 58 Minn. 359, 59 N. W. 1085; Bratton v. Rogers, 62 Miss. 281; Randall v. Lingwall, 43 Oreg. 383, 73 Pac. 1 (reviewing many cases); Hottenstein v. Lerch, 104 Pa. St. 454; Lance v. Gorman, 136 Pa. St. 200, 20 Atl. 792, 20 Am. St. Rep. 914; Duff v. McDonough, 155 Pa. St. 10, 25 Atl. 608; Woodson v. Collins, 56 Tex. 168; Clendenning v. Bell, 70 Tex. 632, 8 S. W. 324; League v. Snyder, 5 Tex. Civ. App. 13, 23 S. W. 825 (lessee's possession is notice, though the term of the written lease has expired); Le Doux v. Johnson, (Tex. Civ. App.) 23 S. W. 902; Duncan v. Matula, (Tex. Civ. App.) 26 S. W. 638; Allison v. Pitkin, 11 Tex. Civ. App. 655, 33 S. W. 293; Mattfield v. Huntington, 17 Tex. Civ. App. 716, 43 S. W. 53 (possession by lessee of part is notice of lessor's right to the whole); Huntington v. Mattfield, (Tex. Civ. App.) 55 S. W. 361; Collum v. Sanger Bros., (Tex.) 82 S. W. 459; Ellison v. Torpin, 44 W. Va. 414, 30 S. E. 183, opinion of Brannon, P., citing this section of the text; Coe v. Manseau, 62 Wis. 81, 22 N. W. 155 (possession by tenant of land subject to mortgage is notice to the owner of the mortgage of the rights of the landlord). In Thomas v. Burnett, 128 Ill. 37, 21 N. E. 352, 4 L. R. A. 222, it was held that where a grantee in an unrecorded deed to land which is fenced and cultivated rents to a tenant, the possession is sufficient to put an attaching creditor on inquiry, although the levy was made shortly after the tenant had surrendered possession and before grantee had an opportunity to rent to a new tenant.

Where the Grantor's Tenant Becomes Tenant of the Grantee, whose conveyance is unrecorded, there is a lack of harmony among the cases upon the question whether his possession is notice of the new landlord's title. On the affirmative it is argued that the subsequent purchaser "should not be excused from inquiry unless there is something more to mislead him than his own assumption that parties occupy under the same right as formerly": Mainwaring v. Templeman, 51 Tex. 205, 213; Duncan v. Matula, (Tex. Civ. App.) 26 S. W. 638; Duff v. McDonough, 155 Pa. St. 10, 25 Atl. 608. Other cases hold that "it is necessary that there should be a visible change, which should indicate to others that there had been a sale, to have the effect of giving notice to a subsequent purchaser or attaching creditor": Veasie v. Parker, 23 Me. 170; Troy v. Walter, 87 Ala. 233, 6 South. 54; Bynum v. Gold, 106 Ala. 427, 17 South. 667; Griffin v. Hall, 111 Ala. 601, 20 South. 485; 115 Ala. 647, 22 South. 156; Powers v. State, 129 Ala. 126, 29 South. 784; Wahrenberger v. Waid, 8 Colo. App. 200, 45 Pac. 518; Stockton v. National Bank, (Fla.) 34 South. 897; Stevens v. Magee, 81 Miss. 644, 33 South. 73; Wilkins v. Bevier, 43 Minn. 213, 45 N. W. 157, 19 Am. St. Rep. 238.

Of Whose Rights the Possession is Notice, in General.— It is not notice of a *stranger's* title — that is, of the unrecorded title of one claiming adversely to the possessor: Calanchini v. Branstetter, 96 Cal. 612, 31 Pac.

amined. The determination of this question must largely depend upon the circumstances or conditions of fact under which it arises, and upon the immediate purpose or object for which the protection by a notice is invoked. Thus the question may arise between the rightful holder of a prior unrecorded title, and a subsequent purchaser whose conveyance is recorded; and it may therefore come within the first rule as stated in a former paragraph,[1] where the possession of a person rightfully entitled is equivalent, in its effects as notice, to a registration; or it may arise in other circumstances, which are not directly affected by the recording acts, and which are governed by the second general rule concerning the effect of possession as notice. A failure to recognize the difference existing between these two kinds of cases will undoubtedly account for whatever of confusion and conflict of opinion may be found in the decisions upon this subject.

§ 620. **Actual, Open, Exclusive Occupancy.**—It is therefore abundantly settled by the decisions, that where the first general rule as stated in a foregoing paragraph is invoked, and the party rightfully in possession under an unrecorded conveyance relies upon the fact of such possession as a constructive notice, equivalent in its effects to a registration,

[1] *Ante*, § 615.

575; Robertson v. Wheeler, 162 Ill. 566, 44 N. E. 870; Roll v. Rea, 50 N. J. Law, 264, 12 Atl. 905; compare Henderson v. Wanamaker, 79 Fed. 736 (possession of another than vendor is notice of defects in vendor's title, including the defense that title was in another than the possessor). That a subsequent purchaser is bound to search the records for mortgages made by the party in possession, see Balen v. Mercier, 75 Mich. 42, 42 N. W. 666.

Possession is not Notice of Rights of Which the Possessor was Ignorant, and of which, therefore, he could impart no information on inquiry being made of him. Thus, where a grantor in possession at the time of a conveyance by his grantee was ignorant of the fraud practiced in obtaining the deed from him, his possession does not charge such subsequent grantee with notice of his equity to have the deed cancelled: Cornell v. Maltby, 165 N. Y. 557, 59 N. E. 291; and a vendee's possession is no notice of the right of a secret assignee of the purchase-money notes from the vendor, of which the vendee knew nothing: First Nat. Bank v. Chafee, 98 Wis. 42, 73 N. W. 318.

to a subsequent grantee or encumbrancer whose deed or mortgage has been recorded, his possession must be an actual, open, distinct, notorious, and exclusive *occupancy* of the land in question. No mere occupation of the premises in common or in connection with a third person, and no mere exercise of acts of ownership equivocal in their nature over the land, will then suffice.[1] [a]

[1] It cannot be pretended that all of the decisions expressly and distinctly refer the necessity of such open, notorious, and exclusive occupancy to the cases in which the first general rule as formulated above is relied upon. In some of the decisions cited below, the requirement of such a kind of occupancy seems to be stated in the most general manner, without any limitation or restriction, as though it applied to every instance of possession operating as a constructive notice. Notwithstanding this apparent confusion in some of the decisions, I think the true rule, established alike by the weight of judicial authority and by principle, is that laid down in the text; it reconciles all apparent conflict of judicial *dicta*, and produces a systematic and harmonious result: See Holmes v. Powell, 8 De Gex, M. & G. 572, 580; Noyes v. Hall, 97 U. S. 34, 38; Cabeen v. Breckenridge, 48 Ill. 91; Truesdale v. Ford, 37 Ill. 210; Dunlap v. Wilson, 32 Ill. 517; Bradley v. Snyder, 14 Ill. 263; 58 Am. Dec. 564; Tankard v. Tankard, 79 N. C. 54, 56; Edwards v. Thompson, 71 N. C. 177, 179; Webber v. Taylor, 2 Jones Eq. 9; Taylor v. Kelly, 3 Jones Eq. 240; Butler v. Stevens, 26 Me. 484 (possession as against a subsequent grantee whose deed is first recorded, under a statute requiring *actual* notice, must be an actual, open, and exclusive occupancy Grantor conveyed in fee, and the grantee recorded his deed, and entered upon the premises. The grantor continued to occupy *with the grantee*. Held, not a sufficient possession to be notice of any interest held by the grantor); Bell v. Twilight, 22 N. H. 500, 519 (to be notice of a prior unrecorded deed, as against a subsequent recorded deed or mortgage, the possession must be exclusive and unequivocal; a mixed possession is not sufficient); Wright v. Wood, 23 Pa. St. 120, 130, 131 (the general rule is admitted, but held not to

(a) This section is cited in Atlanta Nat. B. & L. Ass'n, 128 Fed. 293. See, in general, in addition to the cases cited below, in this note and the following notes, McCarthy v. Nicrosi, 72 Ala. 332, 47 Am. Rep. 418; Hillman v. Levy, 55 Cal. 117; Hayward v. Mayse, 1 App. D. C. 133; Sanford v. Weeks, 38 Kan. 319, 16 Pac. 465, 5 Am. St. Rep. 748; Galley v. Ward, 60 N. H. 331; Cox v. Divinney, 65 N. J. L. 389, 47 Atl. 569 (the occupation does not suggest that any one other than the reputed owner of the premises is in possession of them); Bryce v. McCulloch, 3 Watts & S. (Pa.) 429, 39 Am. Dec. 35; and see Hodge v. Amerman, 40 N. J. Eq. 99, where the court said: "It need not be by actual residence on the land, but where there is no actual *pedis possessio*, dominion must be manifested by such open and notorious acts of ownership as will naturally be observed by others, and the acts must be of a character so cer-

§ 621. Vacant Premises — Constructive Possession.— If the possession is vacant at the time when the contract, conveyance, or mortgage is executed — that is, if the premises

apply to the case of a mere intruder; the possession must be of one *claiming a right*); Coleman v. Barklew, 27 N. J. L. 357, 359 (possession of a first grantee whose deed is not recorded may be notice to a second grantee whose deed is recorded; but it must be actual, distinct, and manifested by such acts of ownership as would naturally be observed and known by others; e. g., land with no building was used by the first grantee and others for pasturing cattle, and this was held not such a visible, open, exclusive possession as would constitute a notice to the second grantee); to the same effect are Williams v. Spriggs, 6 Ohio St. 585, 594; Ely v. Wilcox, 20 Wis. 523, 531; 91 Am. Dec. 436; Wickes v. Lake, 25 Wis. 71; Troy City Bank v. Wilcox, 24 Wis. 671; Bogue v. Williams, 48 Ill. 371; Patten v. Moore, 32 N. H. 382; Martin v. Jackson, 27 Pa. St. 504, 506; 67 Am. Dec. 489; Meehan v. Williams, 48 Pa. St. 238; McMechan v. Griffing, 3 Pick. 149; 15 Am. Dec. 198; Holmes v. Stout, 4 N. J. Eq. 492; 10 N. J. Eq. 419 (mere cutting timber on the premises from time to time is not a sufficient possession); Brown v. Volkening, 64 N. Y. 76, 82, 83. On the other hand, in Krider v. Lafferty, 1 Whart. 303, a grantee whose deed was not registered took possession of the ground, planted it with willows so as to obtain materials in his trade of basket-making, and continued to use the land in this manner, growing the willows and cutting them every year for his business. This was held to be a change in the condition of the premises and a visible occupation of them sufficient to affect a subsequent purchaser with notice. In Hatch v. Bigelow, 39 Ill. 136, paving the sidewalk in front of a lot, putting up a placard on the lot offering it for sale, and receiving applicants and referring them to the party's agent, were held a sufficient possession of the lot to constitute notice.

tain and definite in denoting ownership as not to be liable to be misunderstood or misconstrued."

Exclusive Occupancy.— This requirement is illustrated by numerous cases where the grantee under an unrecorded conveyance continues to reside on the land as a member of the grantor's family, or where the grantor otherwise exercises acts of ownership concurrently with the grantee: Adams-Booth Co. v. Reid, 112 Fed. 106 (residence of sons with father); Motley v. Jones, 98 Ala. 443, 13 South. 782 (deed from husband to wife); Munn v. Achey, 110 Ala. 628, 18 South. 299 (occupancy of a widowed mother, together with her sons, who were holders of the record title, not notice of her equities); Wells v. American Mortgage Co., 109 Ala. 430, 20 South. 136; Jerome v. Carbonate Nat. Bk., 22 Colo. 37, 43 Pac. 215; Harris v. McIntyre, 118 Ill. 275, 8 N. E. 182 (occupancy of brother and sister); Lindley v. Martindale, 78 Iowa, 379, 43 N. W. 233 (mother allowed title to stand in name of son); Elliot v. Lane, 82 Iowa, 484, 48 N. W. 720, 31 Am. St. Rep. 504; Rankin v. Coar, 46 N. J. Eq. 566, 22 Atl. 177, 11 L. R. A. 661 (joint occupancy of son and mother); Pope v. Allen, 90 N. Y. 298; Patterson v. Mills, 121 N. C. 258, 28 S. E. 368 (deed to

are entirely unoccupied — the purchaser cannot be affected by any notice arising from possession. He is not thereby put upon an inquiry concerning the title or interest of the

grantors' sisters); Derrett v. Britton, (Tex. Civ. App.) 80 S. W. 562; Puckett v. Reed, (Tex. Civ. App.) 22 S. W. 515.

In general, the possession of a wife, being referable to that of her husband, is not notice of secret equities in her favor: Garrard v. Hull, 92 Ga. 787, 20 S. E. 357 (where the husband was a tenant of the holder of the legal title); Gray v. Lamb, 207 Ill. 228, 69 N. E. 794; Roderick v. McMeekin, 204 Ill. 625, 68 N. E. 443; Thomas v. Kennedy, 24 Iowa, 397, 95 Am. Dec. 740 (legal title in husband). But the possession of the wife is not referable to the husband alone, where neither of them held the record title, to the extent of excusing a purchaser from inquiry of either of them: Kirby v. Tallmadge, 160 U. S. 379, 16 Sup. Ct. 349; especially in view of the frequency with which homestead property is taken in the name of the wife: Id. So, where the deed was made to the husband by mistake, and not recorded, the fact that the husband also occupied the farm with his wife does not prevent her possession from imparting notice: Brown v. Carey, 149 Pa. St. 134, 23 Atl. 1103. See also Broome v. Davis, 87 Ga. 584, 13 S. E. 749 (if premises occupied by husband and wife be a homestead, the creditors of the wife have constructive notice of its character, though the formal paper title is in the wife); Allen v. Moore, 30 Colo. 307, 70 Pac. 682 (open and exclusive possession by a married woman after separation from her husband puts a purchaser on inquiry as to her rights). In Townsend v. Little, 109 U. S. 510, 3 Sup. Ct. 357, the fact that an apparent wife lived with her apparent husband, in whose name the title stood, was held not to be constructive notice of a secret equity in the wife.

Insufficient Acts of Ownership.— Jerome v. Carbonate Nat. Bank, 22 Colo. 37, 43 Pac. 215 (making of improvements, payment of taxes, etc., not notice, unless brought to the attention of the person sought to be charged, especially where the grantor exercises concurrent acts of ownership); Mack v. McIntosh, 181 Ill. 633, 54 N. E. 1019 (no possession of building by storing goods in cellar under sidewalk); Holland v. Brown, 140 N. Y. 344, 35 N. E. 577 (occupation of uplands adjoining the shore of navigable waters is not possession of the shore unless by visible boundaries or monuments at or near the shore its relation to the uplands is suggested); Billington v. Welsh, 5 Binney (Pa.), 129, 6 Am. Dec. 406 (nothing to distinguish occupancy of vendee of a portion from his vendor's occupancy of the rest of the land); Gulf, C. & S. F. R. Co. v. Gill, 5 Tex. Civ. App. 496, 23 S. W. 142 (construction of railroad track does not affect purchaser of land 132 feet from the track with notice of the railroad's claim to such land); Wright v. Lassiter, 71 Tex. 640, 10 S. W. 295 (possession taken under unrecorded title bond and part of land actually occupied not the subject of dispute).

Sufficient Acts of Ownership.— In general, to constitute actual, open and visible possession, only that use is required of which the land is capable and to which it is adapted. See Simmons Creek Coal Co. v. Doran, 142 U. S. 417, 12 Sup. Ct.

last occupant who has given up the possession, and is not charged with a constructive notice of facts which he might have learned by means of such inquiry.[1] While this rule

[1] Miles v. Langley, 1 Russ. & M. 39; 2 Russ. & M. 626; Jones v. Smith, 1 Hare, 43, 62; Meehan v. Williams, 48 Pa. St. 238; Boggs v. Varner, 6 Watts & S. 474; Hewes v. Wiswell, 8 Me. 94.

239 (use of uninclosed land as a cattle range); Tate v. Pensacola, Gulf L. & D. Co., 37 Fla. 439, 20 South. 542, 53 Am. St. Rep. 251 (trees used for firewood, and limit of the possession claimed plainly marked); Rock Island & P. R. Co. v. Dimick, 144 Ill. 628, 32 N. E. 291, 19 L. R. A. 105 (sufficient use of farm passageway beneath railroad; such use may be intermittent); Ashelford v. Willis, 194 Ill. 492, 62 N. E. 817 (use of a right of way); Mason v. Mullahey, 145 Ill. 383, 34 N. E. 36 (cutting timber from a tract of woodland and paying taxes thereon); White v. White, 105 Ill. 313 (tract enclosed, owner gathered fruit yearly); Rogers v. Turpin, 105 Iowa, 183, 74 N. W. 925 (use of land as pasture); Bolland v. O'Neal, 81 Minn. 15, 83 Am. St. Rep. 362, 83 N. W. 471 (timber land occupied by logging camps); Millard v. Wegner, (Nebr.) 94 N. W. 802 (tract enclosed and used as pasture); Gardom v. Chester, 60 N. J. Eq. 238, 46 Atl. 602 (occupancy not necessarily continuous; interrupted occupation of house at a summer resort); League v. Buena Ventura Stock Co., 2 Tex. Civ. App. 448, 21 S. W. 307 (enclosing the land with other land in a large pasture containing 28,000 acres).

In general, as to the sufficiency of the acts of occupation, see Smith v. Gale, 144 U. S. 509, 12 Sup. Ct. 674 (possession of part is sufficient); Mallett v. Kaehler, 141 Ill. 70, 30 N. E. 549 (one of the lots occupied partly by a barn, timber and grass taken from both lots); Boyer v. Chandler, 160 Ill. 394, 43 N. E. 803, 32 L. R. A. 113 (possession of floor of building is notice of contract to purchase the entire premises); Tillotson v. Mitchell, 111 Ill. 518 (sufficient although owner was a carpenter and was engaged in the construction of a house on the lot); Truth Lodge, No. 213, A. F. & A. M. v. Barton, 119 Iowa, 230, 97 Am. St. Rep. 303, 93 N. W. 106 (possession of upper floor of building); Mattfield v. Huntington, (Tex. Civ. App.) 43 S. W. 53 (possession by lessee of part is notice of landlord's right to the whole); Hottenstein v. Lerch, 104 Pa. St. 454 (actual cultivation as farm land every year is sufficient); Sweatman v. Edmunds, 28 S. C. 62, 5 S. E. 165 (possession of part is sufficient); Ramirez v. Smith, 94 Tex. 184, 59 S. W. 258 (possession of part notice of claim to whole); Kuhl v. Lightle, 29 Wash. 137, 69 Pac. 630 (knowledge of the erection of a schoolhouse puts on inquiry as to an unrecorded deed to the school district); Dennis v. Northern Pac. R. Co., 20 Wash. 320, 55 Pac. 210 (occupation by railway tracks of a strip of the land purchased puts on inquiry as to the width of the right of way). See to same effect, Day v. Railroad Co., 41 Ohio St. 392; Ward v. Metropolitan El. Ry. Co., 152 N. Y. 39, 46 N. E. 319, affirming 82 Hun 545, 31 N. Y. Suppl. 527 (operation of an elevated railway in a street is open possession of the easements appurtenant to abutting lots).

is equally clear and just in its theory, great doubt and difficulty might arise in its application, especially under the conditions of land ownership which ordinarily exist in this country. Does the vacancy of possession within the true meaning of the rule include every case where the premises are not in the visible, actual, continuous occupation of some person claiming a right as owner, tenant, or otherwise? or is it confined to those cases where no person is known to exercise any acts of dominion or ownership over the land? The answer to this question given by the English courts is very definite and certain. It is well settled in England that the possession which may amount to a constructive notice need not be that of the actual occupant, the terre-tenant. Where the purchaser of land has knowledge or information that its rents and profits are received by a person other than his grantor or vendor, who claims to be the owner, this fact is constructive notice to the purchaser of the title and interest of the one thus receiving the rents and profits, and of the rights of all parties holding under such title.[2] [a] It is also settled by the English decisions that a rightful possession, in order to put a subsequent purchaser upon inquiry, and to affect him with constructive notice, need not be an actual occupation, continually visible or actively asserted without cessation. "If a man has once received rightful and actual possession of land, he may go to any distance from it without authorizing any servant, or agent, or other person to enter upon it or look after it; may leave

2 Knight v. Bowyer, 2 De Gex & J. 421; 23 Beav. 609. Of course, the *mere fact* that a third person is receiving the rents and profits is not of itself any notice to a purchaser; the purchaser must receive information or acquire knowledge of such fact, in order that he may be affected with notice. It is plain, also, that this particular case falls under the second general rule as stated *ante*, in § 615.

(a) Though the purchaser's actual knowledge that the rents are paid to some person whose receipt is inconsistent with the title of the vendor is notice of that person's rights, knowledge that they are paid to a real estate agent does not put upon inquiry: Hunt v. Luck, [1901] 1 Ch. 45, 70 Law J. Ch. 30, 83 Law T. (N. S.) 479, 49 Wkly. Rep. 155.

it for years uncultivated and unused; may set no mark of ownership upon it,— and his possession may nevertheless still continue, at least unless his conduct afford evidence of intentional abandonment, which such conduct as I have mentioned would not necessarily do."[3b] In order that such a *constructive* possession by a person claiming rightfully should charge the purchaser with notice of the party's interests, the purchaser must receive information or have knowledge of the *actual* possession originally taken, the *actual* occupation of the premises originally maintained, by the adverse claimant. Unless this prior fact should be brought to the knowledge of the purchaser, there would certainly be nothing in the circumstances described sufficient to put him upon an inquiry. The effect thus given to a mere *constructive* possession by the English courts cannot be reconciled, in my opinion, with rules concerning the notice resulting from possession which have been established in this country by the overwhelming weight of authority, especially when taken in connection with our statutory system of recording, and the judicial interpretation which has been given to that legislation. It seems to be a necessary conclusion from the unvarying line of decisions, some of which are cited in the foregoing paragraphs, that as against a subsequent grantee or encumbrancer whose deed or mortgage has been duly recorded, no *mere constructive* possession of a prior and even rightful claimant, consisting only of an original act of taking actual possession, followed by a leaving of the premises entirely vacant and unoccupied, can amount to the constructive notice from possession as

[3] Holmes v. Powell, 8 De Gex, M. & G. 572, 581, per Turner, L. J.; see *ante*, § 614, note, where the passage is quoted in full. See also, to the same general effect, Wilson v. Hart, L. R. 1 Ch. 463, 467; 2 Hem. & M. 551; Clements v. Welles, L. R. 1 Eq. 200; 35 Beav. 513; Feilden v. Slater, L. R. 7 Eq. 523; Parker v. Whyte, 1 Hem. & M. 167; and compare the American cases Hatch v. Bigelow, 39 Ill. 136; Krider v. Lafferty, 1 Whart. 303.

(b) To the same effect, Chapman v. Chapman, 91 Va. 397, 21 S. E. 813, 50 Am. St. Rep. 846, relying on Holmes v. Powell.

recognized by the American law. This result seems necessarily to follow from the provisions of the recording acts, and the judicial interpretation given to them in many of the states.[4] [c]

§ 622. **Time of the Possession.**—In order that any kind of possession, whether actual and visible, or simply constructive, or consisting in the rightful receipt of rents and profits, may put a purchaser upon an inquiry, and operate as a constructive notice, it must exist at the time of the transaction by which his rights and interests are created. A possession which had ended before, or which did not commence until after, the sale to him was made, or the conveyance or encumbrance was executed, could not affect him with any constructive notice.[1] [a]

§ 623. **The Presumption is Rebuttable.**— We have seen that the *rationale* of the doctrine consists in the legal presumption that the party dealing with respect to the estate, seeing, hearing, or learning that it was possessed by a stranger, thereupon made an inquiry into the grounds of such possession, and became informed of all the facts which could be ascertained through a diligent inquiry, and this presumed information is the constructive notice. The question is therefore a vital one, whether this legal presumption is absolute and conclusive, so that the party is neces-

[4] See Brown v. Volkening, 64 N. Y. 76, 82, 83, in which the effect of a mere *constructive* possession as operating to charge a subsequent purchaser with notice under the recording statutes is discussed, and the positions of the text are fully sustained.

[1] Mcehan v. Williams, 48 Pa. St. 238; Boggs v. Varner, 6 Watts & S. 474; Hewes v. Wiswell, 8 Me. 94; Wright v. Wood, 23 Pa. St. 120, 130, 131.

(c) In United States v. Minor, 29 Fed. 134, it was held that possession of agricultural lands, over a quarter of a mile away from a tract of unin-closed and uncultivated timber land, was not constructive notice to a *bona fide* purchaser of the timber land.

(a) Roussain v. Norton, 53 Minn. 560, 55 N. W. 747 ("a former possession, which has ceased, will not suffice, although there be evidence of its having existed still apparent on the land"); Scotch Lumber Co. v. Sage, 132 Ala. 598, 90 Am. St. Rep. 932, 32 South. 607; Chapman v. Chapman, 91 Va. 397, 21 S. E. 813, 50 Am. St. Rep. 846 (citing this section of the text).

sarily charged with the notice, or whether it is only *prima facie* and rebuttable. In a very large number of the decided cases, the language used by the court, while dealing with constructive notice arising from possession, does undoubtedly speak of this presumption, without any limitations, as though it were absolute and conclusive, and as though the constructive notice were necessary and certain.[1] If we should rely solely upon the general language of these judicial *dicta,* and upon the great preponderance in numbers of the cases in which such expressions of opinion are to be found, we should certainly be compelled to regard the question as definitely answered,— the presumption as absolute and conclusive. When, however, we examine these judicial utterances, when we apply to them the settled rules of interpretation, when we go below their surface and discover the real points *decided,* we shall find that the courts have not, in the vast majority of instances, consciously and intentionally defined the nature of the presumption, and have not in an authoritative manner passed upon the question. Such a scrutiny will show very clearly that in by far the greater number of these decisions the real nature of the presumption was not consciously and intentionally before the courts for examination. The cases referred to, with a few possible exceptions, belong to one or another of the three following groups: 1. In some of them the court is simply announcing, in its most general form, the doctrine concerning constructive notice arising from possession by a stranger. The general rule is stated in its broadest manner; all special facts and circumstances which might modify it are passed over in silence; all restrictions and limitations which might apply to it are tacitly ignored, or postponed for future consideration whenever occasion may require it.[2] The sweeping language used by judges in cases of this kind is clearly not decisive upon the nature of the presumption. 2. A second group includes those cases

[1] See *ante,* cases under §§ 614, 615.

[2] See *ante,* cases under §§ 614, 615.

in which, upon the special facts and circumstances before it, the court really decides that a purchaser or encumbrancer, knowing the fact of possession by a stranger, and being put upon inquiry thereby, has either wholly neglected to make any inquiry, or has failed to prosecute it with due diligence, and is therefore *conclusively* presumed to have obtained full information, and is absolutely charged with notice. In cases of this kind, the language of the judges, however general it may be, must, upon the most elementary rules of interpretation, be confined to the very facts of the particular controversy; and the court only intends to decide that a party, being put upon an inquiry, and failing to prosecute the inquiry in a proper manner, is conclusively presumed to have obtained all the information possible, and is affected with an absolute notice.[3] In still a third group the courts have merely held that where a prior grantee is in *rightful* possession under an unrecorded conveyance, and his possession is open, notorious, visible, and exclusive, a subsequent purchaser or encumbrancer, even though his deed or mortgage is put upon record, becomes charged with an absolute notice. This is, as it seems to me, only another mode of stating the well-settled rule, that when a party is put upon an inquiry and the circumstances are such that the inquiry, if duly prosecuted, must necessarily lead to knowledge of the prior adverse title, the presumption that he obtained the knowledge is conclusive. In short, the facts of these cases are so strong that the party put upon the in-

[3] Many of the cases which *seem* to treat the presumption as conclusive properly belong to this group: Gouverneur v. Lynch, 2 Paige, 300; Grimstone v. Carter, 3 Paige, 421; 24 Am. Dec. 230; Brice v. Brice, 5 Barb. 533; Tuttle v. Jackson, 6 Wend. 213; 21 Am. Dec. 306; Hanly v. Morse, 32 Me. 287; McLaughlin v. Shepherd, 32 Me. 143; 52 Am. Dec. 646; Webster v. Maddox, 6 Greenl. 256; Kent v. Plummer, 7 Greenl. 464; Jaques v. Weeks, 7 Watts, 272; Kerr v. Day, 14 Pa. St. 112; 53 Am. Dec. 526; Hardy v. Summers, 10 Gill & J. 316; 32 Am. Dec. 167; Macon v. Sheppard, 2 Humph. 335; Morton v. Robards, 4 Dana, 258; Brush v. Halloway, 2 J. J. Marsh. 180; Burt v. Cassety, 12 Ala. 739; Scroggins v. Dougal, 8 Ala. 382; and see notes under §§ 614, 615.

quiry cannot by any evidence rebut and overcome the *prima facie* presumption.[4] [a]

§ 624. Same Continued.— There is, on the other hand, an able and well-considered series of decisions in which the nature of the legal presumption arising from possession has been directly and intentionally examined. In all these cases, where the court has deliberately met the question, has intentionally investigated the presumption arising from possession, and has definitely passed upon its nature, it has been held that the presumption, under ordinary circumstances, or independently of special and controlling circumstances, is not a conclusive one, but is only *prima facie*, and may be rebutted and overcome by proper evidence showing that the party has made a diligent inquiry, and has nevertheless failed to discover the real truth concerning the existence of an adverse right or interest. This conclusion may be considered as settled by the decided weight of judicial authority, English and American.[1] [a] It is also in

[4] School Dist. v. Taylor, 19 Kan. 287; Noyes v. Hall, 97 U. S. 34, 38; Cabeen v. Breckenridge, 48 Ill. 91; Truesdale v. Ford, 37 Ill. 210; Dunlap v. Wilson, 32 Ill. 577; Emmons v. Murray, 16 N. H. 385; Farmers' L. & T. Co. v. Maltby, 8 Paige, 361; Strickland v. Kirk, 51 Miss. 795, 797; Moss v. Atkinson, 44 Cal. 3, 17; Killey v. Wilson, 33 Cal. 690; Russell v. Sweezey, 22 Mich. 235, 239; Tunison v. Chamblin, 88 Ill. 378, 390. And see Tankard v. Tankard, 79 N. C. 54, 56; Edwards v. Thompson, 71 N. C. 177, 179.

[1] Whitbread v. Jordan, 1 Younge & C. 303, per Alderson, B.; Jones v. Smith, 1 Hare, 43, 60–70, per Wigram, V. C.; Hanbury v. Litchfield, 2 Mylne & K. 629, 633; Williamson v. Brown, 15 N. Y. 354, 360, 362 (see opinion quoted *ante*, in note under § 606); Thompson v. Pioche, 44 Cal. 508, 516; Fair v. Stevenot, 29 Cal. 486; Rogers v. Jones, 8 N. H. 264; Flagg v. Mann, 2 Sum. 486, 554; Kerr v. Day, 14 Pa. St. 112; 53 Am. Dec. 526; and see, on the general question of the presumption arising from facts sufficient to put a party upon inquiry being overcome by evidence of an inquiry diligently made, but unsuccessful, Penny v. Watts, 1 Macn. & G. 150; Ware v. Lord Egmont, 4 De Gex, M. & G. 460; Roberts v. Croft, 2 De Gex & J. 1; Espin v. Pemberton, 3 De Gex & J. 547; Hunt v. Elmes, 2 De Gex, F. & J. 578; Hewitt v. Loosemore, 9 Hare, 449.

§ 623, (a) See, also, Tankard v. Tankard, 84 N. C. 286.

§ 624, (a) Emeric v. Alvarado, 90 Cal. 444, 471–474, 27 Pac. 356 (since possession is only evidence tending to show notice, a finding of possession is consistent with a finding of no notice); Hillman v. Levy, 55 Cal. 117; Scheerer v. Cuddy, 85 Cal. 271, 34 Pac. 713; Alliance Trust Co. v.

complete conformity with principle. Undoubtedly, in ordinary cases, where a third person is possessed under a claim of right or title which is actually valid, an inquiry prosecuted with reasonable diligence from parties naturally conversant with the facts will generally result in a discovery of the truth, and the presumption thus becomes conclusive, not because it is essentially so, but because it is necessarily confirmed by the existing facts,— no evidence can overturn it. A different condition of circumstances, however, might easily exist, and often does exist. The purchaser put upon an inquiry might exhaust all the reasonable modes of acquiring knowledge; he might receive incorrect information from the parties acquainted with the real facts, and on whom he had a right to rely; he might even be misled by the person in possession; he might act in the most perfect good faith,— and come to the reasonable conclusion that the possession was not based upon any adverse claim, and was wholly subordinate to his own right and that of his immediate grantor or mortgagor. To say that the presumption is, under such circumstances, conclusive, and the constructive notice is absolute, would be to violate all the equitable reasons upon which the whole doctrine of constructive notice is founded.[2]

2 As a simple illustration, suppose the subsequent purchaser, who is put upon an inquiry, should go to the party in possession, and should categorically demand from him an explanation,— a statement of the right under which he claimed to hold his possession — and he should be told in explicit terms that the possession was based upon no right,— was merely by sufferance of the owner and grantor,— and that it could not in any way interfere with the purchaser's title; would the possessor be permitted to contest the purchaser's right, to allege that he was charged with notice, because the presumption arising from his own possession was conclusive? See Leach v. Ansbacher, 55 Pa. St. 85.[b]

O'Brien, 32 Oreg. 333, 50 Pac. 801, 51 Pac. 640, citing § 623 of the text (presumption of notice from possession fails where an inquiry would not be likely to elicit the truth, as where the occupant put the apparent legal title in another for the purpose of defrauding creditors).

(b) That the presumption of notice is overcome where, upon inquiry being made, the occupant disclaims title, see Trumpower v. Marcy, 92 Mich. 529, 52 N. W. 999; Barchent v. Sellick, 69 Minn. 513, 95 N. W. 458; Ellison v. Torpin, 44 W. Va. 414, 30 S. E. 183, opinion of English, J.

§ 625. **Possession by a Lessee or Tenant.**— It is the settled rule in England that possession by a lessee is constructive notice to a purchaser not only of the tenant's rights and interests directly growing out of or connected with the lease itself, but also of all rights and interests which he may have acquired by other and collateral agreements, as, for example, from a contract to convey the land, or to renew the lease, and the like. This rule has also been adopted by American courts.[1] [a] It applies to a lessee, a sublessee, and a tenant from year to year.[2] Upon the question whether the lessee's possession is also a constructive notice of the lessor's title, there seems to be a conflict among the English and American decisions. It is settled in England that a purchaser or encumbrancer is not by such possession charged with a constructive notice of the nature or extent of the landlord's title and interest.[3] [b] This restrictive rule of the

1 Daniels v. Davison, 16 Ves. 249; 17 Ves. 433; Douglas v. Witterwronge (cited), 16 Ves. 253; Knight v. Bowyer, 23 Beav. 609, 641; Lewis v. Bond, 18 Beav. 85; Wilbraham v. Livesey, 18 Beav. 206; Meux v. Maltby, 2 Swanst. 277, 281; Crofton v. Ormsby, 2 Schoales & L. 583; Powell v. Dillon, 2 Ball & B. 416; Bailey v. Richardson, 9 Hare, 734; Barnhart v. Greenshields, 9 Moore P. C. C. 18, 33, 34; Kerr v. Day, 14 Pa. St. 112; 53 Am. Dec. 526; Cunningham v. Pattee, 99 Mass. 248, 252.

2 Feilden v. Slater, L. R. 7 Eq. 523; Parker v. Whyte, 1 Hem. & M. 167; Wilson v. Hart, L. R. 1 Ch. 463; 2 Hem. & M. 551; Clements v. Welles, L. R. 1 Eq. 200; 35 Beav. 513.

3 Jones v. Smith, 1 Hare, 43, 63, per Wigram, V. C.; Barnhart v. Greenshields, 9 Moore P. C. C. 18, 36; and when the person in actual possession is a sublessee, a purchaser is not thereby affected with notice of covenants contained in the original lease from which his right is derived: Hanbury v. Litchfield, 2 Mylne & K. 629, 633; Jones v. Smith, 1 Hare, 43, 62; and see *ante*, § 618.

(a) See *ante*, § 616 and notes; Morrison v. Herrick, 130 Ill. 631, 22 N. E. 537; Chesterman v. Gardner, 5 Johns. 29, 9 Am. Dec. 265; Phelan v. Brady, 119 N. Y. 587, 23 N. E. 1109, 8 L. R. A. 211; Anderson v. Brinser, 129 Pa. St. 376, 11 Atl. 809, 18 Atl. 520, 6 L. R. A. 205; Smith v. James, 22 Tex. Civ. App. 154, 54 S. W. 41; Allen v. Gates, 73 Vt. 222, 50 Atl. 1092 (citing this section of the text). *Contra*, see Red River Val. L. & I. Co. v. Smith, 7 N. Dak. 23, 74 N. W. 194; Brown v. Roland, 11 Tex. Civ. App. 648, 33 S. W. 273; Smith v. Miller, 63 Tex. 72.

(b) Hunt v. Luck, [1901] 1 Ch. 45, 70 Law J. Ch. 30, 83 Law T. (N. S.) 479, 49 Wkly. Rep. 155; affirmed on appeal, [1902] 1 Ch. 428. See *ante*, § 618 and notes.

English courts has been adopted and followed by some of the American cases.[4] Another and more numerous group of decisions by the courts of various states hold that a purchaser, by means of a lessee's possession, is put upon an inquiry respecting all the rights and interests under which he holds and which affect the property, and is therefore charged with a constructive notice of the lessor's title and estate.[5 c] From the number and authority of the decisions

[4] Flagg v. Mann, 2 Sum. 486, 557; Jaques v. Weeks, 7 Watts, 261, 272; Beattie v. Butler, 21 Mo. 313; 64 Am. Dec. 234.

[5] O'Rourke v. O'Connor, 39 Cal. 442, 446; Thompson v. Pioche, 44 Cal. 508, 516; Dickey v. Lyon, 19 Iowa, 544; Nelson v. Wade, 21 Iowa, 49; Morrison v. March, 4 Minn. 422; Bank v. Godfrey, 23 Ill. 579, 607; Pittman v. Gaty, 5 Gilm. 186; Bank v. Flagg, 3 Barb. Ch. 316; Kerr v. Day, 14 Pa. St. 112; 53 Am. Dec. 526; Sergeant v. Ingersoll, 15 Pa. St. 343, 348; Wright v. Wood, 23 Pa. St. 120, 130; Hood v. Fahnestock, 1 Pa. St. 470; 44 Am. Dec. 147; Sailor v. Hertzog, 4 Whart. 259.

(c) See *ante*, § 618, and notes; Crawford v. Chicago, etc., R. R. Co., 112 Ill. 314; Thomas v. Burnett, 128 Ill. 37, 21 N. E. 352, 4 L. R. A. 222; Haworth v. Taylor, 108 Ill. 275; Mallett v. Kaehler, 141 Ill. 70, 30 N. E. 549; A. R. Beck Lumber Co. v. Rupp, 188 Ill. 562, 80 Am. St. Rep. 190, 59 N. E. 429; Rea v. Crossman, 95 Ill. App. 70; Bowman v. Anderson, 82 Iowa, 210, 47 N. W. 1087, 31 Am. St. Rep. 473; Hannan v. Seidentopf, 113 Iowa, 658, 86 N. W. 44; O'Neill v. Wilcox, 115 Iowa, 15, 87 N. W. 742; Townsend v. Blanchard, 117 Iowa, 36, 90 N. W. 519; Wilkins v. Bevier, 43 Minn. 213, 19 Am. St. Rep. 238, 45 N. W. 157 (*dictum*); Wolf v. Zabel, 44 Minn. 90, 46 N. W. 81; Northwestern Land Co. v. Dewey, 58 Minn. 359, 59 N. W. 1085; Bratton v. Rogers, 62 Miss. 281; Randall v. Lingwall, (Oreg.) 73 Pac. 1; Hottenstein v. Lerch, 104 Pa. St. 454; Lance v. Gorman, 136 Pa. St. 200, 20 Atl. 792, 20 Am. St. Rep. 914; Duff v. McDonough, 155 Pa. St. 10, 25 Atl. 608; Woodson v. Collins, 56 Tex. 168; Glendenning v. Bell, 70 Tex. 632, 8 S. W. 324; League v. Snyder, 5 Tex. Civ. App. 13, 23 S. W. 825; Le Doux v. Johnson, (Tex. Civ. App.) 23 S. W. 902; Duncan v. Matula, (Tex. Civ. App.) 26 S. W. 638; Allison v. Pitkin, (Tex. Civ. App.) 33 S. W. 293; Mattfield v. Huntington, 17 Tex. Civ. App. 716, 43 S. W. 53; Huntington v. Mattfield, (Tex. Civ. App.) 55 S. W. 361; Ellison v. Torpin, 44 W. Va. 414, 30 S. E. 183, opinion of Brannon, P.; Coe v. Manseau, 62 Wis. 81, 22 N. W. 155. The possession of a tenant of the grantor who holds over and attorns to the grantee has been held to impart notice to a subsequent purchaser of the grantee's unrecorded conveyance: Mainwarring v. Templeman, 57 Tex. 205, 213; Duncan v. Matula, (Tex. Civ App.) 26 S. W. 638; Duff v. McDonough, 155 Pa. St. 10, 25 Atl. 608; but other cases require such a visible change as to arrest attention and put creditors and subsequent purchasers upon inquiry: Veasie v. Parker, 23 Me. 170; Bynum

by which it is sustained, this conclusion may justly be regarded as the American doctrine.

§ 626. 3. By Recital or Reference in Instruments of Title — General Rule.— Wherever a purchaser holds under a conveyance, and is obliged to make out his title through that deed, or through a series of prior deeds, the general rule is firmly established that he has constructive notice of every matter connected with or affecting the estate which appears, either by description of parties, by recital, by reference, or otherwise, on the face of any deed which forms an essential link in the chain of instruments through which he must derive his title. The reasons for this doctrine are obvious and most convincing; in fact, there could be no security in land ownership unless it were strictly enforced. The right of such a purchaser is, under our system of conveyancing, confined to the instruments which constitute his chain of title, which are his title deeds, and everything appearing in those instruments and forming a legitimate part thereof is a necessary element of his title. The *rationale* of the rule is equally clear and certain. Any description, recital of fact, reference to other documents, puts the purchaser upon an inquiry; he is bound to follow up this inquiry step by step, from one discovery to another, from one instrument to another, until the whole series of title deeds is exhausted, and a complete knowledge of all the matters referred to in their provisions and affecting the estate is obtained. Being thus put upon the inquiry, he is conclusively presumed to have prosecuted it until its final result, and with ultimate success. The purchaser's ignorance that a particular instrument forming a link in his chain of title was in existence, and his consequent failure to examine it, would not in the slightest affect the operation of the rule. An imperative duty is laid

v. Gold, 106 Ala. 427, 17 South. 667; Griffin v. Hall, 111 Ala. 601, 20 South. 485; 115 Ala. 647, 22 South. 156; Powers v. State, 129 Ala. 126, 29 South. 784; Troy v. Walter, 87 Ala. 233, 6 South. 54; Wahrenberger v. Waid, 8 Colo. App. 200, 45 Pac. 518; Stockton v. National Bank, (Fla.) 34 South. 897; Stevens v. Magee, 81 Miss. 644, 33 South. 73; Wilkins v. Bevier, 43 Minn. 213, 45 N. W. 157, 19 Am. St. Rep. 238.

upon him to ascertain *all* the instruments which constitute essential parts of his title, and to inform himself of all that they contain.[6 a]

[6] Frye v. Partridge, 82 Ill. 267, 270; Chicago etc. R. R. Co. v. Kennedy, 70 Ill. 350, 361, 362; Rupert v. Mark, 15 Ill. 540; Merrick v. Wallace, 19 Ill. 486; Morrison v. Kelly, 22 Ill. 610; 74 Am. Dec. 169; Morris v. Hogle, 37 Ill. 150; 87 Am. Dec. 243; Doyle v. Teas, 4 Scam. 202; McConnell v. Reed, 4 Scam. 117; Allen v. Poole, 54 Miss. 323; Deason v. Taylor, 53 Miss. 697, 701; Wiseman v. Hutchinson, 20 Ind. 40; Croskey v. Chapman, 26 Ind. 333; Johnston v. Gwathmey, 4 Litt. 317; 14 Am. Dec. 135; Corbitt v. Clenny, 52 Ala. 480, 483; Dudley v. Witter, 46 Ala. 664, 694, 695; Burch v. Carter, 44 Ala. 115, 117; Campbell v. Roach, 45 Ala. 667; Witter v. Dudley, 42 Ala. 616, 621, 625; Newsome v. Collins, 43 Ala. 656, 663; Major v. Buckley, 51 Mo. 227, 231; Ridgeway v. Holliday, 59 Mo. 444; Willis v. Gay, 48 Tex. 463; 26 Am. Rep. 328; Wood v. Krebbs, 30 Gratt. 708; Burwell's Ex'rs v. Fauber, 21 Gratt. 446; Long v. Weller's Ex'rs, 29 Gratt. 347; Brush v. Ware, 15 Pet. 93, 114; Mueller v. Engeln, 22 Bush, 441, 444; Stidham v. Matthews, 29 Ark. 650, 659, 660; Pringle v. Dunn, 37 Wis. 449, 464; 19 Am. Rep. 772; Fitzhugh v. Barnard, 12 Mich. 105; Case v. Erwin, 18 Mich. 434; Baker v. Mather, 25 Mich. 51, 53; Frost v. Beekman, 1 Johns. Ch. 288, 298; Howard Ins. Co. v. Halsey, 8 N. Y. 271; 59 Am. Dec. 478; Gibert v. Peteler, 38 N. Y. 165; 97 Am. Dec. 785; Acer v. Westcott, 46 N. Y. 384; 7 Am. Rep. 355; Murrell v. Watson, 1 Tenn. Ch. 342; Rafferty v. Mallory, 3 Biss. 362, 368, 369; Green v. Early, 39 Md. 223, 229; White v. Foster, 102 Mass. 375, 380; Acer v. Westcott, 1 Lans. 193, 197; Sigourney v. Munn, 7 Conn. 324; Christmas v. Mitchell, 3 Ired. Eq. 535; Hagthrop v. Hook's Adm'rs, 1 Gill & J. 270; Kerr v. Kitchen, 17 Pa. St. 433; Malpas v. Ackland, 3 Russ. 273; Davies v. Thomas, 2 Younge & C. 234; Greenfield v. Edwards, 2 De Gex, J. & S. 582; Pilcher v. Rawlins, L. R. 11 Eq. 53; Robson v. Flight, 4 De Gex, J. & S. 608; Clements v. Welles, L. R. 1 Eq. 200; Wilson v. Hart, L. R. 1 Ch. 463. The facts and decisions in a few of the earlier English cases throw much light upon the general rule, its operation and foundation. In Moore v. Bennett, 2 Ch. Cas. 246, and Bacon v. Bacon, Toth. 133, it was said that where a purchaser can only make out title by a deed which leads him to another fact, he shall not be deemed a purchaser without notice of that fact, but shall be *presumed* cognizant thereof; for it is *crassa negligentia* that he sought not after it. In Bisco v. Earl of Banbury, 1 Ch. Cas. 287, the rule was stated very clearly. A purchaser had actual notice of a certain mortgage. This mortgage deed referred to other encumbrances; and he was held to be charged with constructive notice of these encumbrances thus referred to in the mortgage. The court said: "The purchaser could not be

(a) This section of the text is cited in Cooke v. Caswell, 81 Tex. 678, 17 S. W. 385; Williamson v. Jones, 43 W. Va. 562, 64 Am. St. Rep. 891, 27 S. E. 411 (purchaser at judicial sale has notice of all the facts which the record, if inspected, would communicate). See, also, Patman v. Harland, L. R. 17 Ch. Div. 353; Central Trust Co. v. W. St. L. & P. R. Co., 29 Fed. 546; s. c. on appeal, Joy v. St. Louis, 138 U. S. 1, 11 Sup. Ct.

§ 627. Nature of the Notice.— The notice which thus results from recitals and other matters contained in title deeds, within the operation of the general rule, is absolute

ignorant of the mortgage, and ought to have seen it, and that would have led him to the other deeds, in which, pursued from one to another, the whole case must have been discovered to him." In Coppin v. Fernyhough, 2 Brown Ch. 291, it was held that a purchaser who has actual notice of one instrument affecting the estate has constructive notice of all other instruments to which an examination of the first could have led him.

243; Thompson v. Sheppard, 85 Ala. 611, 5 South. 334; Gaines v. Summers, 50 Ark. 322, 7 S. W. 301; Herring v. Fitts, 43 Fla. 54, 99 Am. St. Rep. 108, 30 South. 804; Simms v. Freihen, 100 Ga. 607, 28 S. E. 288; Atlanta Land & Loan Co. v. Haile, 106 Ga. 498, 32 S. E. 606; Kerfoot v. Cronin, 105 Ill. 609; Crawford v. Chicago, etc., R. Co., 112 Ill. 314; Stokes v. Riley, 121 Ill. 166, 11 N. E. 877; Leiter v. Pike, 127 Ill. 287, 20 N. E. 23; Zear v. Boston Safe Dep. & Tr. Co., 2 Kan. App. 505, 43 Pac. 977; Knowles v. Williams, 58 Kan. 221, 48 Pac. 856; Taylor v. Mitchell, 58 Kan. 194, 48 Pac. 859; Shuttleworth v. Kentucky C., I. & D. Co., 22 Ky. Law Rep. 1806, 61 S. W. 1013; Farmers & Drovers Bk. v. German Ins. Bank, 23 Ky. Law Rep. 2008, 66 S. W. 280; International Dev. Co. v. Howard, 24 Ky. Law Rep. 266, 68 S. W. 459; Smith v. Burgess, 133 Mass. 513, citing §§ 626–628 of the text; Norris v. Hill, 1 Mich. 202; Stewart v. Matheny, 66 Miss. 21, 5 South. 387, 14 Am. St. Rep. 538; Gulf Coast Canning Co. v. Foster, (Miss.) 17 South. 683; Lydings v. Pitcher, 82 Mo. 379; National Bank of Commerce v. Morris, 114 Mo. 255, 21 S. W. 511, 35 Am. St. Rep. 754, 19 L. R. A. 463; Seiberling v. Tipton, 113 Mo. 373, 21 S. W. 4; Loring v. Groomer, 110 Mo. 632, 19 S. W. 950; Hubbard v. Knight, 52 Nebr. 400, 72 N. W. 473; Carter v. Leonard, (Nebr.) 91 N. W. 574; Buchanan v. Balkum, 60 N. H. 406; Westervelt v. Wyckoff, 32 N. J. Eq. 188; Spielman v. Hunt, 36 N. J. Eq. 199, 206; Jennings v. Dixey, 36 N. J. Eq. 490; Condit v. Bigalow, 64 N. J. Eq. 504, 54 Atl. 160; Roll v. Rea, 50 N. J. Law, 264, 12 Atl. 905, citing this section; Sweet v. Henry, 175 N. Y. 268, 67 N. E. 574; Gibson v. Winslow, 46 Pa. St. 380, 84 Am. Dec. 552; Hancock v. McAvoy, 151 Pa. St. 439, 25 Atl. 48; Tate v. Clement, 176 Pa. St. 550, 35 Atl. 214; Jennings v. Bloomfield, 199 Pa. St. 638, 49 Atl. 135; Payne v. Abercrombie, 10 Heisk. 161; Christian v. Hughes, 12 Tex. Civ. App. 622, 36 S. W. 298; Montgomery v. Noyes, 73 Tex. 203, 11 S. W. 138; Bergman v. Blackwell, (Tex. Civ. App.) 23 S. W. 243; Powers v. Smith, (Tex. Civ. App.) 29 S. W. 416; Lindley v. Nunn, 17 Tex. Civ. App. 70, 42 S. W. 310; O'Connor v. Vineyard, (Tex. Civ. App.) 43 S. W. 55; Jemison v. Scottish-American Mortgage Co., 19 Tex. Civ. App. 232, 46 S. W. 886; Smith v. Farmers' Loan & Trust Co., 21 Tex. Civ. App. 170, 51 S. W. 515; Stone v. Kahle, 22 Tex. Civ. App. 185, 54 S. W. 375; Wells v. Houston, 23 Tex. Civ. App. 629, 57 S. W. 584; White v. Provident Nat. Bank, 27 Tex. Civ. App. 487, 65 S. W. 498; McCoy v. Cunningham, 27 Tex. Civ. App. 476, 65 S. W. 1084; Montgomery v. Noyes, 73 Tex. 203, 11 S. W. 138; Golson v. Fielder, 2 Tex.

in its nature. The party having been put upon an inquiry, the presumption that he obtained a knowledge of *all* the facts which could be ascertained by means of a diligent inquiry prosecuted through the entire chain of title deeds, and through all the instruments referred to, is conclusive; it cannot be rebutted by any evidence of a failure to discover the truth, nor even by proof of ignorance that instruments affecting the title were in existence. This presumption extends to unrecorded documents as well as to those which have been duly recorded.[1]

§ 628. Extent of the Notice.— Where, under the operation of the foregoing general rule, a purchaser has notice of a title deed, he is presumed to know all its contents, and is bound thereby. As an illustration, notice of a lease includes

[1] Corbitt v. Clenny, 52 Ala. 480, 483; Stidham v. Matthews, 29 Ark. 650, 659, 660; Howard Ins. Co. v. Halsey, 8 N. Y. 271; 59 Am. Dec. 478; 4 Sand. 565; Johnson v. Thweatt, 18 Ala. 741; Wailes v. Cooper, 24 Miss. 208; Honore's Ex'rs v. Bakewell, 6 B. Mon. 67; 43 Am. Dec. 147; Nelson v. Allen, 1 Yerg. 360; and see many of the cases cited in the last preceding note. In fact, all the decisions, either explicitly or implicitly, treat the presumption as conclusive, and the notice as absolute.[a]

Civ. App. 400, 21 S. W. 173; Waggoner v. Dodson, 96 Tex. 415, 73 S. W. 517; Brotherton v. Anderson, 27 Tex. Civ. App. 587, 66 S. W. 682; Lovejoy v. Raymond, 58 Vt. 509, 2 Atl. 156; Flanary v. Kane, (Va.) 46 S. E. 312; Roanoke Brick & Lime Co. v. Simmons, (Va.) 20 S. E. 955; Robinson v. Crenshaw, 84 Va. 348, 5 S. E. 222; Graff v. Castleman, 5 Rand. 207, 16 Am. Dec. 741; Morehead v. Horner, 30 W. Va. 548, 4 S. E. 448; Hoback v. Miller, (W. Va.) 29 S. E. 1014 (one claiming title through a judicial sale charged with notice that the decree was void for want of jurisdiction); Town v. Gensch, 101 Wis. 445, 76 N. W. 1096, 77 N. W. 893; Reichert v. Neuser, 93 Wis. 513, 67 N. W. 939. Of course recitals in deeds outside the chain of title do not constitute constructive notice: Jenkins v. Southern Ry. Co., 109 Ga. 35, 34 S. E. 355; Ramirez v. Smith, 94 Tex. 184, 59 S. W. 258 (recitals in judgment).

(a) See Hancock v. McAvoy, 151 Pa. St. 439, 25 Atl. 48; Tolbert v. Horton, 31 Minn. 518, 18 N. W. 647; Mahoney v. Flanagan, (Tex. Civ. App.) 78 S. W. 245. In Roll v. Rea, 50 N. J. Law, 264, 12 Atl. 905, it was held that a purchaser who was informed by a deed in his chain of title that out of a large tract of land, which included that conveyed to him, some parcels, not designated, had been conveyed to purchasers, but has no intimation that any of these purchasers had failed to record their deeds, need not look beyond the records; see, also, Paul v. Kerswell, (N. J. Eq.) 37 Atl. 1102.

in its effects a constructive notice of all its covenants.[1] [a] Furthermore, the necessity of prosecuting the inquiry, and the constructive notice arising therefrom, extend to every instrument forming an essential link in the direct chain of title through which the purchaser holds; that is, to the ultimate source of his title, and to every succeeding deed through which the title must be directly traced, and which is necessary to its establishment. The purchaser is thus charged with notice of every provision in each separate instrument constituting the entire series by which his own interest can be affected, or from which others have derived or

[1] Taylor v. Stibbert, 2 Ves. 437; Hall v. Smith, 14 Ves. 426; Walter v. Maunde, 1 Jacob & W. 181; Tanner v. Florence, 1 Ch. Cas. 259; Cosser v. Collinge, 3 Mylne & K. 282; Pope v. Garland, 4 Younge & C. 394; Martin v. Cotter, 3 Jones & L. 496, 506; Lewis v. Bond, 18 Beav. 85; Wilbraham v. Livesey, 18 Beav. 206; Cox v. Coventon, 31 Beav. 378; Drysdale v. Mace, 2 Smale & G. 225; Smith v. Capron, 7 Hare, 185; Clements v. Welles, L. R. 1 Eq. 200; 35 Beav. 513. To this rule there is an important limitation. In suits for specific performance of a contract the vendee will not always be charged with notice of all the covenants contained in a lease of the premises, of which lease he has a general notice. This is especially so where the lease contains unusual covenants seriously affecting the value of the property, and information concerning them has not been given. Lord Chancellor Sugden said of such a case: "It is a question of *bona fides*. Where the purchaser has completed his purchase, the rule [i. e., the rule stated in the text] is right; but where the purchaser is only bidding for something, and has not been informed of the obligations to which he will be liable in becoming the purchaser, it is always a question of good faith": Martin v. Cotter, 3 Jones & L. 496, 506. In Wilbraham v. Livesey, 18 Beav. 206, Sir John Romilly, M. R., held that while a person who contracts for a lease from another, with knowledge that he holds under a leasehold title, has notice of the ordinary covenants in the original lease, he will not be held to have notice of peculiar and unusual covenants. See also Van v. Corpe, 3 Mylne & K. 269, 277; Flight v. Barton, 3 Mylne & K. 282; Pope v. Garland, 4 Younge & C. 394, 401. The reason of this limitation is, that the remedy of specific performance is somewhat discretionary; or to speak more accurately, it will not be granted unless the position of the plaintiff is perfectly equitable, fair, and just.

(a) See, also, Gordon v. Constantine Hydraulic Co., 117 Mich. 620, 76 N. W. 142; Spielman v. Kliest, 36 N. J. Eq. 199, 206; Peer v. Wadsworth, (N. J. Eq.) 58 Atl. 379; Sweet v. Henry, 175 N. Y. 268, 67 N. E. 574.

may derive any rights.[2 b] Not only is a purchaser thus charged with a constructive notice of everything material in the deeds which form the direct chain through which his title is deduced, but if any of these conveyances should contain a recital of or reference to another deed otherwise collateral, and not a part of the direct series, he would by means of such recital or reference have notice of this collateral instrument, of all its contents, and of all the facts indicated by it which might be ascertained through an inquiry prosecuted with reasonable diligence.[3 c] Finally, the

2 See the cases cited *ante*, under § 626; also Howard Ins. Co. v. Halsey, 8 N. Y. 271; 59 Am. Dec. 478; 4 Sand. 565; Guion v. Knapp, 6 Paige, 35; 29 Am. Dec. 741; Harris v. Fly, 7 Paige, 421; Acer v. Westcott, 1 Lans. 193; Jumel v. Jumel, 7 Paige, 591; Briggs v. Palmer, 20 Barb. 392; 20 N. Y. 15; 21 N. Y. 574; Babcock v. Lisk, 57 Ill. 327; Dargin v. Becker, 10 Iowa, 571; Hamilton v. Nutt, 34 Conn. 501; McAteer v. McMullen, 2 Pa. St. 32; Martin v. Nash, 31 Miss. 324; George v. Kent, 7 Allen, 16; Pike v. Goodnow, 12 Allen, 472, 474; Brown v. Simons, 44 N. H. 475; Sanborn v. Robinson, 54 N. H. 239; and the same is true of parties deriving title from or through public grants or patents: Brush v. Ware, 15 Pet. 93, 111; Bonner v. Ware, 10 Ohio, 465.

3 Deason v. Taylor, 53 Miss. 697, 701; George v. Kent, 7 Allen, 16; Judson v. Dada, 79 N. Y. 373, 379; Green v. Slayter, 4 Johns. Ch. 38; Cambridge Bank v. Delano, 48 N. Y. 326; Hope v. Liddell, 21 Beav. 183; Jones v. Smith, 1 Hare, 43; 1 Phill. Ch. 244. Deason v. Taylor, 53 Miss. 697, is a very illustrative case. It holds that a purchaser is not only bound by notice of all recitals in the deed to himself, and of everything stated in the several conveyances which make up his direct chain of title, but he must investigate and explore every collateral matter to which his attention is thus directed. For example, a prior deed in a chain of title recited that the sale to the grantee therein was on credit. Held, that a subsequent purchaser was charged with constructive notice of the prior grantor's lien on the premises, and he was bound to ascertain whether that purchase price referred to had been paid or was still unpaid; and the fact that the time of payment as stated in the prior deed had passed did not excuse or in any way affect the necessity of his making inquiry. The court cited, as sustaining the rule thus laid down, Wiseman v. Hutchinson, 20 Ind. 40; Croskey v. Chapman, 26 Ind. 333; Johnston v. Gwathmey, 4 Litt. 317; 14 Am. Dec. 135; Honore v. Bakewell, 6 B. Mon. 67; 43 Am. Dec. 147;

(b) See, also, Robinson v. Crenshaw, 84 Va. 348, 5 S. E. 222.

(c) See Fouse v. Gilfillan, 45 W. Va. 213, 32 S. E. 178, 185 (deed referred to mechanic's lien, and notice of lien referred to contract. This put on inquiry as to other liens).

notice extends to all deeds and other instruments properly falling within the two preceding rules, whether they are recorded or unrecorded. In other words, a purchaser is charged with notice of any deed forming a part of his direct chain of title, and of every collateral instrument recited or referred to, as well when it is unrecorded as when it is recorded.[4 f]

Thornton v. Knox, 6 B. Mon. 74.[d] In Avent v. McCorkle, 45 Miss. 221, it was held that under the same circumstances a subsequent purchaser may assume the prior purchase price to have been paid, when a sufficient time has elapsed to bar any claim for such price under the statute of limitations. It has also been held that where one executes a deed, release, or other instrument affecting the title to real estate, which contains a reference to some other deed for a more complete description of the premises, or for some other purpose, he thereby becomes charged with notice of the instrument thus referred to, of its contents, and of the facts which it indicates: See Howard Ins. Co. v. Halsey, 8 N. Y. 271; 59 Am. Dec. 478; 4 Sand. 565; Guion v. Knapp, 6 Paige, 35; 29 Am. Dec. 741. In Howard Ins. Co. v. Halsey, *supra*, the rule was certainly carried to its extreme limits.[e]

[4] Stidham v. Matthews, 29 Ark. 650, 659, 660; Baker v. Mather, 25 Mich. 51, 53; White v. Foster, 102 Mass. 375, 380; Howard v. Chase, 104 Mass. 249; George v. Kent, 7 Allen, 16; Garrett v. Puckett, 15 Ind. 485; Ross v. Worthington, 11 Minn. 438; 88 Am. Dec. 95; Price v. McDonald, 1 Md. 403; 54 Am. Dec. 657; Hudson v. Warner, 2 Har. & G. 415. In Baker v. Mather, 25 Mich. 51, a second mortgagee had constructive notice of a prior unrecorded mortgage expressly mentioned in and excepted from the deed to his mortgagor, although this deed itself was also unrecorded. In White v. Foster, 102 Mass. 375, 380, a deed referred to a mortgage of the

(d) See, to the same effect, Thompson v. Sheppard, 85 Ala. 611, 5 South. 334; Tydings v. Pitcher, 82 Mo. 379 (purchaser put on inquiry as to the fact that the lien may have been extinguished by an unrecorded deed reconveying the premises to the former owner).

(e) And where the recitals in a recorded deed clearly indicate a resulting trust in favor of parties not named, whose relinquishment of a right referred to in the deed constitutes its consideration, a purchaser is thereby put on inquiry, and is charged with notice of what might have been learned by such inquiry: Montgomery v. Noyes, 73 Tex. 203, 11 S. W. 138. And where a deed recited that it was made subject to such rights as a city might have acquired by deed, condemnation proceeding, judgment, or otherwise, the recital was held to constitute notice of the existence and contents of a previous deed in escrow to the city by the grantor: Lester v. Pike, 127 Ill. 287, 20 N. E. 23.

(f) Central Trust Co. v. W. St. L. & P. R. Co., 29 Fed. 546; Talmadge v. Interstate B. & L. Assn., 105 Ga. 550, 31 S. E. 618; Crawford v. Chicago, etc., R. Co., 112 Ill. 314; Taylor v. Mitchell, 58 Kan. 194, 48

§ 629. Limitation — Matters Purely Collateral.[a] — To the general rule defining constructive notice from title papers, and to the subordinate rules contained in the preceding paragraph, there are one or two necessary limitations. In the first place, a purchaser is not charged with constructive notice[1] of absolutely every matter or fact stated in the instruments forming his direct chain of title, or in a collateral instrument connected with the direct series by reference or recital. The rules do not extend to, and he is not constructively bound by, a recital in any deed or other title paper of matter which is wholly foreign to the nature and objects of the instrument. In other words, he has no constructive notice of any matter contained in a recital which does not affect his own interest in the property held under or through the conveyance, or from which other persons do not derive any rights in such property; he is not charged with notice of any fact wholly collateral and foreign to the objects and effects of the instrument as a conveyance of an estate or interest to himself.[2] In the second place, the rules

land by the grantor, which was on record, and which reserved "all the trees growing on the land, the same having been sold to A." Held, that the grantee thereby had notice of A's title as a valid title, although A's deed of the trees was not recorded.

1 Of course he may have *actual* notice of any and every matter so stated, if it can be proved that he actually saw and read the provision containing the statement. Example of no such notice. See Sleeper v. Chapman, 121 Mass. 404.

2 Mueller v. Engeln, 12 Bush, 441, 444; Burch v. Carter, 44 Ala. 115, 117. Mueller v. Engeln, 12 Bush, 441, admirably illustrates this limitation. A purchaser held under a deed of land. It was held that he had no constructive

Pac. 859; National Bank of Commerce v. Morris, 114 Mo. 255, 35 Am. St. Rep. 754, 21 S. W. 511, 19 L. R. A. 463; Buchanan v. Balkum, 60 N. H. 406; Westervelt v. Wyckoff, 32 N. J. Eq. 188; Sweet v. Henry, 175 N. Y. 268, 67 N. E. 574; McKee v. Perchment, 69 Pa. St. 342; Hancock v. McAvoy, 151 Pa. St. 439, 25 Atl. 48; Tate v. Clement, 176 Pa. St. 550, 35 Atl. 214; Moore v. Scott, (Tex. Civ. App.) 38 S. W. 394; Robertson v. Guerin, 50 Tex. 317; Garrett v. Parker, (Tex. Civ. App.) 39 S. W. 147; Town v. Gensch, 101 Wis. 445, 76 N. W. 1096, 77 N. W. 893; Reichert v. Neuser, 93 Wis. 513, 67 N. W. 939. But see Crofut v. Wood, 3 Hun, 571. See also § 627.

(a) Cited in Cooke v. Caswell, 81 Tex. 678, 17 S. W. 385.

do not extend to any recital or statement contained in an instrument which is purely collateral, and deals with another subject-matter, and which is not connected with the direct series of title deeds by reference, although such collateral instrument may have been executed between the same parties. The purchaser is not charged with constructive notice of such a recital or statement.[3]

§ 630. Particular Instances.— The constructive notice arises not only from recitals, references, and other similar statements of fact, but also from the character and description of the parties to a deed or other instrument of title. A purchaser may thus be charged with notice of the rights held by third persons, from the fact that they are joined as parties to a conveyance, or from the character or description of them appearing in the instrument, as married women, trustees, administrators, executors, and the like.[1] The im-

notice of a clause in such deed which purported to be a bill of sale of certain chattels from the grantor, and attempted to reserve a lien thereon in favor of the grantor.

[3] Boggs v. Varner, 6 Watts & S. 469; Burch v. Carter, 44 Ala. 115, 117; Sleeper v. Chapman, 121 Mass. 404 (clause in a chattel mortgage).

[1] As illustrations: A grantee by a deed, in which the grantor is described as an administrator and conveys as such, has constructive notice of the trust and of all rights under it, and obtains no title as against the heirs to whom the land had descended: Rafferty v. Mallory, 3 Biss. 362, 368, 369; a married woman being a party is notice of her interest: Steedman v. Poole, 6 Hare, 193; the fact that persons uniting as parties are described as devisees may be notice of their rights: Burgoyne v. Hatton, Barn. Ch. 237; and see Attorney-General v. Hall, 16 Beav. 388. A purchaser by a deed from a grantor who is a trustee, whose only title is that of a trustee, may have notice of the trust, and will certainly have such notice if the grantor executes the deed in his character as trustee: See Sergeant v. Ingersoll, 7 Pa. St. 340; 15 Pa. St. 343, 348; Dudley v. Witter, 46 Ala. 664, 694; Johnson v. Thweatt, 18 Ala. 741; Witter v. Dudley, 42 Ala. 616, 621, 625; Coy v. Coy, 15 Minn. 119.[a] A grantee from one of two joint owners has con-

(a) In general, for illustrations of the rule that a party dealing with a trustee with reference to trust property, having notice of its character, is charged with notice of the terms of the trust, see Smith v. Ayer, 101 U. S. 320; Leake v. Watson, 58 Conn. 332, 18 Am. St. Rep. 270, 20 Atl. 343; Gale v. Hardy, 20 Fla. 171; Williamson v. Morton, 2 Md. Ch. 94; Abell v. Brown, 55 Md. 217; Marbury v. Ehlen, 72 Md. 206, 19 Atl. 648, 20 Am. St. Rep. 467 (corporation bound with such notice when

mediate parties — grantor and grantee, mortgagor and mortgagee — by whom and to whom the instrument is directly executed have, of course, a notice of everything which it contains. The notice is then really an *actual* one, rather than constructive; for the immediate parties are assumed to have read their own conveyance, and to have become acquainted with all of its contents.[2 b]

§ 631. When the Notice Arises.— The doctrine of constructive notice from title deeds applies only to instruments actually in existence; it does not extend to deeds which may be executed in the future, and which may possibly affect the

structive notice of the interest held by the other joint owner: Campbell v. Roach, 45 Ala. 667. A grantee from one who holds only under a land contract has notice of his own grantor's interest, and of the rights held by the vendor in the contract: Newsome v. Collins, 43 Ala. 656, 663.

2 For example: Where a deed of land described it as encumbered by a mortgage, the grantee would have actual notice of such encumbrance: Guion v. Knapp, 6 Paige, 35; 29 Am. Dec. 741; Bellas v. Lloyd, 2 Watts, 401; Kerr v. Kitchen, 17 Pa. St. 433; Knouff v. Thompson, 16 Pa. St. 357, 364; Hackwith v. Damrore, 1 Mon. 235. For instances in which a grantee has notice of his grantor's title as trustee, or as a joint owner, or as a vendee, under the deed of conveyance executed between them, see Sergeant v. Ingersoll, 7 Pa. St. 340; 15 Pa. St. 343, 348; Dudley v. Witter, 46 Ala. 664, 694; Witter v. Dudley, 42 Ala. 616, 621, 625; Johnson v. Thweatt, 18 Ala. 741; Campbell v. Roach, 45 Ala. 667; Newsome v. Collins, 43 Ala. 656, 663.

stock transferred on its books to a person designated as "trustee"); Mercantile Nat. Bank v. Parsons, 54 Minn. 56, 55 N. W. 825, 40 Am. St. Rep. 299; Jeffray v. Tower, 63 N. J. Eq. 530, 53 Atl. 182; Swarey v. De Montigny, 37 N. Y. Suppl. 503; In re Nimick's Estate, 179 Pa. St. 591, 36 Atl. 350 (property charged by decree with payment of partnership debts). When a recorded deed shows on its face, by proper construction, that the grantee does not take the beneficial interest in the property conveyed, but takes in trust for his wife, a purchaser from him is charged with notice of the trust: Creswell v. Jones, 68 Ala. 420.

(b) Council Bluffs Lodge v. Billups, 67 Iowa, 674, 25 N. W. 846; Tolbert v. Horton, 31 Minn. 518, 18 N. W. 647 (recital in party's own mortgage of a prior mortgage); Knox County v. Brown, 103 Mo. 223, 15 S. W. 382; Buchanan v. Balkum, 60 N. H. 406; McMurphy v. Adams, 67 N. H. 440, 39 Atl. 333; Texas Tram & Lumber Co. v. Gwin, 29 Tex. Civ. App. 1, 67 S. W. 892, 68 S. W. 721; Keyser v. Clifton, (Tex. Civ. App.) 50 S. W. 957; Passumpsic Sav. Bank v. Buck, 71 Vt. 190, 44 Atl. 93; Fouse v. Gilfillan, 45 W. Va. 213, 32 S. E. 178, 185.

subject-matter. A purchaser is therefore not charged with constructive notice of the contents of a deed which is merely in contemplation or which may by possibility be executed, even though it should afterwards become operative.[1] In applying the general doctrine, it is also settled by the English courts that where a person receives actual notice of a deed, and this notice is at the same time accompanied by an erroneous statement as to its contents, under such circumstances that he may reasonably rely upon the information, he is not thereby charged with a constructive notice of the real contents.[2] A recital, reference, or other statement in a

[1] Cothay v. Sydenham, 2 Brown Ch. 391. A purchaser was informed that a draught of a deed had been prepared, but not that it was executed. He was held not to be charged with notice of the instrument as a deed, although it had in fact been executed. Lord Thurlow stated the rule in such cases as follows: "If the notice had been of a deed actually executed, it certainly would do; but where the notice is not of a deed, but only of an intention to execute a deed, it is otherwise; there is no case nor reasoning which goes so far as to say that a purchaser shall be affected by notice of a deed in contemplation."

[2] Jones v. Smith, 1 Hare, 43, 60–70, per Wigram, V. C. The opinion in this case is very instructive: Allen v. Knight, 5 Hare, 272; Bird v. Fox, 11 Hare, 40; Harryman v. Collins, 18 Beav. 11; Ware v. Lord Egmont, 4 De Gex, M. & G. 460, 473; and see cases cited *ante*, in note under § 616.[a]

(a) In the recent case of Patman v. Harland, L. R. 17 Ch. Div. 353, it was held by Jessel, M. R., that a purchaser or lessee having notice of a deed forming part of the chain of title of his vendor or lessor has constructive notice of the contents of the deed, and is not protected from the consequences of not looking at the deed, even by the most express representations of the vendor or lessor that it contains no restrictive covenants nor anything affecting the title. The master of the rolls distinguished this case from the case of Jones v. Smith, 1 Hare, 43, and the other cases cited, by reason of the fact that in Jones v. Smith, 1 Hare, 43, the purchaser in that case was told by the vendor that the prior deed did not affect his title, while in the present case the lessee had notice that the deed did affect his vendor's title. It would seem to follow from these decisions that a subsequent vendee or lessee may rely upon representations of his vendor or lessor that a prior deed does not affect his title; but if he has notice that it does affect the title, he is bound to examine the deed for himself, and cannot rely upon the representations of his lessor or vendor as to the nature of its contents. This distinction is followed in the recent cases, English & Scottish Mercantile Co. v. Brunton, [1892] 2 Q. B. 700, and In re Valletort Steam Laundry Co., Ltd., [1903] 2 Ch. 654. See, also, Simpson v. Hinson, *ante*, § 601, note (b).

title deed, in order to operate as notice, must be so definite and distinct that it conveys some information to the party, or else arouses his attention by directing him to the source of information. A statement may be so vague and uncertain in its terms that it will not put a purchaser upon an inquiry, and will not therefore affect his conscience with notice.[3] [b] Finally, the notice arising from title deeds, like every other instance or kind of constructive notice, does not operate between the immediate parties to a conveyance,— the grantor and grantee, mortgagor and mortgagee,— but only between a purchaser, grantee, or mortgagee and some prior party holding or claiming to hold an adverse right, interest, or title.[4] [c]

§ 632. By Lis Pendens — Rationale of the Doctrine.[a]— It has been stated in numerous judicial opinions, and the same view has been repeated by text-writers, that the rule concerning the effect of *lis pendens* is wholly referable to the general doctrine of constructive notice. It has been said

It has been held in some American decisions that the grantee by a quit-claim deed is charged with notice of any defects in the title, and cannot be a purchaser without notice: See Ridgeway v. Holliday, 59 Mo. 444; Smith v. Dunton, 42 Iowa, 48; Watson v. Phelps, 40 Iowa, 482; but see *post*, § 753, note.

[3] White v. Carpenter, 2 Paige, 217, per Walworth, C.: "The recital must be such as to explain itself by its own terms, or refer to some deed or circumstance which explains it or leads to its explanation." See Bell v. Twilight, 22 N. H. 500; Kaine v. Denniston, 22 Pa. St. 202; French v. The Loyal Co., 5 Leigh, 627.

[4] Champlin v. Laytin, 6 Paige, 189, 203.

(b) In the following cases the recitals were held insufficient to amount to notice: Bailey v. Southern Ry. Co., 22 Ky. L. Rep. 1397, 60 S. W. 631; Robinson v. Owens, 103 Tenn. 91, 52 S. W. 870; McDaniel v. Harley, (Tex. Civ. App.) 42 S. W. 323; McBride v. Moore, (Tex. Civ. App.) 37 S. W. 450; Durst v. Daugherty, 81 Tex. 650, 17 S. W. 388. In Mahoney v. Flanagan, (Tex. Civ. App.) 78 S. W. 245, and Commercial & Farmers' Bank v. Vass, 130 N. C. 590, 41 S. E. 791, the recitals were sufficiently definite. A recital charges with notice only by putting on such inquiry as the information points to: Whitfield v. Riddle, 78 Ala. 99.

(c) Wertheimer v. Thomas, 168 Pa. St. 168, 31 Atl. 1096, 47 Am. St. Rep. 882.

(a) This section is cited in Buser v. Shepard, 107 Ind. 417, 8 N. E. 280.

that a pending suit in equity operates as a constructive notice to the world, and that a purchaser *pendente lite* is bound by the final result of the litigation, because he is charged with such a notice of the proceeding, entirely irrespective of any information which he may or may not have had. Courts of the highest ability and authority have, however, adopted a somewhat different theory. According to this view, "it is not correct to speak of *lis pendens* as affecting a purchaser through the doctrine of notice, though undoubtedly the language of the courts often so describes its operation. It affects him, not because it amounts to notice, but because the law does not allow litigant parties to give to others, pending the litigation, rights to the property in dispute, so as to prejudice the opposite party. Where a litigation is pending between a plaintiff and a defendant as to the right to a particular estate, the necessities of mankind require that the decision of the court in the suit shall be binding, not only on the litigant parties, but also on those who derive title under them by alienations made pending the suit, whether such alienees had or had not notice of the pending proceedings. If this were not so, there could be no certainty that the litigation would ever come to an end. A mortgage or sale made before final decree to a person who had no notice of the pending proceedings would always render a new suit necessary, and so interminable litigation might be the consequence."[1][b] It must not be supposed that this

[1] Bellamy v. Sabine, 1 De Gex & J. 566, 578, 584. In this most carefully considered case the theory given in the text was fully adopted and made the basis of decision by the court of appeal in chancery. Lord Chancellor Cranworth, after using the language which I have quoted in the text, proceeded as follows (p. 579): "That this is the true doctrine as to *lis pendens* appears to me to be not only founded on principle, but also consistent with the authorities." He cites Culpepper v. Aston, 2 Ch. Cas. 115, 221; Sorrell v. Carpenter, 2 P. Wms. 482, and adds: "In both these cases the doc-

(b) This theory is adopted in nearly all the recent cases. The text is cited in Hayden v. Thrasher, 28 Fla. 162, 9 South. 855; Norris v. Ile, 152 Ill. 190, 199, 38 N. E. 762, 43 Am. St. Rep. 233; Turner v. Houpt, 53 N. J. Eq. 526, 33 Atl. 28 (a most instructive opinion by Pitney, V. C.

mode of explanation affects in the slightest degree the settled rules concerning *lis pendens,* or alters the rights and liabilities of alienees from a party to a suit during its pen-

trine really was, that, pending a litigation, the defendant cannot by alienation affect the rights of the plaintiff to the property in dispute; and the same principle is applicable against a plaintiff, so as to prevent him from alienating to the prejudice of the defendant where, from the nature of the suit, he may have in the result a right against the plaintiff; as on a bill by a devisee to establish a will against an heir, if in the result the devise is declared void, the heir is not to be prejudiced by an alienation of the devisee (plaintiff) *pendente lite:* See Garth v. Ward, 2 Atk. 174. The language of the court in these cases, as well as in Worsley v. Earl of Scarborough, 3 Atk. 392, certainly is to the effect that *lis pendens* is implied notice to all the world. I confess I think that is not a perfectly correct mode of stating the doctrine. What ought to be said is, that, *pendente lite,* neither party to the litigation can alienate the property in dispute so as to affect his opponent." The Lord Justice Turner gives the same *rationale* of the doctrine. He says (p. 584): "The doctrine of *lis pendens* is not, as I conceive, founded upon any of the peculiar tenets of a court of equity as to implied or constructive notice. It is, as I think, a doctrine common to the courts both of law and of equity, and rests, as I apprehend, upon this foundation, that it would plainly be impossible that any action or suit could be brought to a successful termination, if alienations *pendente lite* were permitted to prevail. The plaintiff would be liable in every case to be defeated by the defendants alienating before the judgment or decree, and would be driven to commence his proceedings *de novo,* subject again to be defeated by the same course of proceeding. That this doctrine belongs to a court of law no less than to courts of equity appears from a passage in the Institutes, vol. 2, p. 375, by Lord Coke." Knight Bruce, L. J., concurred in these opinions.

citing many cases); Southern Rock Is. Plow Co. v. Pitluk, (Tex. Civ. App.) 63 S. W. 354. See, also, Moody v. Miller, 103 Ga. 452, 30 S. E. 258; Reid, Murdock & Co. v. Sheffy, 75 Ill. App. 136; Farmers' Bank v. First Nat. Bank, 30 Ind. App. 520, 66 N. E. 503; Olson v. Liebpke, 110 Iowa, 594, 81 N. W. 801, 80 Am. St. Rep. 327; Noyes v. Crawford, 118 Iowa, 15, 96 Am. St. Rep. 363, 91 N. W. 799; Taylor v. U. S. B. & L. Assn's Assignee, 22 Ky. L. Rep. 1560, 60 S. W. 927; Smith v. Hodsdon, 78 Me. 180, 3 Atl. 276; Dodd v. Lee, 57 Mo. App. 167; Geishaker v. Pancoast, 57 N. J. Eq. 60, 40 Atl. 200 (the doctrine is directly involved in the decision of this case; see *post,* § 638, note b); Lamont v. Cheshire, 65 N. Y. 30; Hailey v. Ano, 136 N. Y. 569, 32 N. E. 1068, 32 Am. St. Rep. 764; Jennings v. Kiernan, 35 Oreg. 349, 55 Pac. 443, 56 Pac. 72; Dovey's Appeal, 97 Pa. St. 153; Dupee v. Salt Lake Valley, etc., Co., 20 Utah 103, 57 Pac. 845, 77 Am. St. Rep. 902; Sharitz v. Moyers, 99 Va. 519, 3 Va. Sup. Ct. Rep. 359, 39 S. E. 166; Goff v. McLain, 48 W. Va. 445, 37 S. E. 566, 86 Am. St. Rep. 64; Brown v. Cohn, 95 Wis. 90, 69 N. W. 71, 60 Am. St. Rep. 83. In Dovey's Appeal, 97 Pa. St. 153, it was held, in considering the

dency; it may, however, prevent the extension of the doctrine, and restrict its further application to particular persons and conditions of fact.

§ 633. The General Rule.— If we accept this *rationale* of the doctrine as correct, the general rule may be accurately formulated as follows: During the pendency of an equitable suit, neither party to the litigation can alienate the property in dispute, so as to affect the rights of his opponent. This brief proposition in reality contains the entire doctrine.[a] Adopting, however, the ordinary mode of explanation, which regards the effect of *lis pendens* as merely a particular instance of constructive notice, "the general and established rule is," using the language carefully chosen by Chancellor Kent in a leading case, "that a *lis pendens* — a pending suit in equity — duly prosecuted, and not collusive, is notice to a purchaser of the property in dispute from a party to the litigation, so as to affect and bind his interest by the decree; and the *lis pendens* begins from the service of the subpœna after the bill is filed."[1] Wherever, therefore, an equitable

[1] The following *résumé* of the doctrine is given in the recent case of Allen v. Poole, 54 Miss. 323, 333, by Simrall, C. J.: "Was Allen a purchaser *pendente lite?* and if so, what are the consequences? A *lis pendens* begins from the service of the subpœna, and not from the filing the bill or issuance of the writ: Allen v. Mandaville, 26 Miss. 397, 399; Murray v. Ballou, 1 Johns. Ch. 566, 576; 2 Sugden on Vendors, 7th Am. ed., 544. If a person purchases an estate pending a suit involving a question of title to it, he will be considered a purchaser with notice, although he was not a party to the suit: Newland on Contracts, 506. The *lis pendens* continues until the final disposition of the suit: Sugden on Vendors, 281, 285. A bill to foreclose a mortgage on the

rationale of the doctrine of *lis pendens*, that a purchaser was not affected because the *lis pendens* amounted to notice, but because the law does not allow litigant parties to give to others, pending the litigation, rights to the property in dispute so as to prejudice the opposite party, and defeat the execution of the decree to be entered in the cause. And the doctrine was consequently said to have no application except in those cases where the *lis* in question is of such a character as to enable a definite decree to be entered therein deciding the right of property between the parties.

(a) This statement of the rule is quoted in Turner v. Houpt, 53 N. J. Eq. 526, 33 Atl. 28; Noyes v. Crawford, 118 Iowa, 15, 96 Am. St. Rep. 363, 91 N. W. 799; Walker v. Goldsmith, 14 Oreg. 125, 12 Pac. 537.

suit affecting the title to a particular estate as its subject-matter has been begun by service of process, and is prosecuted in good faith, whether we say that the *lis pendens* is

premises is a suit involving the title within the rule: Choudron v. Magee, 8 Ala. 570. Equally so must be a suit asserting the vendor's lien. *Lis pendens* is, in law, notice of every fact averred in the pleadings pertinent to the matter in issue or the relief sought, and of the contents of exhibits filed and proved: Center v. Bank, 22 Ala. 743, 757. But in order that the notice may attach, the property involved in the suit must be so pointed out in the proceedings as to warn the public that they intermeddle at their peril: Miller v. Sherry, 2 Wall. 237; Green v. Slayter, 4 Johns. Ch. 38; Sugden on Vendors, 344. At the time Allen bought the property from Scott, the solicitor and agent of Brooks & Co., Emily Poole had filed her bill, and had obtained service of a summons upon Scott. There was a *lis pendens*, and he was chargeable with notice of the character and extent of Mrs. Poole's claim on the land,— of everything which the pleadings and exhibits set forth. The technical notice arising from *lis pendens* has its foundation in necessity; 'for it would be impossible for any suit to be brought to a successful termination if alienations pending the suit could prevail.'" It will be observed that in this last sentence the learned judge quotes the very language of Turner, L. J., in Bellamy v. Sabine, 1 De Gex & J. 566, cited under the preceding paragraph, and thereby adopts the theory sanctioned by that case. In Center v. Bank, 22 Ala. 743, 757, it was said: "*Lis pendens*, which in a chancery suit begins with the filing of the bill and service of subpœna, and continues until the final orders are taken in the case, is notice of every fact contained in the pleadings which is pertinent to the issue, and of the contents of exhibits to the bill which are produced and proved." The leading American cases by which the general rule, originally established by the English court of chancery, was adopted were Murray v. Ballou, 1 Johns. Ch. 566; Murray v. Lylburn, 2 Johns. Ch. 441; Murray v. Finster, 2 Johns. Ch. 155,— all decided by Chancellor Kent. See also, as sustaining the doctrine stated in the text, Real Estate Sav. Inst. v. Collonious, 63 Mo. 290, 294; Turner v. Babb, 60 Mo. 342; O'Reilly v. Nicholson, 45 Mo. 160; Blanchard v. Ware, 43 Iowa, 530, 531; 37 Iowa, 305, 307; Holman v. Patterson's Heirs, 29 Ark. 357; Brundage v. Biggs, 25 Ohio St. 652; Seabrook v. Brady, 47 Ga. 650; Douglass v. McCrackin, 52 Ga. 596; Tharpe v. Dunlap, 4 Heisk. 674, 686; Salisbury v. Morss, 7 Lans. 359, 365, 366; Cook v. Mancius, 5 Johns. Ch. 89, 93; Sedgwick v. Cleveland, 7 Paige, 287; Van Hook v. Throckmorton, 8 Paige, 33; White v. Carpenter, 2 Paige, 217, 252; Hayden v. Bucklin, 9 Paige, 512, 514; Jackson v. Losee, 4 Sand. Ch. 381; Jackson v. Andrews, 7 Wend. 152, 156; Parks v. Jackson, 11 Wend. 442, 451, 457; 25 Am. Dec. 656; Hopkins v. McLaren, 4 Cow. 667; Griffith v. Griffith, 1 Hoff. Ch. 153; Leitch v. Wells, 48 Barb. 637; 48 N. Y. 585; Chapman v. West, 17 N. Y. 125; Patterson v. Brown, 32 N. Y. 81; Mitchell v. Smith, 53 N. Y. 413; Ayrault v. Murphy, 54 N. Y. 203; Harrington v. Slade, 22 Barb. 161; Pratt v. Hoag, 5 Duer, 631; Norton v. Birge, 35 Conn. 250; Borrowscale v. Tuttle, 5 Allen, 377; Haven v. Adams, 8 Allen, 363, 367, per Chapman, J.; Beeckman v. Montgomery, 14 N. J. Eq. 106; 80 Am. Dec. 229; Mc-

constructive notice to all the world, or regard the doctrine as necessarily resting upon a basis of expediency, the result is the same; an alienee of the subject-matter from either

Pherson v. Housel, 13 N. J. Eq. 299; Hersey v. Turbett, 27 Pa. St. 418; Boulden v. Lanahan, 29 Md. 200; Inloes's Lessee v. Harvey, 11 Md. 519; Tongue v. Morton, 6 Har. & J. 21; Edwards v. Banksmith, 35 Ga. 213; Brandon v. Cabiness, 10 Ala. 155; Choudron v. Magee, 8 Ala. 570; Hoole v. Attorney-General, 22 Ala. 190; Ashley v. Cunningham, 16 Ark. 168; Whiting v. Beebe, 12 Ark. 421, 564; Gossom v. Donaldson, 18 B. Mon. 230; Owings v. Myers, 3 Bibb, 278; Roberts v. Fleming, 53 Ill. 196, 198; Jackson v. Warren, 32 Ill. 331; Gilman v. Hamilton, 16 Ill. 225; Kern v. Hazlerigg, 11 Ind. 443; 71 Am. Dec. 360; Truitt v. Truitt, 38 Ind. 16; Green v. White, 7 Blackf. 242; McGregor v. McGregor, 22 Iowa, 441; Knowles v. Rablin, 20 Iowa, 101; Loomis v. Riley, 24 Ill. 307; Cooley v. Brayton, 16 Ill. 10; Culpepper v. Aston, 2 Ch. Cas. 115, 221; Preston v. Tubbin, 1 Vern. 286; Sorrell v. Carpenter, 2 P. Wms. 482; Garth v. Ward, 2 Atk. 174; Worsley v. Earl of Scarborough, 3 Atk. 392; Higgins v. Shaw, 2 Dru. & War. 356; Tredway v. McDonald, 51 Iowa, 663.[b]

[b] See, in addition to the cases cited in the notes, *post* and *supra*, the following, chiefly recent, illustrations of the general rule: Walden v. Bodley, 9 How. (50 U. S.) 34, 49; Eyster v. Gaff, 91 U. S. 521; Tilton v. Cofield, 93 U. S. 163; Warren County v. Marcy, 97 U. S. 96; Union Trust Co. v. Southern I. N. & I. Co., 130 U. S. 565, 570, 9 Sup. Ct. 606; Mellen v. Iron Works, 131 U. S. 352, 371, 9 Sup. Ct. 781; Thompson v. Baker, 141 U. S. 648, 12 Sup. Ct. 89; Lacassagne v. Chapuis, 144 U. S. 119, 12 Sup. Ct. 659 (Louisiana); Kimberling v. Hartly, 1 Fed. 571; Allen v. Halliday, 28 Fed. 261; Owen v. Kilpatrick, 96 Ala. 421, 11 South. 476; Wells v. American Mortg. Co., 109 Ala. 430, 20 South. 136 (citing §§ 633 *et seq.* of the text); Stein v. McGrath, 128 Ala. 175, 30 South. 792; Daggs v. Wilson, (Ariz.) 59 Pac. 150; Hale v. Warner, 36 Ark. 217; Marchbanks v. Banks, 44 Ark. 48; Pickett v. Ferguson, 45 Ark. 177, 55 Am. Rep. 545; Lockwood v. Bates, 1 Del. Ch. 435, 12 Am. Dec. 121; Hayden v. Thrasher, 28 Fla. 162, 9 South. 855 (citing this section of the text); Lenders v. Thomas, 35 Fla. 518, 17 South. 633, 48 Am. St. Rep. 255; Elizabeth Cordage Co. v. Whitlock, 37 Fla. 190, 20 South. 255; Smith v. Coker, 65 Ga. 461; Wilson v. Wright, 72 Ga. 848; Hallorn v. Trum, 125 Ill. 247, 17 N. E. 823; Harding v. American Glucose Co., 182 Ill. 551, 74 Am. St. Rep. 189, 55 N. E. 577, 608; Brachtendorf v. Kehm, 72 Ill. App. 228; Haverly v. Alcott, 57 Iowa, 171, 10 N. W. 326; Bacon v. Early, (Iowa) 90 N. W. 353; Myers v. Jones, 61 Kan. 191, 59 Pac. 275; Henderson v. Pickett's Heirs, 20 Ky. (4 T. B. Mon.) 54, 16 Am. Dec. 130; Friedman v. Janssen, 23 Ky. L. Rep. 2151, 66 S. W. 752; Louisiana Civ. Code, art. 2453; Smith v. Hodsdon, 78 Me. 180, 3 Atl. 276; Schaferman v. O'Brien, 28 Md. 565, 92 Am. Dec. 708; Long v. Richards, 170 Mass. 120, 48 N. E. 1083, 64 Am. St. Rep. 281; Hall Lumber Co. v. Gustin, 54 Mich. 624, 20 N. W. 616; Hammond v. Paxton, 58 Mich. 393, 25 N. W. 321; Hope v. Blair, 105 Mo. 85, 16 S. W. 595, 24 Am. St. Rep. 366;

party during the pendency of the suit takes it subject to the rights of the other party involved in the controversy, and is bound by the decree or judgment finally rendered. In the great majority of ordinary litigations the rule has naturally been applied to an alienee of the defendant; but it is also extended, wherever the nature and object of the suit require, to one who derives title from the plaintiff.[c] The same *principle* embraces actions at law, as well as suits in equity; but from the essential nature of legal titles, it need not ordinarily be invoked at law. In all actions at law to which the doctrine could apply,— as, for example, in actions of ejectment,— if the plaintiff recovers a judgment against the defendant, he has also a perfect title against any alienee of the defendant, since he must necessarily recover upon the strength of his own legal title; in other words, the defendant

Becker v. Stroeher, 167 Mo. 306, 66 S. W. 1083; Lincoln Rapid Transit Co. v. Rundle, 34 Nebr. 559, 52 N. W. 563; Powell v. Campbell, 20 Nev. 232, 19 Am. St. Rep. 350, 2 L. R. A. 615, 20 Pac. 156; Hovey v. Elliott, 118 N. Y. 132, 23 N. E. 475; Shannon v. Pentz, 1 App. Div. 331, 37 N. Y. Suppl. 304; Walker v. Goldsmith, 14 Oreg. 125, 12 Pac. 537; Puckett v. Puckett, 21 Oreg. 370, 28 Pac. 65; Gardner v. Peckham, 13 R. I. 102; Arnold's Petition, 15 R. I. 15, 23 Atl. 31; Baum v. Trantham, 45 S. C. 291, 23 S. E. 54; Williamson v. Williams, 11 Lea (Tenn.), 355; Woodfolk v. Blount, 4 Tenn. (3 Hayw.) 147, 9 Am. Dec. 736; Wagner v. Smith, 81 Tenn. (13 Lea) 560; Russell v. Kirkbride, 62 Tex. 455; Hoffman v. Blume, 64 Tex. 334; Randall v. Snyder, 64 Tex. 350; Reppetoe v. Dwyer, 65 Tex. 703; Wortham v. Boyd, 66 Tex. 401, 1 S. W. 109; Paxton v. Meyer, 67 Tex. 96, 2 S. W. 817; Moore v. Moore, 67 Tex. 293, 3 S. W. 284; Smith v. Cassidy, 73 Tex. 161, 12 S. W. 13; Evans v. Walborn, 74 Tex. 530, 15 Am. St. Rep. 858; Portis v. Hill, 30 Tex. 529, 98 Am. Dec. 481; Armstrong v. Broom, 5 Utah, 176, 13 Pac. 364; Lynch v. Andrews, 25 W. Va. 751; Stone v. Tyree, 30 W. Va. 687, 5 S. E. 878; Wilfong v. Johnson, 41 W. Va. 283, 23 S. E. 730; Despard v. Despard, 53 W. Va. 443, 44 S. E. 448; Gaynor v. Blewitt, 82 Wis. 313, 33 Am. St. Rep. 47, 52 N. W. 313. In the monographic note to Stout v. Phillippi Mfg. Co., 41 W. Va. 339, 56 Am. St. Rep. 853–878, all the phases of the doctrine, except as it depends upon statutes, are treated with Mr. Freeman's customary vigor and clearness.

(c) See *post*, § 638. See, also, Henderson v. Wanamaker, 79 Fed. 736, 25 C. C. A. 181; Olson v. Liebpke, 110 Iowa, 594, 81 N. W. 801, 80 Am. St. Rep. 327; Garver v. Graham, 6 Kan. App. 344, 51 Pac. 812; Cook v. French, 96 Mich. 525, 56 N. W. 101. A suit and cross-suit constitute only one action, and notice of the suit is notice of the cross-suit also: Hall Lumber Co. v. Gustin, 54 Mich. 624, 20 N. W. 616.

can never give to an assignee or alienee a better title against the plaintiff than that which he himself holds.[2] [d] It is otherwise in many equitable suits. Where the plaintiff in equity has only an equitable title or right to the property in dispute, it might be possible for the defendant to transfer the subject-matter to a *bona fide* purchaser, and thus to clothe such transferee with a title overriding the equity of the plaintiff. The doctrine of constructive notice by *lis pendens* is therefore an essential incident of many equitable suits, in order to prevent a failure of justice. It naturally came to be regarded as peculiar to proceedings in courts of equity, although the same *principle* would operate, if necessary, at law. This analysis and description, it should be observed, are entirely independent of any statutory modifications which have been made in some of the states and in England.

§ 634. **Requisites of the Lis Pendens.**— Having thus explained the general rule and the reasons upon which it rests, I shall very briefly state those incidents of the pending suit which must exist in order that the rule may operate and its effects may be produced upon an alienee. The *lis pendens* and the consequent notice, to use the language ordinarily employed, only begin from the service of a subpœna or other process after the filing of the bill, so that the court may have acquired jurisdiction of the defendant.[1] [a] The effect of the

[2] Sheridan v. Andrews, 49 N. Y. 478.

[1] Allen v. Poole, 54 Miss. 323, 333; Allen v. Mandaville, 26 Miss. 397, 399; Center v. Bank, 22 Ala. 743; Farmers' National Bank v. Fletcher, 44 Iowa, 252; Murray v. Ballou, 1 Johns. Ch. 566, 576; Hayden v. Bucklin, 9 Paige, 512; Leitch v. Wells, 48 N. Y. 585; but see King v. Bell, 28 Conn. 593; Norton v. Burge, 35 Conn. 250, 280; Dresser v. Wood, 15 Kan. 344; Haughwout v. Murphy, 21 N. J. Eq. 118; Weeks v. Tomes, 16 Hun, 349.

(d) The text is quoted in Smith v. Hodsdon, 78 Me. 180, 3 Atl. 276.

(a) Garnes v. Stiles, 14 Pet. 326; McClaskey v. Barr, 48 Fed. 130, Banks v. Thompson, 75 Ala. 531; Rooney v. Michael, 84 Ala. 585, 4 South. 421; Majors v. Cowell, 51 Cal. 478; Grant v. Bennett, 96 Ill. 513; Hallorn v. Trum, 125 Ill. 247, 17 N. E. 823 (service by publication); Allison v. Drake, 145 Ill. 500, 32 N. E. 537; Norris v. Ile, 152 Ill. 190, 199, 38 N. E. 762, 43 Am. St. Rep. 233; Reid, Murdoch & Co. v. Sheffy, 75 Ill. App. 136; Hansen v. Klicka, 78 Ill. App. 177; Wellsford v. Durst, 8 Kan. App. 231, 55 Pac. 493 (no notice when service of summons set aside); Campbell's Case, 2 Bland, 209, 20 Am. Dec. 360; H. L. Spencer Co. v.

suit as notice continues through the entire time of its pendency, and ends when the suit is really ended by a final judg-

Koell, (Minn.) 97 N. W. 974; Lincoln Rapid Transit Co. v. Rundle, 34 Nebr. 559, 52 N. W. 563 (from service or publication of summons, by Code, § 85); Jackson v. Dickenson, 15 Johns. 309, 8 Am. Dec. 236; Walker v. Goldsmith, 14 Oreg. 125, 12 Pac. 537, dissenting opinion, citing the text; Duff v. McDonough, 155 Pa. St. 10, 25 Atl. 608 (from service of copy of bill, which is equivalent to service of subpœna); Miller v. Kershaw, 1 Bail. Eq. 479, 23 Am. Dec. 183; Williamson v. Williams, 79 Tenn. (11 Lea) 355; Woolridge v. Boyd, 81 Tenn. (13 Lea) 151; Staples v. White, 88 Tenn. (3 Pick.) 30, 12 S. W. 339; Smith v. Cassidy, 73 Tex. 161, 12 S. W. 13 (service by publication); Hanrick v. Gurley, (Tex. Civ. App.) 48 S. W. 994 (where summons is not served until after return day, no *lis pendens* until answer filed); see, also, S. C., 54 S. W. 347; Stone v. Tyree, 30 W. Va. 687, 5 S. E. 878. In Williamson v. Williams, 11 Lea (Tenn.), 355, it was held that the *lis pendens* did not operate as notice until the service of process upon the defendant, even though a copy of the bill had been previously read to such defendant by a co-defendant who had been served with process. It seems that if the bill is filed after the service of summons, the *lis pendens*, upon filing of the bill, relates to the time of service; that service of summons upon a person not named in the bill does not affect him with *lis pendens* notice; but that he may supply such defect in the bill by making a voluntary appearance: Reid, Murdoch & Co. v. Sheffy, 75 Ill. App. 136.

In a few states, by statutory provision, the *lis pendens* begins from the *filing* of the bill, complaint, or petition: Iowa Code, sec. 2628; Fisher v. Shropshire, 147 U. S. 133, 13 Sup. Ct. 201 (Iowa); Haverly v. Alcott, 57 Iowa, 171, 10 N. W. 376, holding also that the improper indexing of the complaint in the appearance docket does not destroy its effect as notice; Wilkinson v. Elliott, 43 Kan. 590, 19 Am. St. Rep. 158, 23 Pac. 614 (a permanent filing is meant; see this case for definition of such filing); Morgan v. Bostic, 132 N. C. 743, 44 S. E. 639. In Kentucky, the notice begins from the *issuance* of summons on the filing of the complaint, since, under the Code, the action is then "commenced": Rothschild's Admrs. v. Kohn, 93 Ky. 107, 19 S. W. 180, 40 Am. St. Rep. 184. In Arkansas, also, it is stated to be the rule that the suit was not commenced "until the bill was filed, and a writ was issued, or publication made, or defendant's appearance entered": Hale v. Warner, 36 Ark. 217; Burleson v. McDermott, 57 Ark. 229, 21 S. W. 222.

In Albro v. Blume, 5 App. Div. 309, 39 N. Y. Supp. 215, it was held that a notice of *lis pendens* is of no effect unless it is followed by the filing of a complaint: See, also, Morgan v. Bostic, 132 N. C. 743, 44 S. E. 639. In Kellogg v. Fancher, 23 Wis. 21, 99 Am. Dec. 96, it was held that a *lis pendens* does not date from the time of the service of the subpœna, unless the papers are filed at such time.

That *jurisdiction of the subject-matter* of the suit, as well as of the defendant's person, is necessary, see Pearson v. Keedy, 6 B. Mon. (45 Ky.) 128, 43 Am. Dec. 160; Benton v. Shafer, 47 Ohio St. 117, 24 N. E. 197, 7 L. R. A. 812.

ment.[2 b] In order, however, that a purchaser *pendente lite* may be thus affected, the suit must be prosecuted in good faith, with all reasonable diligence, and without unnecessary delay. A neglect to comply with this requisite would relieve a purchaser from the effect of the *lis pendens* as notice.[3 c]

2 Ibid.; Turner v. Crebill, 1 Ohio, 372; and see Lee Co. v. Rogers, 7 Wall. 181; Jackson v. Warren, 32 Ill. 331; Winborn v. Gorrell, 3 Ired. Eq. 117; 40 Am. Dec. 456; Page v. Waring, 76 N. Y. 463.

3 Murray v. Ballou, 1 Johns. Ch. 566, per Kent, C.; Herrington v. McCollum, 73 Ill. 476; Petree v. Bell, 2 Bush, 58; Clarkson v. Morgan, 6 B. Mon. 441, 448; Watson v. Wilson, 2 Dana, 406; 26 Am. Dec. 459; Price v. McDonald, 1 Md. 403, 412; 54 Am. Dec. 657; Gibler v. Trimble, 14 Ohio, 323; Trimble v. Boothby, 14 Ohio, 109; 45 Am. Dec. 526.

(b) See, also, Whitfield v. Riddle, 78 Ala. 99.

If the suit be ended by an *abandonment or dismissal* by the adverse party, the rights of the purchaser remain as if the suit had never been commenced; the doctrine of *lis pendens* applies only to suits that proceed to a final decree, not to a suit that is voluntarily dismissed by the complainant: Wortham v. Boyd, 66 Tex. 401, 1 S. W. 109, citing this section of the text; Allison v. Drake, 145 Ill. 500, 32 N. E. 537; Karr v. Burns, 1 Kan. App. 232, 40 Pac. 1087; Valentine v. Austin, 124 N. Y. 400, 26 N. E. 973. And a suit is deemed to have been abandoned, within the meaning of this rule, when another suit seeking the same relief is instituted and carried to a decree in its place. The *lis pendens* filed in the first suit will not be given effect in the second: Hammond v. Paxton, 58 Mich. 393, 25 N. W. 321. As a general rule, one who purchases after dismissal of the suit and before it is revived or a new action commenced, is not charged with notice: Pipe v. Jordan, 22 Colo. 392, 45 Pac. 371, 55 Am. St. Rep. 138; Trentor v. Pothen, 46 Minn. 298, 24 Am. St. Rep. 225, 49 N. W. 129; Ludlow's Heirs v. Kidd's Exrs., 3 Ohio, 541. But that the purchaser cannot rely on an entry, mistakenly made in the appearance docket, to the effect that the case was settled, when later entries, before the time of his purchase, showed that the suit was treated by the parties as still pending, see Furry v. Ferguson, 105 Iowa, 231, 74 N. W. 903.

(c) Quoted in Taylor v. Carroll, 89 Md. 32, 42 Atl. 920, 44 L. R. A. 479 (delay of twenty years fatal); cited in Hayes v. Nourse, 114 N. Y. 607, 22 N. E. 40, 11 Am. St. Rep. 700 (failure to prosecute for forty years, and purchase sixteen years after the last proceeding in the suit); Tinsley v. Rice, 105 Ga. 285, 31 S. E. 174 (the doctrine was said to rest not on negligence alone, but on estoppel). See, also, Pipe v. Jordan, 22 Colo. 392, 55 Am. St. Rep. 138, 45 Pac. 371; Durand v. Lord, 115 Ill. 610, 4 N. E. 483 (inference of abandonment justified from a delay of four years in filing, in the trial court, the mandate of the supreme court); Wallace v. Marquett, 88 Ky. 130, 10 S. W. 374 (delay of twenty-three years fatal); Kelley v. Culver's Admr.,

The question of reasonable diligence in prosecuting the suit must, however, depend upon the circumstances of each case. Thus the abatement of the suit by the death of a party will not destroy its effect as *lis pendens*, provided it is revived without unnecessary delay.[4 d] Even a judgment in favor of the defendant does not necessarily at once terminate the *lis pendens*. If the unsuccessful party is entitled to appeal, the constructive notice continues during a reasonable time for an appeal to be taken.[5 e] The effect of *lis pendens* upon the

[4] Ashley v. Cunningham, 16 Ark. 168; Debell v. Foxworthy, 9 B. Mon. 228; Watson v. Wilson, 2 Dana, 406; 26 Am. Dec. 459. In the last-named case the effect of a death, and the necessity of a revivor without delay, are fully and carefully examined by the court. And see also Herrington v. McCollum, 73 Ill. 476.

[5] When an appeal is thus taken without delay, the *lis pendens* is, of course, prolonged until the final decision: Debell v. Foxworthy, 9 B. Mon. 228; Gilman v. Hamilton, 16 Ill. 225.

(Ky.) 75 S. W. 272; Hammond v. Paxton, 58 Mich. 393, 25 N. W. 321 (suit abandoned by institution of another seeking the same relief); Fox v. Reeder, 28 Ohio St. 181, 22 Am. Rep. 370 (delay of twenty-seven years); Bybee v. Summers, 4 Or. 354; Mann v. Roberts, 79 Tenn. (11 Lea) 57 (delay of three and a half years). But, "as a general rule, there will be no estoppel against the right to enforce the *lis pendens*, unless the complainant has been so negligent in its prosecution as to induce the belief that such prosecution has been abandoned": Norris v. Ile, 150 Ill. 190, 203, 43 Am. St. Rep. 233, 38 N. E. 762; Olson v. Liebpke, 110 Iowa, 594, 80 Am. St. Rep. 327, 81 N. W. 801 (where numerous suits were brought by plaintiff in the same county, all involving a federal question, and it was stipulated that appeals should be continued in all except two of the cases until a final decision of those cases by the federal courts, the requirement of diligence in prosecution is satisfied); Hillside Coal & Iron Co. v. Heermans, 191 Pa. St. 116, 43 Atl. 76 (delay of fourteen years). In Jones v. Robb, (Tex. Civ. App.) 80 S. W. 395, it was held that failure to prosecute a suit between the years 1866 and 1870 was not negligence, the disturbed condition of the country being an excuse.

(d) That the revivor must be without unnecessary delay, see, also, Shiveley's Admrs. v. Jones, 6 B. Mon. (Ky.) 274, 276.

(e) Dunnington v. Elston, 101 Ind. 375; Farmers' Bank v. First Nat. Bank, 30 Ind. App. 520, 66 N. E. 503; Olson v. Liebpke, 110 Iowa, 594, 81 N. W. 801, 80 Am. St. Rep. 327; McClung v. Hohl, 10 Kan. App. 93, 61 Pac. 507; Boyd v. Emmons, 103 Ky. 393, 45 S. W. 364 (long delay, but several appeals, and continuous effort made to settle estate); Cook v. French, 96 Mich. 525, 56 N. W. 101; Smith & Vaile Co. v. Burns, 72 Miss. 966, 18 South. 483; St. Regis Paper Co. v. Santa Clara L. Co., 69 N. Y. Supp. 904, 34 Misc. Rep. 428; Bird v. Gilliam, 34 S. E. 196, 125 N. C.

rights of an alienee depends not only upon this element of time, but also upon the averments of the pleadings. Proper and specific allegations are a necessary requisite. *Lis*

76 (purchase before expiration of time for motion for rehearing); Randall v. Snyder, 64 Tex. 350; Glaze v. Johnson, (Tex. Civ. App.) 65 S. W. 662; Wick v. Dawson, 48 W. Va. 469, 37 S. E. 639 (although *lis pendens* released by order of the court). But see Olyphant v. Phyfe, 27 Misc. Rep. 64, 58 N. Y. Supp. 217. In Foulke v. Zimmerman, 81 U. S. (14 Wall.) 113, a will of a resident of New York was probated in Louisiana. The proceedings showed an appeal in New York. The devisee sold the land in Louisiana, and then a new trial was granted in New York. It was held that the purchaser was protected.

It has been held that the *lis pendens* does not continue as against a purchase made after judgment and before a *writ of error* is sued out, since proceedings by writ of error constitute a wholly new and independent suit: Cheever v. Minton, 12 Colo. 557, 21 Pac. 710, 13 Am. St. Rep. 258; Eldridge v. Walker, 80 Ill. 270; Wadhams v. Gay, 73 Ill. 415, 422; McCormick v. McClure, 6 Blackf. (Ind.) 466; Macklin v. Allenberg, 100 Mo. 337, 13 S. W. 350; Taylor v. Boyd, 3 Ohio, 337, 352, 17 Am. Dec. 603; but the more reasonable opinion makes no distinction between writ of error and appeal as regards the continuance of the *lis pendens:* Moore v. Moore, 67 Tex. 293, 3 S. W. 284; Harle v. Langdon's Heirs, 60 Tex. 555, 562. "There is also some conflict of opinion as to whether a person who purchases property from a party to a suit after final decree therein, and within the time limited by law for filing a *bill of review*, is a purchaser *pendente lite*, and is bound by a decree of reversal on a bill of review subsequently filed. This question was answered in the affirmative in Earle v. Couch, 3 Met. (Ky.) 453, and in Clarey v. Marshall's Heirs, 4 Dana (Ky.), 95, 96. The decision in these cases is based upon the ground that a purchaser under such circumstances is presumed to know that the decree may be reversed on a bill of review, or, in other words, that he buys with the knowledge that the litigation is not at an end until the period has expired for filing a bill of review or taking an appeal. On the other hand, a different conclusion was reached in a very well considered case in the state of Ohio. Ludlow v. Kidd, 3 Ohio, 541. . . . . [Citing, also, Lee County v. Rogers, 7 Wall. 181; Cole v. Miller, 32 Miss. 89, 101.] We are of the opinion, both on principle and authority, that a bill of review ought not to be regarded as a continuation of the original suit, merely for the purpose of affecting a purchaser in good faith, after a final decree, with notice. In our judgment, one who thus purchases after the lapse of the term at which a final decree on the merits is rendered, without notice that a bill of review is in contemplation, or will be exhibited, should be protected from the effect of a decree on such a bill if it is subsequently filed. After a final decree the losing party, by proper diligence, can always guard against the risk of losing the fruits of the litigation by a sale to an intermediate purchaser; and, on grounds of public policy, it is better to exact of him such diligence in the prosecution of his claim, than to suffer the title of valuable property to be clouded for an indefinite period

pendens is notice of everything averred in the pleadings pertinent to the issue or to the relief sought, and of the contents of exhibits filed and proved.[6] [f] In order that the notice may thus operate, the specific property to which the suit relates must be pointed out in the pleadings in such a manner as to call the attention of all persons to the very thing, and warn them not to intermeddle. It is not necessary that the land should be described by metes and bounds; certainty to a common intent — reasonable certainty — is sufficient. The specific subject-matter should be so described and identified that no one, upon reading the allegations, could have a reasonable doubt as to what was intended. The averments of the bill "must be so definite that any one on reading it can learn what property was intended to be made the subject of litigation."[7] [g] The notice arising from a pending suit

[6] Allen v. Poole, 54 Miss. 323, 333; Center v. Bank, 22 Ala. 743, 757.

[7] Allen v. Poole, 54 Miss. 323, 333; Miller v. Sherry, 2 Wall. 237; Green v. Slayter, 4 Johns. Ch. 38; Griffith v. Griffith, 9 Paige, 315, 317; 1 Hoff. Ch. 153; Low v. Pratt, 53 Ill. 438; Lewis v. Madisons, 1 Munf. 303. See Brown v. Goodwin, 75 N. Y. 409; Jones v. McNarrin, 68 Me. 334; 28 Am. Rep. 66; Jaffray v. Brown, 17 Hun, 575.

by the possibility that the litigation may be renewed by a bill of review": Rector v. Fitzgerald, 59 Fed. 808, 811, 812, 19 U. S. App. 423, 8 C. C. A. 277, *per* Thayer, D. J.

That the notice continues pending a writ of error from the state supreme court to a federal court, see Olson v. Liebpke, 110 Iowa, 594, 80 Am. St. Rep. 327, 81 N. W. 801. One purchasing after the time for appeal (Aldrich v. Chase, 70 Minn. 243, 73 N. W. 161), or for bill of review (Rector v. Fitzgerald, 59 Fed. 808, 19 U. S. App. 423, 8 C. C. A. 277) has expired, is protected; or, at any rate, must be made a party to a statutory proceeding for vacating or modifying the decree: Aldrich v. Chase, 70 Minn. 243, 73 N. W. 161.

(f) Norris v. Ile, 152 Ill. 190, 204, 38 N. E. 762, 43 Am. St. Rep. 233; Stout v. Philippi Mfg. etc. Co., 41 W. Va. 339, 56 Am. St. Rep. 843, 23 S. E. 571.

(g) McLean v. Baldwin, 136 Cal. 565, 69 Pac. 259; Coulter v. Lumpkin, 94 Ga. 225, 21 S. E. 461; Geo. D. Washburn & Co. v. Dannenberg Co., 117 Ga. 567, 44 S. E. 97; Norris v. Ile, 152 Ill. 190, 202, 43 Am. St. Rep. 233, 38 N. E. 762; Citizens' Sav. Bank v. Stewart, 90 Iowa 467, 57 N. W. 957; Wilkinson v. Elliott, 43 Kan. 590, 23 Pac. 614, 19 Am. St. Rep. 158; Boyd v. Emmons, 103 Ky. 393, 45 S. W. 364; Hailey v. Ano, 136 N. Y. 569, 32 Am. St. Rep. 764, 32 N. E. 1068; Oliphant v. Burns, 146 N. Y. 218, 40 N. E. 980; Arnold's Petition, 15 R. I. 15, 23 Atl. 31; Russell v. Kirkbride, 62 Tex. 455; Seibel

does not affect property not embraced within the descriptions of the pleading; nor does its operation extend beyond the prayer for relief.[8 h] I would remark, in passing, that

[8] Ibid. See Chapman v. West, 17 N. Y. 125, for peculiar circumstances in which the notice extends to a portion of the premises not directly embraced within the objects of the suit; Drake v. Crowell, 40 N. J. L. 58.

v. Bath, 5 Wyo. 409, 40 Pac. 756. In Arnold's Petition, 15 R. I. 15, 23 Atl. 31, it was held that a prayer that "a receiver of the property, books, papers, debts, choses in action, and estate of every kind of said B. & A., both as copartners aforesaid and individually, may be appointed," sufficiently points out the property of an insolvent firm. An omission to state the number of feet of street frontage is immaterial when the description is otherwise definite: Clark v. Empire Lumber Co., 87 Ga. 742, 13 S. E. 826. Part of this paragraph of the text is quoted in Arrington v. Arrington, 114 N. C. 151, 19 S. E. 351, where a statement that all the property of the defendant was involved was held sufficient. The court said that much greater particularity is required where one of several parcels, or a part of a single parcel, of land is the subject of litigation.

That the *lis pendens* applies to *timber* growing upon the land in suit, and removed therefrom during the litigation, see Alliance Trust Co. v. Nettleton Hardwood Co., 74 Miss. 585, 21 South. 396, 36 L. R. A. 155, 60 Am. St. Rep. 531; Goff v. McLain, 48 W. Va. 445, 37 S. E. 566, 86 Am. St. Rep. 64; *contra*, Gardner v. Peckham, 13 R. I. 102, on the ground that the doctrine of *lis pendens* enables the successful litigant to follow specific property but not to recover its value.

(h) Since operation of the *lis pendens* does not extend beyond the prayer for relief, a cross-bill in an action for divorce is ineffectual as a *lis pendens* unless it asks to have property specifically described appropriated to the payment of the judgment: Sun Ins. Co. v. White, 123 Cal. 196, 55 Pac. 902. To the effect that the operation does not extend beyond the prayer for relief, see New England L. & T. Co. v. Miller, (Tex. Civ. App.) 40 S. W. 646; Adoue v. Tankersley, (Tex. Civ. App.) 28 S. W. 346. When the suit does not involve the land purchased, the rule of *lis pendens* does not apply: Woods v. Douglass, 52 W. Va. 517, 44 S. E. 234.

Effect of Amending the Bill.— A bill so defective in its averments as not to create *lis pendens* may be subsequently cured by amendment, and the *lis pendens* will commence at the time of filing the amendments, if the defendant has been served with process: Norris v. Ile, 152 Ill. 190, 202, 43 Am. St. Rep. 233, 38 N. E. 762; Miller v. Sherry, 2 Wall. 237 (original bill radically defective for want of description of the property; *lis pendens* dates from amendment). In general, amendments which do not change the identity of the suit relate back to its commencement, for the purposes of *lis pendens*. "The question of the continued pendency of the suit is one of actual and substantial identity. Are the parties the same, the property to be affected the same, and the general purpose and object the same?" Turner v. Houpt, 53 N. J. Eq. 526, 33 Atl. 28, by Pitney, V. C. (in a suit for rescission, amendments merely introducing new evi-

while the general doctrine of notice by *lis pendens* and the foregoing special rules have ordinarily been applied to real property described by the plaintiff in his bill of complaint, they should, upon principle, apply with equal force to the "counterclaims" and "cross-complaints" authorized by the reformed procedure, by which the defendant alleges some equitable interest or right, and demands some affirmative equitable relief. In such pleadings the defendant becomes the *actor*, and is to all intents and purposes a plaintiff.[1]

dence of fraud); Norris v. Ile, 152 Ill. 190, 203, 204, 43 Am. St. Rep. 233, 38 N. E. 762 (amendment setting up new evidence); Burt v. Gamble, 98 Mich. 402, 57 N. W. 261 (in a bill to foreclose a mortgage, an amendment set up an additional claim under an agreement modifying the mortgage; but the original bill claimed the total amount, and the decree was rendered for that amount; held, *lis pendens* not affected); Cotton v. Dacey, 61 Fed. 481; Tilton v. Cofield, 93 U. S. 163; Arnold's Devisees v. Arnold's Exr., (Ky.) 17 S. W. 203; Stoddard v. Myers, 8 Ohio, 203; Gibbon v. Dougherty, 10 Ohio St. 365; Landon v. Morris, 5 Sim. 247. On the other hand, see Gage v. Parker, 178 Ill. 455, 53 N. E. 317 (supplemental bill equivalent to amendment setting up new matter): "The abandonment of one cause of action and the adoption of a new one, by amendment, is, in effect, the dismissal of the former suit and the commencement of a new one upon a different cause of action"; and the *lis pendens* dates from the filing of the amendment: Wortham v. Boyd, 66 Tex. 401, 1 S. W. 109 (original suit to cancel a deed, amended so as to affirm the deed and enforce a grantor's lien). "The suit pending at the time of the transfer . . . . is the one that must serve as a basis for the rule of *lis pendens*, and not matters raised by subsequent amendment or suits:" Mansur & Tebbetts Impl. Co. v. Beer, 19 Tex. Civ. App. 311, 45 S. W. 972; Letcher v. Reese, 24 Tex. Civ. App. 537, 60 S. W. 256; and see Stone v. Connelly, 58 Ky. (1 Met.) 652, 71 Am. Dec. 499. Statements implying that the continuity of the suit may be broken by a simple amendment, found in Mitf. Eq. Pl. 330, 1 Daniell Ch. Pr. 402, and Story Eq. P., sec. 904, are shown to be unfounded, by Pitney, V. C., in Turner v. Houpt, 53 N. J. Eq. 526, 33 Atl. 28, 42. Where a statute requires the recording of a notice of *lis pendens*, an amendment of the complaint will not validate an invalid notice: Brox v. Rider, 67 N. Y. Suppl. 772, 56 App. Div. 388.

(i) This passage is quoted in Walker v. Goldsmith, 14 Oreg. 125, 12 Pac. 537. It is there intimated, but not decided, that the *lis pendens* should not become operative to bind a purchaser from the plaintiff until the answer is filed setting up such equitable claim. But see Hall Lumber Co. v. Gustin, 54 Mich. 624, 20 N. W. 616. There, in a suit to foreclose a mortgage, the mortgagor and certain junior mortgagees were made parties defendant, and after a demurrer to the bill was overruled, the mortgagor conveyed an interest in the mortgaged premises to a third party. Subsequently, the junior

§ 635. **To What Kinds of Suits the Rule Extends — Suits Concerning Land.**—It may be stated as a general proposition that the doctrine of notice by *lis pendens* extends to all equitable suits which involve the title to a specific tract of land, or which are brought to establish any equitable estate, interest, or right in an identified parcel of land, or to enforce any lien, charge, or encumbrance upon land. Among the most familiar instances in which the rule applies are suits to foreclose mortgages, to enforce vendor's liens, to establish trusts, and the like.[1] [a]

[1] Allen v. Poole, 54 Miss. 323, 333; Choudron v. Magee, 8 Ala. 570; Real Estate Sav. Inst. v. Collonious, 63 Mo. 290, 294 (suit to set aside a partition sale on account of fraud); Blanchard v. Ware, 43 Iowa, 530, 531; 37 Iowa, 305, 307 (suit to specifically perform a contract for sale of land fraudulently concealed by the grantor); Brundage v. Biggs, 25 Ohio St. 652, 656 (equitable interest in the land set up by the defendant in a "counterclaim," or cross-complaint); Seabrook v. Brady, 47 Ga. 650 (suit to enforce a charge on land); Tharpe v. Dunlap, 4 Heisk. 674, 686 (suit involving the title to land); Salisbury v. Morss, 7 Lans. 359, 365 (suit to enforce a charge created by will on land devised); Edwards v. Banksmith, 35 Ga. 213; Knowles v. Rablin, 20 Iowa, 101; Wickliffe v. Breckinridge, 1 Bush, 427; Bayer v. Cockerill, 3 Kan. 282; Horn v. Jones, 28 Cal. 194; Cockrill v. Maney, 2 Tenn. Ch. 49; Watson v. Wilcox, 39 Wis. 643; 20 Am. Rep. 63; Truitt v. Truitt, 38 Ind. 16. The action of ejectment by which an equitable interest was enforced under the peculiar practice prevailing in Pennsylvania operated as notice within the principle of the rules: Bollin v. Connelly, 73 Pa. St. 336; Hersey v. Turbett, 27 Pa. St. 418; Hill v. Oliphant, 41 Pa. St. 364. A suit to foreclose an unrecorded mortgage may thus operate as a notice of the mortgage

mortgagees filed a cross-bill asserting the mortgages made to them, and insisting upon a foreclosure in their own behalf, and they subsequently recovered judgment for the relief prayed for. It was claimed that the purchaser *pendente lite* was not affected by this foreclosure on the ground that no notice had been filed respecting the cross-complaint, but the court held that the defenses interposed and the action taken by the subsequent mortgagees were what might reasonably have been expected, that the cross-suit and original suit constituted but one cause, and that the notice given of the original suit was constructive notice to the parties and all persons subsequently acquiring title under them, and bound the latter by the decree finally entered, though it involved the assertion of claims held by the junior mortgagees.

(a) This section of the text is cited in Mansur & Tebbetts Impl. Co. v. Beer, 19 Tex. Civ. App. 311, 45 S. W. 972; Wilkerson v. Phillips, (Ky.) 81 S. W. 691.

See, also, the following recent illustrations: *Foreclosure* of mortgage: Norris v. Ile, 152 Ill. 190, 43 Am. St. Rep. 233, 38 N. E. 762. *Partition:* McClaskey v. Barr, 48 Fed. 130; Harms v. Jacobs, 160 Ill. 589,

§ 636. Suits concerning Personal Property.— While the doctrine, in general, applies to all equitable suits in which

to subsequent purchasers in place of an actual recording: Center v. Bank, 22 Ala. 743; Chapman v. West, 17 N. Y. 125; but not, perhaps, where a statute requires an *actual* notice of the prior unrecorded mortgage: McCutchen v. Miller, 31 Miss. 65; Newman v. Chapman, 2 Rand. 93; 14 Am. Dec. 766.[b]

43 N. E. 745; Clark v. Charles, 55 Neb. 202, 75 N. W. 563. *Injunction* against tax sale: Hixon v. Oneida County, 82 Wis. 515, 52 N. W. 445. Petition for *receiver* of partnership property: Arnold's Petition, 15 R. I. 15, 23 Atl. 31. *Foreclosure of liens — Vendor's lien:* Owen v. Kilpatrick, 96 Ala. 421, 11 South. 476; Hale v. Warner, 36 Ark. 217; Swift v. Dederick, 106 Ga. 35, 31 S. E. 788. *Attorney's lien:* Wilson v. Wright, 72 Ga. 848. *Suit to contest validity of will:* McIlwrath v. Hollander, 73 Mo. 105, 39 Am. Rep. 484. *Suit by administrator to settle estate or for sale of land:* Parks v. Smoot's Admr., 105 Ky. 63, 48 S. W. 146; Harris v. Davenport, 132 N. C. 697, 44 S. E. 406. *Suit to set aside fraudulent deed:* Dorgan v. Waring, 11 Ala. 988, 46 Am. Dec. 234. *Action for divorce and alimony,* where the disposition of property is involved: Wilkinson v. Elliott, 43 Kan. 590, 19 Am. St. Rep. 158, 23 Pac. 614; provided the complaint describes specific property and asks that it be set aside to the complainant; Garver v. Graham, 6 Kan. App. 344, 51 Pac. 812; Powell v. Campbell, 20 Nev. 232, 19 Am. St. Rep. 350, 20 Pac. 156, 2 L. R. A. 615; Tolerton v. Williard, 30 Ohio St. 579; Daniel v. Hodges, 87 N. C. 95; otherwise such action does not bind the property that may eventually be decreed as alimony: Sun Ins. Co. v. White, 123 Cal. 196, 55 Pac. 902; Feigley v. Feigley, 7 Md. 537, 61 Am. Dec. 375; Houston v. Timmerman, 17 Oreg. 499, 11 Am. St. Rep. 848; Sapp v. Wightman, 103 Ill. 150 (bill sets forth the defendant's lands as affecting the amount of alimony to be allowed, but asserts and seeks no right in respect to them).

But an action to recover damages for *trespass* is not a suit involving the title to land, within the meaning of the doctrine: Hailey v. Ano, 136 N. Y. 569, 32 Am. St. Rep. 764, 32 N. E. 1068 (though as between the parties in such action the judgment may be conclusive as to the title); London v. Mullins, 52 Ill. App. 410. Notice of intention to apply for a receiver does not amount to *lis pendens:* Murray v. Blatchford, 1 Wend. 583, 19 Am. Dec. 537. The doctrine was held not applicable in a suit in which a bond and mortgage were in litigation but the land encumbered by them was not: Green v. Rick, 121 Pa. St. 130, 6 Am. St. Rep. 670, 15 Atl. 497, 2 L. R. A. 48; and in a suit of forcible detainer by a landlord against his tenant, as such a suit involves no question of title, and consequently does not charge third parties with notice of an assertion of title by the tenant inconsistent with his lease: Hoffman v. Blume, 64 Tex. 334. The doctrine does not apply to an action collusively prosecuted, when the parties to it all know that there is no right to enforce: Rippetoe v. Dwyer, 65 Tex. 703.

(b) See, also, Moody v. Millen, 103 Ga. 452, 30 S. E. 258; Douglass v. McCrackin, 52 Ga. 596.

the subject-matter is land, or any estate or interest therein, the proposition is equally true and general that it does not extend to ordinary suits concerning personal property, goods and chattels, securities or money.[a] The reason for this restriction is obvious; there is no necessity for invoking the rule in such litigations, under all ordinary circumstances. The decisions have, however, admitted an exception to this general proposition in one class of suits. Actions brought to enforce a trust extending over personal property, goods, and securities not negotiable in their nature are held to be within the operation of the rule. A purchaser of such trust property from the trustee, during the pendency of the action, is charged with constructive notice, and his purchase is invalid as against the plaintiff whose rights are established by the final decree.[1 b] It is well settled that the

[1] Murray v. Lylburn, 2 Johns. Ch. 441; Leitch v. Wells, 48 Barb. 637; 48 N. Y. 585; Scudder v. Van Amburgh, 4 Edw. Ch. 29; Diamond v. Lawrence Co. Bank, 37 Pa. St. 353; 78 Am. Dec. 429; Bolling v. Carter, 9 Ala. 921; Shelton v. Johnson, 4 Sneed, 672; 70 Am. Dec. 265. This exception has, however, been admitted by the courts with great caution, and within narrow limits, so as not to interfere with that freedom of transfer and certainty of title required by the interests of mercantile and commercial business. It has never been extended to securities or other personal property which are negotiable or even semi-negotiable in the transactions of commerce. The leading case is Murray v. Lylburn, 2 Johns. Ch. 441. A bill had been filed against one Winter, who held land as trustee for the plaintiff, charging a breach of trust; and an injunction was issued restraining W. from disposing of such trust property or proceeds thereof. Pending this suit, W. sold and conveyed a parcel of the trust land, and took back a bond and mortgage for the price.

(a) This section is cited in Wilkerson v. Phillips, (Ky.) 81 S. W. 691. See, also, Miles v. Lefi, 60 Iowa, 168, 14 N. W. 233. Not, to litigation over a mere demand for money: Hailey v. Ano, 136 N. Y. 569, 32 N. E. 1068, 32 Am. St. Rep. 764; London v. Mullins, 52 Ill. App. 410; Armstrong v. Carwile, 56 S. C. 463, 35 S. E. 196; Bayley v. Bayley, (N. J. Eq.) 57 Atl. 271. Suit on promissory note does not affect purchaser of land: Carson v. Fears, 91 Ga. 482, 17 S. E. 342. Does not apply to action of slander: Ray v. Roe, 2 Blackf. 258, 18 Am. Dec. 159. In England, the question had never been decided until recently, when it was settled that the doctrine does not apply to personal property other than chattel interests in land: Wigram v. Buckly, [1894] 3 Ch. 483. This case does not admit the exception mentioned in the text, viz, an action to enforce a trust in personal property; but no such trust was involved in the case.

(b) The doctrine has also been held applicable in a suit to *establish a lien* on personal property: Hovey v. Elliott, 118 N. Y. 132, 23 N. E. 475

doctrine of constructive notice from *lis pendens* does not embrace suits concerning negotiable instruments or moneys, so as to affect the title of a transferee for value and in good faith during the pendency of the action, even when the trans-

These securities he assigned to Lylburn, who paid value for them, and had no actual notice of the pending suit against W. The plaintiff thereupon filed this supplemental bill against L. and W. to reach the bond and mortgage so transferred. Chancellor Kent, after saying that the plaintiff's right to relief against L. depended entirely upon the former suit being constructive notice to L., proceeded: "The object of that suit was to take the whole subject of the trust out of W.'s hands, together with all the papers and securities relating thereto. If W. had held a number of mortgages and other securities in trust, when the suit was commenced, it would not be pretended that he might safely defeat the object of the suit and the justice of the court by selling these securities. If he possessed cash, as proceeds of the trust estate, or negotiable paper not due, *or perhaps movable personal property, such as horses, cattle, grain, etc.*, I am not prepared to say the rule is to be carried so far as to affect such sales. The safety of commercial dealings would require a limitation of the rule; but bonds and mortgages are not the subjects of ordinary commerce, and they formed one of the specific subjects of the suit against W. If the trustee, pending the suit, changed the land into personal security, I see no good reason why the *cestui que trust* should not be at liberty to affirm the sale, and take the security; and whoever afterwards purchased it was chargeable with notice of the suit." In Leitch v. Wells, 48 Barb. 637, the supreme court of New York applied the same rule to a purchaser of stocks during the pendency of a similar suit; but this decision was reversed on appeal: Leitch v. Wells, 48 N. Y. 585. The court of appeals did not *decide*, however, that the rule cannot apply to stocks. The rule seems also to have been held applicable, by Judge Story, to a suit brought for the settlement of partnership affairs, and to enforce the partner's lien upon property of the firm: Hoxie v. Carr, 1 Sum. 173; Dresser v. Wood, 15 Kan. 344.

(bonds); to *foreclose a chattel mortgage:* Armstrong v. Broom, 5 Utah, 176, 13 Pac. 364; in this case a chattel mortgage, valid for only a limited time as against the mortgagor's creditors, was kept alive by the suit begun within such time; *to subject a debt specifically described:* Hacker v. White, 23 Ky. Law Rep. 849, 64 S. W. 446; *to set aside a fraudulent conveyance of personalty:* Dillard & Coffin Co. v. Smith, 105 Tenn. 372, 59 S. W. 1010; *to suits relating to slaves:* Meux v. Anthony, 11 Ark. (6 Eng.) 411, 52 Am. Dec. 274; Fletcher v. Ferrell, 39 Ky. (9 Dana) 372, 35 Am. Dec. 143; Cromwell v. Clay, 31 Ky. (1 Dana) 578, 25 Am. Dec. 165; *in suits to wind up the affairs of an insolvent corporation:* Powell v. National Bank of Commerce, (Colo. App.) 74 Pac. 536; Mellen v. Moline Ironworks, 131 U. S. 352, 9 Sup. Ct. 781; Belmont Nail Co. v. Columbia I. & S. Co., 46 Fed. 8. For further instance where the doctrine has been applied to suits concerning personal property, see Reid, Murdoch & Co. v. Sheffy, 75 Ill. App. 136; Bergman v. Bergman, 43 Oreg. 456, 72 Pac. 1086, 73 Pac. 341, 99 Am. St. Rep. 771.

fer was made in direct violation of an injunction, so that the indorser or assignor would be punishable for the contempt.[2 c]

§ 637. What Persons are Affected by the Notice.— Assuming that all the foregoing requisites exist, the constructive

2 The evident reasons for this distinction are based upon the exigencies of commerce, and the familiar doctrines respecting negotiable paper: Murray v. Lylburn, 2 Johns. Ch. 441, per Kent, C.; Leitch v. Wells, 48 N. Y. 585; Stone v. Elliott, 11 Ohio St. 252, 260; Winston v. Westfeldt, 22 Ala. 760; 58 Am. Dec. 278; Kieffer v. Ehler, 18 Pa. St. 388, 391; Hibernian Bank v. Everman, 52 Miss. 500; Mayberry v. Morris, 62 Ala. 113. As to the effect of a "creditor's suit," and how far it operates as notice to a purchaser *pendente lite* of property which it claims to reach by means of an equitable lien, see McDermutt v. Strong, 4 Johns. Ch. 687; Hadden v. Spader, 20 Johns. 554; Weed v. Pierce, 9 Cow. 722; Edmeston v. Lyde, 1 Paige, 637; 19 Am. Dec. 454; Corning v. White, 2 Paige, 567; 22 Am. Dec. 659; Farnham v. Campbell, 10 Paige, 598; Miller v. Sherry, 2 Wall. 237; United States Bank v. Burke, 4 Blackf. 141; Norton v. Birge, 35 Conn. 250; Watson v. Wilson, 2 Dana, 406; 26 Am. Dec. 459; Blake v. Bigelow, 5 Ga. 437; McCutchen v. Miller, 31 Miss. 65.[d]

(c) See, also, Cass County v. Gillett, 100 U. S. 585; Orleans v. Platt, 99 U. S. 676 (county bonds); Warren County v. Marcy, 97 U. S. 96 (bonds); Carroll County v. Smith, 111 U. S. 556, 562, 4 Sup. Ct. 539 (bonds); Hill v. Scotland County, 34 Fed. 208 (bonds); Myers v. Hazzard, 50 Fed. 155; Farmers' Loan & T. Co. v. Young, 54 Fed. 759, 772, 4 C. C. A. 561, 6 U. S. App. 469 (bonds); Mims v. West, 38 Ga. 18, 95 Am. Dec. 379; State v. Board of Com'rs of Wichita County, 59 Kan. 512, 53 Pac. 526 (bonds); Carr v. Lewis Coal Co., 96 Mo. 157, 9 Am. St. Rep. 328, 8 S. W. 907; Pittsburgh, C., C. & St. L. R. Co. v. Lynde, 55 Ohio St. 23, 44 N. E. 596 (bonds); Howe v. Hartness, 11 Ohio St. 449, 78 Am. Dec. 312; Day v. Zimmerman, 68 Pa. St. 72, 8 Am. Rep. 157; Mansur & Tebbetts Impl. Co. v. Beer, 19 Tex. Civ. App. 311, 45 S. W. 972; Gannon v. Northwestern Nat. Bank, 83 Tex. 274, 18 S. W. 573; Farmers' & Merchants' Nat. Bank v. Waco Elect. R. & L. Co., (Tex. Civ. App.) 36 S. W. 131; Kellogg v. Fancher, 23 Wis. 21, 99 Am. Dec. 96. Where (as in Missouri) a *bona fide* indorsee of negotiable paper secured by mortgage takes the mortgages free from equities between the original parties only, such purchaser may be affected by a *lis pendens:* Dodd v. Lee, 57 Mo. App. 167. To the same effect, see Bowman v. Anderson, 82 Iowa 210, 47 N. W. 1087, 31 Am. St. Rep. 473.

(d) Kimberling v. Hartly, 1 Fed. 571; Hallorn v. Trum, 125 Ill. 247, 17 N. E. 823; Union Nat. Bank v. Lane, 177 Ill. 171, 69 Am. St. Rep. 216, 52 N. E. 361; Keith v. Losier, 88 Iowa, 649, 55 N. W. 952; Ruth v. Wells, 13 S. Dak. 482, 83 N. W. 568, 79 Am. St. Rep. 902 (does not operate to keep the judgment alive after the statutory period for which the judgment is made a lien); Williamson v. Williams, 11 Lea (Tenn.), 355; Goff v. McLain, 48 W. Va. 445, 37 S. E. 506, 86 Am. St. Rep. 64.

notice by the pendency of the suit extends only to those who derive title *from a party or privy pendente lite.* A purchaser of the very land described in the pleadings from one who is not a party to the suit, or a privy to such party, is never chargeable with the constructive notice.[1 a] If, how-

[1] Miller v. Sherry, 2 Wall. 237; Stuyvesant v. Hone, 1 Sand. Ch. 419; Stuyvesant v. Hall, 2 Barb. Ch. 151; Parks v. Jackson, 11 Wend. 442; 25 Am. Dec. 656; French v. The Loyal Co., 5 Leigh, 627; Clarkson v. Morgan, 6 B. Mon. 441; Scarlet v. Gorham, 28 Ill. 319; Parsons v. Hoyt, 24 Iowa, 154; Herrington v. Herrington, 27 Mo. 560. In Miller v. Sherry, 2 Wall. 237, Swayne, J., said: "Another reason why the bill could not operate as constructive notice,—Williams, who held the legal title, was not a party. We apprehend that to affect a person as a purchaser *pendente lite*, it is necessary to show that the holder of the legal title was impleaded before the purchase which is to be set aside." In Brundage v. Biggs, 25 Ohio St. 652, 656, the defendant, by a cross-complaint, set up an equitable interest in the land, the legal title to which was in the plaintiff's wife. She was made a party in this cross-complaint, and applied by her attorney and obtained leave from the court to answer. The husband and wife, *pendente lite*, united in a conveyance of the land to A, who paid value, and had no actual notice of the suit. Held, that the wife was a party; that A was a purchaser from a party, and had constructive notice and was bound by the result of the suit. Fuller v. Scribner, 76 N. Y. 190, holds that the notice binds a subsequent judgment creditor of a party whose judgment would otherwise be an encumbrance.

(a) Boykin v. Jones, 67 Ark. 571, 57 S. W. 17 (*lis pendens* does not affect purchaser at tax sale); Irving v. Cunningham, 77 Cal. 52, 18 Pac. 878 (statutory notice does not affect persons who enter into possession adversely to all the parties); Merrill v. Wright, (Nebr.) 91 N. W. 697 (citing this section of the text); Arnold v. Smith, 80 Ind. 417, 422; Noyes v. Crawford, 118 Iowa 15, 96 Am. St. Rep. 363, 91 N. W. 799; Jaycox v. Smith, 45 N. Y. Suppl. 299, 17 App. Div. 146; Becker v. Howard, 4 Hun, 361 (does not affect purchaser at tax-sale); Buxton v. Sargent, 7 N. Dak. 503, 75 N. W. 811; Advance Thresher Co. v. Esteb, 41 Oreg. 469, 69 Pac. 447; Green v. Rick, 121 Pa. St. 130, 15 Atl. 497, 6 Am. St. Rep. 760, 2 L. R. A. 48; Johnson v. Irwin, 16 Wash. 652, 48 Pac. 345; Buxton v. Sargent, 7 N. Dak. 503 (purchaser from one not named in the statutory notice as a party); Marchbanks v. Banks, 44 Ark. 48 (purchaser from one who was not a party at the time, but was brought in afterwards, not bound). If a foreclosure purchaser is looked upon as a successor to the equitable interest of the mortgagee, and not as a purchaser from the mortgagor, he is not bound by a *lis pendens* in a prior suit against the mortgagor to which the mortgagee is not made a party: Hokanson v. Gunderson, 54 Minn. 499, 56 N. W. 172, 40 Am. St. Rep. 354; Sprague v. White, 73 Iowa 670, 35 N. W. 751; Roosevelt v. Land & River Co., 108 Wis. 653, 84 N. W. 157; but see Lacassagne v. Chapuis, 144 U. S. 119, 12 Sup. Ct. 659.

ever, a person has acquired a prior right to the specific land, the commencement of a suit affecting the same land will not invalidate any act which he may subsequently do in pursuance of such antecedent right, or for the purpose of carrying it into effect.[2 b]

[2] Farmers' Nat. Bank v. Fletcher, 44 Iowa, 252; Stuyvesant v. Hone, 1 Sand. Ch. 419; Stuyvesant v. Hall, 2 Barb. Ch. 151; Parks v. Jackson, 11

(b) Thus, where a mortgagee purchases at his own foreclosure sale, his title on such purchase relates back to the date of his mortgage, and is not affected by a mechanics' lien suit against the mortgagor begun after the commencement of the foreclosure suit: Andrews v. National Foundry & Pipe Works, 77 Fed. 774, 23 C. C. A. 454, 36 L. R. A. 153; National Foundry & Pipe Works v. Oconto City Water Supply Co., 113 Fed. 793, 802, 51 C. C. A. 465; see also Sprague v. White, 73 Iowa, 670, 35 N. W. 751; Laccassaigne v. Abraham, 48 La. Ann. 1160, 20 South. 672; Oetgen v. Ross, 47 Ill. 142, 95 Am. Dec. 468 (landlord who takes premises after lease has expired, without notice of pending ejectment suit against tenant, is not subject thereto). Where a bond is given for title before suit, a conveyance after is not subject to *lis pendens:* Parks v. Smoot's Adm'r, 105 Ky. 63, 48 S. W. 146; Wille v. Ellis, 22 Tex. Civ. App. 462, 54 S. W. 922. And see Jackson v. Dickenson, 15 Johns. 309, 8 Am. Dec. 236.

Upon the question whether the holder of an unrecorded deed or mortgage who does not record it until after the *lis pendens* notice, is in effect a purchaser *pendente lite*, there is a sharp conflict between the cases. That he is not a purchaser *pendente lite*, see Warnock v. Harlow, 96 Cal. 298, 31 Pac. 168, 31 Am. St. Rep. 209; Grant v. Bennett, 96 Ill. 513; Noyes v. Crawford, 118 Iowa 15, 96 Am. St. Rep. 363, 91 N. W. 799; Hammond v. Paxton, 58 Mich. 393, 25 N. W. 321; Baker v. Bartlett, 18 Mont. 446, 56 Am. St. Rep. 594, 45 Pac. 1084; Haughwort v. Murphy, 22 N. J. Eq. 531; Lamont v. Cheshire, 65 N. Y. 30; Walker v. Goldsmith, 14 Oreg. 125, 12 Pac. 537; Jennings v. Kiernan, 35 Oreg. 349, 56 Pac. 72, 55 Pac. 443 (if the plaintiff has notice of the unrecorded deed); Irvin's Lessee v. Smith, 17 Ohio 226, 239; Kohn v. Lapham, 13 S. Dak. 78, 82 N. W. 408; Eldridge v. Stenger, 19 Wash. 697, 54 Pac. 541 (plaintiff had notice of the unrecorded deed); Webster v. Pierce, 108 Wis. 407, 83 N. W. 938 (in ejectment; this result depends on construction of the *lis pendens* statutes). The reasons for this view were forcibly expounded by Dwight, Com'r, in the leading case of Lamont v. Cheshire, 65 N. Y. 30, 37, 38. The statute there construed, like that in many other states, read "Every person whose conveyance or incumbrance is subsequently executed *or subsequently recorded* shall be deemed a subsequent purchaser or incumbrancer, and shall be bound by all proceedings taken after filing of such notice, to the same extent as if he were made a party to the action." After considering the general nature and function of a notice *lis pendens*, the learned commissioner continues: "It has been seen in the course of

§ 638. To a Purchaser from Either Litigant Party.— The question yet remains whether the rule of constructive notice applies to a purchaser *pendente lite* from either party to the litigation. The principle upon which the doctrine is

Wend. 442; 25 Am. Dec. 656; Clarkson v. Morgan, 6 B. Mon. 441; Trimble v. Boothby, 14 Ohio, 109; 45 Am. Dec. 526; Gibler v. Trimble, 14 Ohio, 323. For example, the bringing a suit against A as the owner of land is not

this discussion that the theory of a *lis pendens* is that there must be no innovation in the proceedings so *as to prejudice* the rights of the plaintiff. It is simply a rule to give effect to the rights *ultimately* established by the decree. Applying this doctrine to the present case, it would be impossible to claim that a *lis pendens* could give a creditor under an attachment a lien superior to the title of a purchaser under an unrecorded conveyance. The statute distinctly provides that a person whose conveyance is executed or recorded subsequent to the filing of a notice shall be deemed a subsequent purchaser, and bound by the proceedings *to the same extent as if he were a party to the action.* It is necessary to ascertain therefore what would have been the effect if the defendants had been made parties to the action. Had the plaintiff made the defendants parties to the action, his attachment proceedings would of course have been nugatory. As soon as the whole case had been disclosed it would have appeared that he was making a claim against a person who was in no respect liable to him; and his complaint would have been dismissed. How can he under the statute have any greater claims by omitting him? The words 'to the same extent as if he were a party to the action' cannot be omitted in construction." Similar statutes were construed to the same effect in Kohn v. Lapham, 13 S. Dak. 78, 82 N. W. 408; Roblia v. Palmer, 9 S. Dak. 36, 67 N. W. 949; Bateman v. Backus, 4 Dak. 433, 34 N. W. 66; Eldridge v. Stenger, 19 Wash. 697, 54 Pac. 541. In several states the same result is reached by holding that the filing of a *lis pendens* is not a "subsequent purchase" under the recording acts, entitled to priority by virtue of prior registration: Warnock v. Harlow, 96 Cal. 298, 31 Pac. 168, 31 Am. St. Rep. 209; Noyes v. Crawford, 118 Iowa, 15, 96 Am. St. Rep. 363, 91 N. W. 799; Baker v. Bartlett, 18 Mont. 446, 56 Am. St. Rep. 594, 45 Pac. 1084.

On the other hand, that such holder of a prior unrecorded deed or incumbrance is a *pendente lite* purchaser, see Fisher v. Shropshire, 147 U. S. 133, 13 Sup. Ct. 201; dissenting opinion in Grant v. Bennett, 96 Ill. 513 (a strong presentation of this view); Ferris v. Udell, 139 Ind. 579, 38 N. E. 180; Smith v. Worster, 59 Kan. 640, 54 Pac. 676, 68 Am. St. Rep. 385 (grantee of mortgagor before foreclosure suit, without notice to mortgagee); Smith v. Hodsdon, 78 Me. 180, 3 Atl. 276; Williams v. Kerr, 113 N. C. 306, 18 S. E. 501; Collingwood v. Brown, 106 N. C. 366, 10 S. E. 868. Most of these decisions were made under that type of recording act which declares that unrecorded instruments shall be invalid except as between the parties thereto and persons having actual notice thereof. "The statute does not declare that an unrecorded deed shall be invalid as against subsequent purchasers or

based, and all the reasons of policy by which it is supported, clearly extend alike to both the litigants. In the great majority of instances, it has undoubtedly been a purchaser from the defendant who has been charged with the constructive notice. The plaintiff, however, is equally prevented from alienating the subject-matter of the controversy, to the prejudice of the defendant, wherever, from the nature of the suit, he might have in the result, by the final decree, a right established as against the plaintiff.[1][a] Finally, is a purchaser from one defendant *pendente lite* affected by the

notice to B, a prior vendee from A, who is in actual possession, and will not prevent him from subsequently taking the necessary steps to complete the purchase and obtain a deed of conveyance.[c]

1 For example, in a suit brought by a devisee against the heirs, to establish a will, the final decree might declare the devise void and establish the title of the defendant. Plainly, in such a case, the plaintiff cannot alienate the land *pendente lite*, and thus cut off the defendant's possible ultimate rights: Garth v. Ward, 2 Atk. 174; Bellamy v. Sabine, 1 De Gex & J. 566, 580, per Lord Cranworth.

other particular classes of persons. It declares generally that such deed shall be invalid; and that means invalid as against all classes of persons, with any and all kinds of rights": Smith v. Worster, 59 Kan. 640, 644, 54 Pac. 676, 68 Am. St. Rep. 385, 388. A statute making *lis pendens* constructive notice to holders of prior unrecorded liens or conveyances was declared unconstitutional, on purely technical grounds affecting its mode of enactment, in Sheasley v. Keens, 48 Nebr. 57, 66 N. W. 1010.

(c) As in Parks v. Smoot's Adm'rs, 105 Ky. 63, 48 S. W. 146 (citing Clarkson v. Morgan's Devisees, 6 B. Mon. 444; Parks v. Jackson, 11 Wend. 444); Walker v. Goldsmith, 14 Oreg. 125, 12 Pac. 537. In the last case, however, the prior vendee was not in possession. In the dissenting opinion, quoting the above passage of the text and this note, such possession, it was insisted, was essential to the vendee's priority in the case put by the author.

Where land is sold to a *bona fide* purchaser, and suit is subsequently brought against the vendor for the recovery of the property, this will not affect the vendee under the doctrine of *lis pendens*. Nor will such suit adversely affect a purchaser from such vendee, although the purchaser might have been chargeable with notice of the pending suit: Planters' Loan & Sav. Bank v. Johnson, 70 Ga. 302.

Who are "Purchasers."—Assignees in bankruptcy, so far as relates to pending suits to enforce liens on the bankrupt's property, are on the same footing as purchasers *pendente lite:* Kimberling v. Hartly, 1 Fed. 571.

(a) See, also, Henderson v. Wanamaker, 79 Fed. 736, 25 C. C. A. 181; Olson v. Liebpke, 110 Iowa, 594, 81 N. W. 801, 80 Am. St. Rep. 327; Cook v. French, 96 Mich. 525, 56 N. W. 101.

right of another defendant in the same suit? This special question has, upon careful consideration, been answered in the negative. It has been held that where a person without actual notice of a suit purchases from one of the defendants property which is the subject of it, he is not, in consequence of the pendency of the suit, affected by an equitable title of another defendant which appears on the face of the proceedings, but of which he has no notice, and to which it is not necessary for any purposes of the suit to give effect.[2] [b]

§ 639. **The Statutory Notice of Lis Pendens.**— The general rule concerning constructive notice by *lis pendens*, although firmly settled, has always been regarded by the courts as a very harsh one in its application to *bona fide* purchasers for value; it has only been tolerated from the supposed necessity.[a] It has not been a favorite with courts of equity, and has never been enlarged in its operation beyond its well-settled limits.[1] These considerations have led the English Parliament and the legislatures of many states to interfere, and to create most important statutory modifications and restrictions. It should be observed that wherever the terms of these statutes, and the alterations made by

[2] Bellamy v. Sabine, 1 De Gex & J. 566. The full court of appeal in chancery, Lord Chancellor Cranworth and Lord Justices Knight Bruce and Turner, held that the case did not come either within the principle of the rule nor within the authorities.

[1] See Leitch v. Wells, 48 N. Y. 585, 609, per Earl, J.; Hayden v. Bucklin, 9 Paige, 512, per Walworth, C.

(b) The principle of Bellamy v. Sabine was applied in Geishaker v. Pancoast, 57 N. J. Eq. 60, 40 Atl. 200, excluding from the protection of the *lis pendens* the interest of another than the complainant, although such interest was disclosed by the bill. See, also, Kickbusch v. Corwith, 108 Wis. 634, 85 N. W. 148. A creditor's bill is not notice of the claims of other creditors than the plaintiff: Stout v. Philippi Mfg. & Merc. Co., 41 W. Va. 339, 23 S. E. 571, 56 Am. St. Rep. 843; St. John v. Strauss, 60 Kan. 136, 55 Pac. 845. The nature of a partition suit, however, is such that it is notice of the rights of all parties to the final decree, whether original parties or brought in by amendment: McClaskey v. Barr, 48 Fed. 130.

(a) An important motive for the modern statutes was to remedy the difficulty arising from the rule which made the *lis pendens* begin from the service of the *subpœna*, often before the bill was filed showing the nature of the suit: Dodd v. Lee, 57 Mo. App. 167.

them, apply only to suits concerning real estate,— which is true in much of the state legislation,— the rule as to suits concerning personal property remains unchanged, the same as at the common law.[2]

§ 640. **Modern Statutory Provisions.**— By the English statute, a pending suit will not affect a purchaser for value and without express notice, unless a notice of *lis pendens* has been properly registered in compliance with the statutory directions.[1] One quite general type of the American statutes enacts that in every suit relating to or affecting real estate the plaintiff may at the time of commencing the action, or afterwards, prior to final judgment, file or procure to be recorded in the clerk's or recorder's office of the county in which the land is situated a written notice describing the lands affected and the general nature of the action, and that no suit concerning real estate shall be notice to a purchaser *pendente lite* for value and without actual notice unless and until such a notice of *lis pendens* has been thus filed or recorded.[2 b] The terms of these statutes apply alike to legal

§ 639, [2] Leitch v. Wells, 48 N. Y. 585, 602, per Hunt, J. Speaking of the statute in New York, the learned judge says: "This relaxation of a rigorous rule applies to real estate only, and as to personal property the rule remains as at the common law."

§ 640, [1] Stats. 2 & 3 Vict., c. 11, sec. 7.[a]

§ 640, [2] *New York.*— Code Proc., sec. 132 (old code); Code Civ. Proc. (new code), Bliss's ed., vol. 2, p. 104, sec. 1670.

California.— Code Civ. Proc. 1880, p. 142, sec. 409.

Connecticut.— Rev. Stats. 1875, p. 402, sec. 4.

Illinois.— Rev. Stats. 1880, p. 149, sec. 9.

Iowa.— 2 Rev. Code 1880, p. 664, secs. 2628, 2629.

Michigan.— 2 Comp. Laws 1871, p. 1535, sec. 29; p. 1805, sec. 10.

Minnesota.— Gen. Stats. 1878, p. 819, sec. 34.

Missouri.— Winslow's Code Proc. 1879, p. 103, sec. 420.

Nevada.— Stats. 1869, p. 215, sec. 128.

(a) By this act, as amended by 18 & 19 Vict., c. 15, it is provided that a *lis pendens* should not bind a purchaser or mortgagee *pendente lite*, without express notice thereof, unless a notice of the pendency of the suit were registered, and that the registered notice should become void at the end of five years, unless it should be re-registered.

(b) *New York.*— Code Civ. Proc., § 1670. To what proceedings the statute is applicable: see In re Bingham, 127 N. Y. 296, 27 N. E. 1055, 57 Hun,

and to equitable actions. The second type of these statutes differs from the former one only in the provisions being more general, and extending to all suits which could possibly

New Jersey.— Rev. 1877, p. 49, sec. 43.
North Carolina.— Code Civ. Proc. 1868, p. 36, sec. 90.
Ohio.— 2 Rev. Stats. 1880, p. 1233, sec. 5056.
Oregon.— Code Civ. Proc. 1863, p. 38, sec. 149.
Pennsylvania.— Dunlop's Dig., p. 677, sec. 6.
Rhode Island.— Gen. Stats. 1872, p. 456, sec. 12.
South Carolina.— Rev. Stats. 1873, p. 600, sec. 155.
Virginia.— Code 1860, p. 770, sec. 5.
West Virginia.— 2 Rev. Stats. 1879, p. 932, sec. 14.
Wisconsin.— 2 Rev. Stats. 1871, p. 1428, sec. 7.

586, 10 N. Y. Suppl. 325; Bachmann v. Wagner, 61 Hun, 625, 16 N. Y. Suppl. 67 (suit to impress lien on real estate); Ackerman v. True, 44 App. Div. 106, 60 N. Y. Supp. 608 (not to suit for damages and to enjoin encroachment on street); Olyphant v. Phyfe, 48 App. Div. 1, 62 N. Y. Suppl. 688, modifying 27 Misc. Rep. 64, 58 N. Y. Suppl. 217 (not to proceedings for sale of lands to pay debts of decedent); Moeller v. Wolkenburg, 67 App. Div. 487, 73 N. Y. Suppl. 890 (injunction against adding to party wall).

Index of lis pendens notices: Code Civ. Proc., § 1672; Hartwell v. Riley, 47 App. Div. 154, 62 N. Y. Suppl. 317. *Cancellation* of the notice is provided for in certain cases: Code Civ. Proc., § 1674; see Murray v. Barth, 30 Abb. N. Cas. 303, 24 N. Y. Suppl. 921; Townsend v. Work, 79 Hun, 381, 29 N. Y. Suppl. 791; Breen v. Lennon, 10 App. Div. 36, 41 N. Y. Suppl. 705; Fitzsimons v. Drought, 15 App. Div. 413, 44 N. Y. Suppl. 453; Cohen v. Levy, 58 N. Y. Suppl. 721; Valentine v. Austin, 124 N. Y. 400, 26 N. E. 973 (actual knowledge of a cancelled *lis pendens* notice does not put on inquiry as to the nature of the suit).

California.— See Pearson v. Creed, 78 Cal. 144, 20 Pac. 302. The notice applies to proceedings for the condemnation of land: Bensley v. Mountain Lake W. Co., 13 Cal. 307, 319, 73 Am. Dec. 575; Roach v. Riverside W. Co., 74 Cal. 263, 15 Pac. 776; and a party acquiring a homestead interest in property after the filing of a *lis pendens* is a purchaser, and charged with constructive notice: Id. The notice does not affect persons who enter into possession adversely to all the parties to the action in which the notice is filed: Irving v. Cunningham, 77 Cal. 52, 18 Pac. 878. That it does not apply to an action of ejectment, affecting possession but not title, see Long v. Neville, 29 Cal. 132, 135. The notice is not necessary in an action to enforce the lien of a tax: Reeve v. Kennedy, 43 Cal. 643.

Colorado.— Code Proc. 1890, sec. 36. See People v. El Paso Co. Dist. Ct., 19 Colo. 343, 35 Pac. 731. The notice is not necessary in an action to enforce a mechanic's lien, since the notice of lien suffices: Empire Land & Canal Co. v. Engley, 18 Colo. 388, 33 Pac. 153.

Connecticut.— Gen. St. 1888, secs. 916, 947. See Longstaff v. Hurd, 66 Conn. 350, 34 Atl. 91 (an application by a partner for the appointment of a receiver for the settlement of the partnership is not an "action intended to affect real estate," though,

furnish an occasion for the operation of the original doctrine. The constructive notice in all actions to which the equitable rule would have applied is made to depend upon

by statute, the real estate of the partnership vests in the receiver on his appointment).

Illinois.— Hurd's Rev. Stats. 1889, c. 11, sec. 9.

Indiana.— Rev. St. 1894, § 327 *et seq.* (Rev. St. 1881, § 325 *et seq.*) require a *lis pendens* notice in a suit to enforce a lien upon realty, not founded on an instrument executed by the party holding the legal title as appears of record: *e. g.*, a vendor's lien: Pennington v. Martin, 146 Ind. 635, 45 N. E. 1111.

Iowa.— McClain's Code, 1888, secs. 3834, 3835.

Kansas.— Code Civ. Proc., § 81; Garver v. Graham, 6 Kan. App. 344, 51 Pac. 812; Wellsford v. Durst, 8 Kan. App. 231, 55 Pac. 493.

Michigan.— Comp. L., § 441; Howell's Stats. 1882, secs. 6619, 7995. See Lockwood v. Noble, 113 Mich. 418, 71 N. W. 856 (*lis pendens* dates from record of the notice); Detroit Citizens' St. Ry. Co. v. City of Detroit, 124 Mich. 449, 83 N. W. 104 (right to maintain and operate a street railway on a street is an "interest in land," under the statute).

Minnesota.—Gen. St. 1894, § 5866; Joslyn v. Schwend, 89 Minn. 71, 93 N. W. 705 (*lis pendens* once filed in a proper action cannot be discharged by the court while suit is pending).

Mississippi.— Code 1892, ch. 85, suits to enforce a lien upon, or any interest in, real estate; does not include creditors' suits to set aside fraudulent conveyances, under § 503: Fernwood Lumber Co. v. Meehan-Rounds Lumber Co., (Miss.) 37 South. 502.

Montana.—Code Civ. Proc. (1887), § 70.

New Mexico.—Comp. Laws, § 1853; Bell v. Gaylord, 6 N. M. 227, 27 Pac. 494 (action wherein real property is attached is an action "affecting" real property).

North Carolina.—Code 1883, § 229; Todd v. Outlaw, 79 N. C. 235; Dancy v. Duncan, 96 N. C. 111, 1 S. E. 455; Spencer v. Credle, 102 N. C. 68, 78, 8 S. E. 901; Collingwood v. Brown, 106 N. C. 362, 10 S. E. 868; Arrington v. Arrington, 114 N. C. 151, 159, 19 S. E. 351; Morgan v. Bostic, 132 N. C. 743, 44 S. E. 639.

Ohio.— Benton v. Shafer, 47 Ohio St. 117, 24 N. E. 197, 7 L. R. A. 812 (the notice does not affect land lying in another county).

Pennsylvania.—Brightly's Purdon's Dig. 1883, p. 641, sec. 24.

Rhode Island.— Pub. Stats. 1882, p. 567, sec. 12; Gen. Laws, c. 246, § 6; Campbell v. Metcalf, 20 R. I. 352, 39 Atl. 190 (in a suit for accounting, a notice that the decree would be levied on certain land belonging to the defendant is not authorized).

South Carolina.— C. C. P., § 153. See Baum v. Trantham, 45 S. C. 291, 23 S. E. 54; Armstrong v. Carwile, 56 S. C. 463, 35 S. E. 196.

Utah.— Laws 1884, § 266, p. 200.

Virginia.— Code 1887, sec. 3566; Hurn v. Kelly, 79 Va. 415.

West Virginia.— Code 1891, c. 139, sec. 13; Osborn v. Glasscock, 39 W. Va. 749, 20 S. E. 702; Shumate's Ex'rs v. Crockett, (W. Va.) 27 S. E. 240 (when notice not necessary); O'Connor v. O'Connor, 45 W. Va. 354, 32 S. E. 276 (same); Herring v. Bender, 48 W. Va. 498, 37 S. E. 568 (release of notice on discontinuance of suit).

Wisconsin.— § 3187 (actions relating to real property generally); § 3088 (actions of ejectment). See

the filing or recording of a proper notice.[3] It is only necessary to add that all the special rules collected in the foregoing paragraphs concerning the commencement of the *lis pendens*, its continuance as long as the suit is diligently prosecuted, its termination by the final judgment which ends the action, the sufficient description or identification of the subject-matter by the allegations of the pleadings, and the persons who are affected by the constructive notice, are still in force, and apply to all cases which come within the operation of the statutory provisions.[4] [d]

[3] In some of these statutes the operation of the statutory notice is confined to particular kinds of personal property.[e]

Kansas.— Dassler's Comp. Laws 1881, p. 612.

Maine.— Rev. Stats. 1871, p. 620, sec. 24; p. 626, sec. 56.

Massachusetts.— Gen. Stats. 1860, p. 626, sec. 51; p. 627, sec. 57; also Supp. 1860, p. 12, sec. 1; Supp. 1873, p. 46, sec. 1.

New Hampshire.— Gen. Laws 1878, p. 518, sec. 3; p. 519, sec. 16.

Vermont.— Gen. Stats. 1870, p. 294, sec. 37; p. 997, sec. 1.

[4] See, as illustrations, Todd v. Outlaw, 79 N. C. 235; Majors v. Cowell, 51 Cal. 478; Dresser v. Wood, 15 Kan. 344; Mills v. Bliss, 55 N. Y. 139; Sheridan v. Andrews, 49 N. Y. 478; Brown v. Goodwin, 75 N. Y. 409; Mitchell v. Smith, 53 N. Y. 413; Ayrault v. Murphy, 54 N. Y. 203; Fuller v. Scribner, 76 N. Y. 190; Page v. Waring, 76 N. Y. 463; Farmers' Nat. Bank v. Fletcher, 44 Iowa, 252; Stuyvesant v. Hall, 2 Barb. Ch. 151; Stuyvesant v. Hone, 1 Sand. Ch. 419; White v. Perry, 14 W. Va. 66; Mayberry v. Morris, 62 Ala. 113; Tredway v. McDonald, 51 Iowa, 663; 2 N. W. 567; Jones v. McNarrin, 68 Me. 334; 28 Am. Rep. 66; Weeks v. Tomes, 16 Hun, 349; Jaffray v. Brown, 17 Hun, 575; Drake v. Crowell, 40 N. J. L. 58.

Webster v. Pierce, 108 Wis. 407, 83 N. W. 938.

(c) *Kansas.*— Comp. L. 1885, c. 80.

Maine.— Rev. Stats. 1883, c. 81, secs. 24, 59.

Massachusetts.— Pub. Stats. 1882, c. 126, sec. 13.

Vermont.— Rev. Laws 1880, sec. 874.

(d) In general, that the effect of the statutes is simply to limit the method of creating the *lis pendens*, see Warnock v. Harlow, 96 Cal. 298, 31 Pac. 166, 31 Am. St. Rep. 209; Pennington v. Martin, 146 Ind. 635, 45 N. E. 1111; Merrill v. Wright, (Nebr.) 91 N. W. 697 (affects only titles derived from parties to the suit); Johnson v. Irwin, 16 Wash. 652, 48 Pac. 345 (same); Smith v. Gale, 144 U. S. 509, 12 Sup. Ct. 674 (Dakota territory); Hayes v. Nourse, 114 N. Y. 607, 11 Am. St. Rep. 700, 22 N. E. 40 (must be diligence in prosecution, citing this section of the text); Lamont v. Cheshire, 65 N. Y. 30, 37. The common law governs in all cases not covered by the statute. The notice is not necessary as against a purchaser or incumbrancer who is not one *bona fide* and for value: Dunning v. Crane, 61 N. J. Eq. 634, 47 Atl. 420; Vance v. Wesley, 85 Fed. 157, 29 C. C. A. 63 (South Carolina);

§ 641. 5. By Judgments.— By the original doctrine of equity, independent of all statutory changes, it was settled that a final judgment or decree by which the *lis pendens* is ended and the controversy is terminated was not a constructive notice to persons not parties to the suit,[1] except to a purchaser *pendente lite*.[2] It should be remembered in this connection that a decree in chancery originally acted only upon the person of a defendant, and did not create any interest or title in or lien upon the property affected by the suit.[3] While this original rule was still unmodified by statute, a purchaser of the property affected by a judgment, even though it was not docketed, would be bound by it, provided he had, prior to the purchase, received actual notice of it.[4] If it was shown that a subsequent purchaser had made a search for judgments, actual notice of an existing judgment might also be inferred from that fact.[5] The British Parliament has, within the past generation, completely changed the original law concerning the effect of judgments, and has adopted another policy for England and Ireland, which is carried out by very stringent statutory enactments.

1 Worsley v. Earl of Scarborough, 3 Atk. 392; Churchil v. Grove, 1 Ch. Cas. 35; Freem. Ch. 176; Lane v. Jackson, 20 Beav. 535; Lee v. Green, 6 De Gex, M. & G. 155.

2 The notice then arose from the *lis pendens*, and not by virtue of any particular attribute of the judgment itself. See *ante*, §§ 633, 634, on the effect of a *lis pendens*.

3 See Lee v. Green, 6 De Gex, M. & G. 155, 168, per Cranworth, L. C.

4 Davis v. Strathmore, 16 Ves. 419.

5 Procter v. Cooper, 2 Drew. 1; 18 Jur. 444; 1 Jur., N. S., 149. As to the effect of notice or want of notice of a registered judgment upon a purchaser, see Knight v. Pocock, 24 Beav. 436; Governors of the Gray Coat Hospital v. Westminster etc. Comm'rs, 1 De Gex & J. 531; Freer v. Hesse, 4 De Gex, M. & G. 495.

Whittaker v. Greenwood, 17 Utah, 33, 53 Pac. 736 (actual notice); Hurn v. Kelly, 79 Va. 415 (actual notice); Brown v. Cohn, 95 Wis. 90, 69 N. W. 71, 60 Am. St. Rep. 83 (purchaser of a tax title); Bell v. Peterson, 105 Wis. 607, 81 N. W. 279 (same). The *lis pendens* statutes do not apply to suits in the federal courts: Stewart v. Wheeling & L. E. R. Co., 53 Ohio St. 151, 41 N. E. 247, 29 L. R. A. 438; McClaskey v. Barr, 48 Fed. 130; Rutherglen v. Wolf, 1 Hughes, C. C. 78, Fed. Cas. No. 12,175; Wilson v. Hefflin, 81 Ind. 35; Majors v. Cowell, 51 Cal. 478.

By a progressive series of statutes, a system of registration has been established for all judgments and decrees; if duly registered within the times and in the modes prescribed by the statutes, they operate as constructive notice; all judgments and decrees not thus duly registered within the times and in the manner prescribed are declared to be void or to lose their priority, both in law and in equity, as against subsequent purchasers, mortgagees, and creditors, notwithstanding any notice which the latter-named persons may have had.[6] Under these statutes, no notice, either constructive or actual, can take the place of a regular registry. A subsequent purchaser, mortgagee, or creditor obtaining an interest in or claim on the land, where the prior judgment or decree was not properly registered in pursuance of the statute, is protected, even though he had received the most complete actual notice of such judgment or decree. The legislative policy is, that a purchaser or encumbrancer should not be obliged to look beyond the official records or books of registry; if a faithful search discloses no judgment, the statute has made him absolutely secure.[7]

[6] See the following English statutes: 1 & 2 Vict., c. 110; 2 & 3 Vict., c. 11; 3 & 4 Vict., c. 82; 18 & 19 Vict., c. 15; 23 & 24 Vict., c. 38; 27 & 28 Vict., c. 112. As an illustration of the provisions of these statutes and of the system which they establish, I quote a part of section 4 of the act of 18 & 19 Vict., c. 15. After reciting the provisions of the act of 1 & 2 Vict., c. 110, as enlarged by the act of 3 & 4 Vict., c. 82, said section enacts "that no judgment or decree, order or rule, which might be registered under said act of the first and second years of her Majesty shall affect any lands, tenements, or hereditaments, at law or in equity, as to purchasers, mortgagees, or creditors, unless and until such a memorandum or minute as in the said act mentioned shall have been left with the proper officer of the proper court, any notice of any such judgment, decree, order, or rule to any such purchaser, mortgagee, or creditor in any wise notwithstanding." The next section (sec. 5 of the same act of 18 & 19 Vict., c. 15), after reciting provisions of the prior statutes, and explaining the same, adds: "So that notice of any judgment, decree, or rule not duly registered shall not avail against purchasers, mortgagees, or creditors as to lands, tenements, or hereditaments."

[7] Greaves v. Tofield, L. R. 14 Ch. Div. 563, 565, per Jessel, M. R.; p. 571, per James, L. J.; p. 575, per Baggallay, L. J.; Lee v. Green, 6 De Gex, M. & G. 155, 168, per Cranworth, L. C.; Beavan v. Earl of Oxford, 6 De Gex, M. & G. 492, 499, 500; Hickson v. Collis, 1 Jones & L. 94, 113, per Lord St. Leonards;

§ 642. **American Legislation.**—A statutory policy with respect to judgments has also been adopted in this country, which is substantially the same throughout all the states. The state statutes have generally provided, with variations in the detail, a mode of docketing judgments at law; and the same method has been extended in many states to equitable decrees and judgments for the recovery of money. This docketed judgment or decree is generally made a lien, for a prescribed period of time, upon all lands of the judgment debtor situated within the same county, and a constructive notice to all subsequent purchasers and encumbrancers of such lands. Intended purchasers or encumbrancers are therefore obliged, for their own protection, to make a search of the official records over the period during which the statutory effect is given to the docketed judgment. In many of the states provision is also made by the statutes for the registration or recording of equitable decrees, and for the effect of such recording or registration upon those persons who subsequently acquired interests in the property covered by the decree.

§ 643. In giving an interpretation to these statutes concerning the docketing of judgments and registration of decrees, and in determining the questions which have arisen therefrom concerning the constructive notice created by the docket or record, and concerning any notice which may supply the want of a proper docket or record, rules have been adopted in the various states quite analogous to those established by the courts with reference to the recording or registration of deeds, mortgages, and other instruments. The statement and discussion of these rules and of the questions connected therewith, so far as they fall within the domain

Shaw v. Neale, 6 H. L. Cas. 581; reversing 20 Beav. 157. For the statutory system of registration established in Ireland, see the following acts: 3 & 4 Vict., c. 105; 11 & 12 Vict., c. 120; 13 & 14 Vict., c. 29; 34 & 35 Vict., c. 72; and Hickson v. Collis, 1 Jones & L. 94, 113; Eyre v. McDowell, 9 H. L. Cas. 619; see also the English editor's note to Le Neve v. Le Neve, 2 Lead. Cas. Eq., 4th Am. ed., secs. 140, 141, 142.

of equity, will therefore find their proper place under the next following section concerning priorities.[1] [a]

§ 644. 6. By Registration or Recording of Instruments.— The subject to be considered under this subdivision is one of the highest practical importance, both at law and in equity, throughout all the American states. While the decisions of the English courts growing out of the local registration statutes of that country are few, and of little assistance to the American lawyer, those arising under our own statutory system are exceedingly numerous, and often involve questions of great magnitude and difficulty. Many of the questions suggested by these recording acts, and among them those which are the most difficult, and which have occasioned the greatest conflict of judicial opinion, properly belong to the general subject of priorities, and will be examined in the subsequent sections which treat of Priorities and the Effects of Notice, and of Purchasers in Good Faith without Notice. In the present subdivision I shall simply consider the effect of the statutory record as a notice; when, how far, and of what the record is a notice; and when and how far any other notice may supply the want of that created by a statutory registration. The whole discussion will be separated into the following subordinate heads: 1. Statement of the statutory system; 2. General theory, object, and scope of the statutes; 3. Requisites of the record, in order that it may be a constructive notice; 4. Of what the record is a constructive notice; 5. To whom it is a notice; 6. Effect of other kinds of notice in the absence of a record; 7. What kind of notice is sufficient to produce such effect; 8. Judgments under the recording acts.

§ 645. (1) The Statutory System in England.— No general system of registration has ever been adopted in Eng-

[1] See *post*, §§ 721–724.

(a) See, also, on the subject of notice by docketing judgments, including the effect of irregularities in the docketing, of errors or omissions in names, and of omission to index or imperfect indexing, monographic note, 87 Am. St. Rep. 665–673.

land. For certain special reasons, however, local statutes were passed early in the last century providing for a registration in two or three counties or parts of counties. Other statutes have extended the method of registration into Ireland. The provisions of the different English statutes are the same. They enact, in substance, that a "memorial" of all deeds and conveyances affecting lands within the specified county may be registered in a prescribed manner, and that "every such conveyance shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for a valuable consideration," unless a memorial thereof shall be registered before the registering of a memorial of the conveyance under which such subsequent purchaser or mortgagee shall claim.[1] It will be observed that this language providing for registration is permissive, not compulsory; and nothing is said concerning the registry operating as a notice, either actual or constructive, to subsequent purchasers and encumbrancers. In construing this statute, the English courts have given a broad meaning to the word "conveyance," in the clause which provides for the registration of any "deed or conveyance." They hold that it

[1] See Registry Act for the West Riding of Yorkshire, 2 & 3 Anne, c. 4; Registry Act for Middlesex, 7 Anne, c. 120; for North Riding of Yorkshire, 8 Geo. II., c. 6; for East Riding of Yorkshire, 6 Anne, c. 35; for Kingston-upon-Hull, 6 Anne, c. 35; Irish Registry Act, 6 Anne, c. 2. There is a very substantial difference between the wording of the Irish act and that of the English statutes, and it more resembles in its design and effect the system which prevails in the United States. It expressly gives an absolute priority to the deed or conveyance first registered, and a subsequent purchaser for value holding the legal estate, even though he has no actual notice of an equitable estate previously registered, is nevertheless bound by such prior registered interest, and compelled to give effect to it. In other words, the prior registry in Ireland is a *constructive* notice to all subsequent purchasers. In this respect the Irish act is the same in its scope and effect as the American system. See the following cases, which give a construction to this statute: Bushell v. Bushell, 1 Schoales & L. 98; Latouche v. Lord Dunsany, 1 Schoales & L. 159, 160; Thompson v. Simpson, 1 Dru. & War. 459; Drew v. Lord Norbury, 3 Jones & L. 267; 9 Ir. Eq. 171; Mill v. Hill, 12 Ir. Eq. 107; 3 H. L. Cas. 828; Hunter v. Kennedy, 1 Ir. Ch. 148; Corbett v. Cantillon, 5 Ir. Ch. 126; In re Driscoll, 1 I. R. Eq. 285; 2 Lead. Cas. Eq., note of English editor, 4th Am. ed., 119.

denotes any instrument which carries from one person to another an interest, whether legal or equitable, in land. It would therefore embrace any instrument in writing, though not under seal, which created an equitable lien or charge, as well as one creating an estate.[2]

§ 646. In the United States.— While there is some variation in the detail among the statutes of the various states, the central conception and essential plan of the system are substantially the same in all. Many of the acts provide in general terms for the recording of deeds and conveyances; others specifically enumerate the kinds of writings which may be registered, including deeds, leases, mortgages, assignments of mortgages and of leases, agreements for the purchase and sale of land, and in fact all species of written instruments by which any estate, interest, or encumbrance, legal or equitable, in or upon land, is created or transferred.[1]

[2] Credland v. Potter, L. R. 10 Ch. 8, 12, per Cairns, L. C. A mortgage had been given which provided for future advances to be made by the mortgagee, and for his being secured by it with respect to such advances. This mortgage had been duly registered under the West Riding act. The mortgagee made a subsequent further advance, and to secure its payment the mortgagor gave a written instrument, not under seal, creating a further charge upon the premises. The question arose whether this instrument should have been registered so as to give the mortgagee priority over a subsequent second mortgage which was registered. The court held that the instrument was a "conveyance," and should have been registered. Lord Cairns said: "There is no magical meaning in the word 'conveyance'; it denotes an instrument which carries from one person to another an interest in land. Now, an instrument giving to a person a charge upon land gives him an interest in the land; if he has a mortgage already, it gives him a further interest; and so, whether made in favor of a person who has already a charge, or of another person, it is a conveyance of an interest in the land." I see no reason why this decision should not apply, and why the same interpretation should not be given, to the word "conveyance," when it is used in the analogous statutes of the American states.

[1] For additional cases interpreting these statutes, see *post*, § 664. Some knowledge of the *material* portions of these different statutory forms is absolutely essential to any correct understanding of the rules laid down by the courts The decisions in one state might be entirely misleading in another state, unless the peculiar statutory language in the first were observed. As mentioned in the text, several types of legislation prevail in the various states. I have arranged the statutes into classes, according to these types, which

In most of the states this language authorizing a registration is permissive only, but in a few of them it is virtually

are determined by the material and controlling terms found in each. The statutes of each class are substantially alike, with respect to these main features, although their language may vary considerably. In almost every state it is enacted that filing or depositing the instrument for record in the proper office has the same effect with respect to notice, priority, etc., as the actual registration produces.

First Class.— No period is specified within which the record must be made. No express mention is made of notice, actual or constructive, in place of a record. The material provision is, in substance, that every conveyance not duly recorded shall be void as against subsequent purchasers or mortgagees in good faith and for a valuable consideration whose conveyance is first duly recorded. In several of these states, *creditors* are joined with subsequent purchasers. In some, "conveyance" includes every instrument affecting land; and assignments of mortgages are often expressly mentioned in statutes belonging to all the classes.

New York.[a] — 2 Rev. Stats., p. 1119, sec. 165; 1 Fay's Dig. of Laws 1876, p. 580. See Westbrook v. Gleason, 79 N. Y. 23, and cases cited; Judson v. Dada, 79 N. Y. 373; Page v. Waring, 76 N. Y. 463; Lacustrine etc. Co. v. Lake Guano etc. Co., 82 N. Y. 476; Hoyt v. Thompson, 5 N. Y. 347; Newton v. McLean, 41 Barb. 285; Schutt v. Large, 6 Barb. 373; Truscott v. King, 6 Barb. 346; Fort v. Burch, 6 Barb. 60.

California.[b] — Civ. Code, secs. 1107, 1213–1217, 2934, 2935, 2950. See Odd Fellows' Sav. Bank v. Banton, 46 Cal. 603; McMinn v. O'Connor, 27 Cal. 238; Fogarty v. Sawyer, 23 Cal. 570; Woodworth v. Guzman, 1 Cal. 203; Call v. Hastings, 3 Cal. 179; Bird v. Dennison, 7 Cal. 297; Chamberlain v. Bell, 7 Cal. 292; 68 Am. Dec. 260; Dennis v. Burritt, 6 Cal. 670; Hunter v. Watson, 12 Cal. 363; 73 Am. Dec. 543; McCabe v. Grey, 20 Cal. 509; Snodgrass v. Ricketts, 13 Cal. 359; Landers v. Bolton, 26 Cal. 393; Frey v. Clifford, 44 Cal. 335; Packard v. Johnson, 51 Cal. 545; Wilcoxson v. Miller, 49 Cal. 193; Patterson v. Donner, 48 Cal. 369; Long v. Dollarhide, 24 Cal. 218; Fair v. Stevenot, 29 Cal. 486; Mahoney v. Middleton, 41 Cal. 41; Jones v. Marks,

(a) *New York.*— 1 Rev. Stats., p. 762, secs. 37, 38; p. 755, secs. 1 *et seq.*; 2 Rev. Stats., p. 286, sec. 61; Laws 1826, c. 313; Laws 1843, c. 199; 4 Rev. Stats., 8th ed., 2469. See Jackson v. Rice, 3 Wend. 180, 20 Am. Dec. 683; Ackerman v. Hunsicker, 85 N. Y. 43, 49, 39 Am. Rep. 621; Tarbell v. West, 86 N. Y. 280; Mutual Life Ins. Co. v. Dake, 87 N. Y. 257; Bacon v. Van Schoonhover, 87 N. Y. 447; Parker v. Conner, 93 N. Y. 118, 45 Am. Rep. 178; Brewster v. Carnes, 103 N. Y. 556, 9 N. E. 323; McPherson v. Rollins, 107 N. Y. 316, 14 N. E. 411, 1 Am. St. Rep. 826; Bradley v. Walker, 138 N. Y. 291, 33 N. E. 1079; Kirsch v. Tozier, 143 N. Y. 390, 38 N. E. 375, 42 Am. St. Rep. 729; Oliphant v. Burns, 146 N. Y. 218, 40 N. E. 980. The assignment of a mortgage is within the operation of the statute: Brewster v. Carnes, 103 N. Y. 556, 9 N. E. 323; Bacon v. Van Schoonhoven, 87 N. Y. 447.

(b) *California.*— Wolf v. Fogarty, 6 Cal. 224, 65 Am. Dec. 509; Chamberlain v. Bell, 7 Cal. 293, 68 Am.

mandatory. Every such conveyance or other instrument, unless recorded, is declared to be void as against subsequent

47 Cal. 242; O'Rourke v. O'Connor, 39 Cal. 442; Smith v. Yule, 31 Cal. 180; Thompson v. Pioche, 44 Cal. 508; Lawton v. Gordon, 37 Cal. 202; Vassault v. Austin, 36 Cal. 691.

Colorado.[c] — Gen. Laws, p. 139, c. 18, sec. 17.

Dakota.— Rev. Code 1877, p. 341, sec. 671.

Idaho.— Rev. Laws 1875, p. 601.

Michigan.[d] — Comp. Laws 1871, pp. 1345, 1346, sec. 423. See Doyle v. Stevens, 4 Mich. 87; Warner v. Whittaker, 6 Mich. 133; 72 Am. Dec. 65; Barrows v. Baughman, 9 Mich. 213; Willcox v. Hill, 11 Mich. 256, 263; Rood v. Chapin, Walk. Ch. 79; Godfroy v. Disbrow, Walk. Ch. 260.

Minnesota.[e] — Stats. 1878, p. 537, c. 40, sec. 21; Smith v. Gibson, 15 Minn. 89, 99; Coy v. Coy, 15 Minn. 119, 126.

Dec. 260; Hassey v. Wilke, 55 Cal. 525; Donald v. Beals, 57 Cal. 399; McNeil v. Polk, 57 Cal. 323; Meherin v. Oaks, 67 Cal. 57, 7 Pac. 47; Scott v. Sierra Lumber Co., 67 Cal. 71, 7 Pac. 131; Frink v. Roe, 70 Cal. 296, 11 Pac. 820; Karns v. Olney, 80 Cal. 90, 13 Am. St. Rep. 101, 22 Pac. 57; Emeric v. Alvarado, 90 Cal. 444, 478, 27 Pac. 356; Warnock v. Harlow, 96 Cal. 298, 31 Pac. 166, 31 Am. St. Rep. 209; Watkins v. Wilhoit, 104 Cal. 395, 38 Pac. 53; Davis v. Ward, 109 Cal. 186, 41 Pac. 1010, 50 Am. St. Rep. 29; Adler v. Sargent, 109 Cal. 42, 41 Pac. 799; Rea v. Haffenden, 116 Cal. 596, 48 Pac. 716; Prouty v. Devlin, 118 Cal. 258, 50 Pac. 380; County Bank of San Luis Obispo v. Fox, 119 Cal. 61, 51 Pac. 11; Woodward v. Brown, 119 Cal. 283, 51 Pac. 2, 542, 63 Am. St. Rep. 108; Lee v. Murphy, 119 Cal. 364, 51 Pac. 549; Commercial Bank of Santa Ana v. Pritchard, 126 Cal. 600, 59 Pac. 130; Cady v. Purser, 131 Cal. 552, 82 Am. St. Rep. 391, 63 Pac. 844.

(c) *Colorado.*— Mills's Stats. 1891, sec. 446. See Appelman v. Gara, 22 Colo. 397, 45 Pac. 366; Annie C. Gold M. Co. v. Marks, 13 Colo. App. 248, 58 Pac. 404; Board of Commissioners v. Ingram, 31 Colo. 319, 73 Pac. 37.

(d) *Michigan.*—Howell's Stats. 1882, sec. 5683. See Anderson v. Baughman, 7 Mich. 69, 74 Am. Dec. 699; Dewey v. Ingersoll, 42 Mich. 18, 3 N. W. 235; Sinclair v. Slawson, 44 Mich. 123, 6 N. W. 207, 38 Am. Rep. 235; Heim v. Ellis, 49 Mich. 241, 13 N. W. 582; Edwards v. McKernan, 55 Mich. 521, 22 N. W. 20; Ingalls v. Bond, 66 Mich. 338, 33 N. W. 404; Balen v. Mercier, 75 Mich. 42, 42 N. W. 666; Cook v. French, 96 Mich. 525, 56 N. W. 101; Williams v. Hyde, 98 Mich. 152, 57 N. W. 98; Corey v. Smalley, 106 Mich. 257, 58 Am. St. Rep. 474, 64 N. W. 13; Gordon v. Constantine Hydraulic Co., 117 Mich. 620, 76 N. W. 142; Crouse v. Mitchell, 130 Mich. 347, 97 Am. St. Rep. 479, 90 N. W. 32.

(e) *Minnesota.*— Butman v. James, 34 Minn. 547, 27 N. W. 66; Geib v. Reynolds, 35 Minn. 331, 28 N. W. 923; Bailey v. Galpin, 40 Minn. 319, 41 N. W. 1054; Byers v. Orensstein, 42 Minn. 386, 44 N. W. 129; Bank of Benson v. Hove, 45 Minn. 40, 47 N. W. 449; Marston v. Williams, 45 Minn. 116, 22 Am. St. Rep. 719, 47 N. W. 644; Cable v. Minneapolis Stock-Yards & P. Co., 47 Minn. 417, 50 N.

purchasers or encumbrancers in good faith for a valuable consideration whose muniments of title are first put on

Montana.[f] — Laws 1872, pp. 400, 401.

Nevada.[g] — Comp. Laws 1873, p. 38, secs. 252–254. See Grellet v. Heilshorn, 4 Nev. 526.

North Carolina.[h] — Battle's Rev. 1873, p. 354, c. 35, sec. 12. Unless recorded, conveyance is void as against *creditors* and subsequent purchasers for value. No notice whatever will take the place of a record: Robinson v. Willoughby, 70 N. C. 358; Fleming v. Burgin, 2 Ired. Eq. 584; Leggett v. Bullock, Busb. 283.

[i]

Washington.[j] — Laws 1859, p. 299.

W. 528; Welch v. Ketchum, 48 Minn. 241, 51 N. W. 113; Sioux City & St. P. R. Co. v. Singer, 49 Minn. 301, 32 Am. St. Rep. 554, 51 N. W. 905; Schoch v. Birdsall, 48 Minn. 441, 51 N. W. 382; Pinney v. Russell, 52 Minn. 447, 54 N. W. 484; St. Paul Title Ins. & Tr. Co. v. Berkey, 52 Minn. 497, 55 N. W. 60; Miller v. Stoddard, 54 Minn. 486, 56 N. W. 131; Roussain v. Norton, 53 Minn. 560, 55 N. W. 747; Beardsley v. Day, 54 Minn. 504, 55 N. W. 46; Bank of Ada v. Gullikson, 64 Minn. 91, 66 N. W. 131; Kellogg v. Kelly, 69 Minn. 124, 71 N. W. 924; Robertson v. Rentz, 71 Minn. 489, 74 N. W. 133.

(f) *Montana.*— Middle Creek Ditch Co. v. Henry, 15 Mont. 558, 39 Pac. 1054; Baker v. Bartlett, 18 Mont. 446, 45 Pac. 1084, 56 Am. St. Rep. 594.

(g) *Nevada.*— Gen. Stats. 1885, sec. 2595.

(h) *North Carolina.*—Code, §§ 3758, 3664; Code 1883, sec. 1254. See Metts v. Bright, 4 Dev. & B. 173, 32 Am. Dec. 683; Davis v. Inscoe, 84 N. C. 396; Hinton v. Leigh, 102 N. C. 28, 8 S. E. 890; Killebrew v. Hines, 104 N. C. 182, 10 S. E. 159, 251, 17 Am. St. Rep. 672; Duke v. Markham, 105 N. C. 131, 10 S. E. 1003, 1017, 18 Am. St. Rep. 889; Cunninggim v. Peterson, 109 N. C. 33, 13 S. E. 714; Cowen v. Withrow, 109 N. C. 636, 13 S. E. 1022; Long v. Crews, 113 N. C. 256, 18 S. E. 499; Allen v. Bolen, 114 N. C. 560, 18 S. E. 560; Davis v. Whitaker, 114 N. C. 279, 19 S. E. 699, 41 Am. St. Rep. 793; Quinnerly v. Quinnerly, 114 N. C. 145, 19 S. E. 99; Maddox v. Arp, 114 N. C. 585, 19 S. E. 665; Barber v. Wadsworth, 115 N. C. 29, 20 S. E. 178; Hooker v. Nichols, 116 N. C. 157, 21 S. E. 207; Cowen v. Withrow, 116 N. C. 771, 21 S. E. 676; Bostick v. Young, 116 N. C. 766, 21 S. E. 552; Royster v. Lane, 118 N. C. 156, 24 S. E. 796; Allen v. Allen, 121 N. C. 328, 28 S. E. 513; Bernhardt v. Brown, 122 N. C. 587, 65 Am. St. Rep. 725, 29 S. E. 884; Dewey v. Sugg, 109 N. C. 328, 13 S. E. 923, 14 L. R. A. 393; McAllister v. Purcell, 124 N. C. 262, 32 S. E. 715; Hallyburton v. Slagle, 130 N. C. 482, 41 S. E. 877; Bell v. Couch, 132 N. C. 346, 43 S. E. 911; Collins v. Davis, 132 N. C. 106, 43 S. E. 579.

(i) *North Dakota.*— Sarles v. McGee, 1 N. D. 365, 48 N. W. 231, 26 Am. St. Rep. 633; Roby v. Bismarck Nat. Bank, 4 N. D. 156, 59 N. W. 719, 50 Am. St. Rep. 633; Doran v. Dazey, 5 N. D. 167, 64 N. W. 1023, 57 Am. St. Rep. 550; Henniges v. Paschke, 9 N. D. 489, 81 Am. St. Rep. 588, 84 N. W. 350.

(j) *Washington.*— Ritchie v. Griffiths, 1 Wash. 429, 25 Pac. 341, 22 Am. St. Rep. 155, 12 L. R. A. 384;

record. In several of the states the effect of a notice of a prior unregistered instrument is expressly recognized by

Wisconsin.[k] — Rev. Stats. 1871, p. 1147, sec. 27. See Ely v. Wilcox, 20 Wis. 551; 91 Am. Dec. 436. Possession a constructive notice: Ely v. Wilcox, 20 Wis. 551; 91 Am. Dec. 436; Stewart v. McSweeney, 14 Wis. 468; Fery v. Pfeiffer, 18 Wis. 510; Gee v. Bolton, 17 Wis. 604.

Connecticut.[l] — Rev. 1875, p. 353, sec. 11: Quite different in terms from the foregoing. No conveyance is effectual against any other person except the grantor and his heirs, until recorded. Record of an instrument creating an equitable interest is notice to every one of such interest. See Hartmyer v. Gates, 1 Root, 61; Ray v. Bush, 1 Root, 81; Franklin v. Cannon, 1 Root, 500; Welch v. Gould, 2 Root, 287; Judd v. Woodruff, 2 Root, 298. Priority: St. Andrews v. Lockwood, 2 Root, 239; Hall's Heirs v. Hall, 2 Root, 383; Beers v. Hawley, 2 Conn. 467; Hinman v. Hinman, 4 Conn. 575; Hine v. Robbins, 8 Conn. 342; Wheaton v. Dyer, 15 Conn. 307. Defective deed no notice: Watson v. Wells, 5 Conn. 468; Carter v. Champion, 8 Conn. 549; 21 Am. Dec. 695; Sumner v. Rhoda, 14 Conn. 135. Equitable conveyance: Dickenson v. Glenney, 27 Conn. 104.

New Hampshire.[m] — Gen. Laws 1878, p. 323, c. 135, sec. 4: Like Connecticut. See Patten v. Moore, 32 N. H. 382, 384.

Rhode Island.[n] — Gen. Stats. 1872, p. 350, c. 162, sec. 4: Like Connecticut.
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Vermont.[p] — Gen. Stats. 1870, p. 448, sec. 7: Like Connecticut. See Griswold v. Smith, 10 Vt. 452.

Howard v. Shaw, 10 Wash. 151, 38 Pac. 746; Malbon v. Grow, 15 Wash. 301, 46 Pac. 330; Congregational Church Bldg. Soc. v. Scandinavian Free Church, 24 Wash. 433, 64 Pac. 750.

(k) *Wisconsin.*—Sanborn and Berryman's Stat. 1889, sec. 2241. See Erwin v. Lewis, 32 Wis. 276; Girardin v. Lampe, 58 Wis. 267, 16 N. W. 614; Mackey v. Cole, 79 Wis. 426, 48 N. W. 520, 24 Am. St. Rep. 728; Hiles v. Attee, 80 Wis. 219, 49 N. W. 816, 27 Am. St. Rep. 32; Davis v. Steeps, 87 Wis. 472, 58 N. W. 769, 41 Am. St. Rep. 51, 23 L. R. A. 818.

(l) *Connecticut.*— Gen. Stats. 1888, sec. 2961. See Booth v. Barnum, 9 Conn. 286, 23 Am. Dec. 339; Beach v. Osborne, 74 Conn. 405, 50 Atl. 1019; Wheeler v. Young, (Conn.) 55 Atl. 670.

(m) *New Hampshire.*— Salvage v. Haydock, 68 N. H. 484, 44 Atl. 696.

(n) *Rhode Island.*—Pub. Stats. 1882, p. 443, sec. 4. See Cook v. Cook, (R. I.) 43 Atl. 537.

(o) *South Dakota.*— Comp. Laws, §§ 3293, 3272; Cannon v. Deming, 3 S. D. 421, 53 N. W. 863; Parrish v. Mahany, 10 S. D. 276, 73 N. W. 97, 66 Am. St. Rep. 715; Citizens' Bank v. Shaw, 14 S. D. 197, 84 N. W. 779; Shelby v. Bowden, (S. D.) 94 N. W. 416.

(p) *Vermont.*— Rev. Laws 1880, sec. 1931. See Ludlow v. Gill, N. Chipman (Vt.), 33, 1 Am. Dec. 695; Sawyer v. Adams, 8 Vt. 172, 30 Am. Dec. 459; Bigelow v. Topliff, 25 Vt. 273, 60 Am. Dec. 264; Johnson v. Burden, 40 Vt. 567, 94 Am. Dec. 436; Morrill v. Morrill, 53 Vt. 74, 38 Am. Rep. 659; Lovejoy v. Raymond, 58

the statute; in a few of them such a notice is required to be "actual"; while in the majority the legislation is silent

Second Class.— No period is specified within which a record must be made. It is provided in substance that conveyances not recorded are void as to subsequent purchasers and encumbrancers in good faith *without notice* whose instruments are first recorded. In some states, creditors are added to subsequent purchasers.

[q]

Arkansas.[r] — Dig. 1874, p. 275, sec. 861: No deed or instrument for the conveyance of any real estate, or by which the title thereto may be affected, shall be valid against a subsequent purchaser for a valuable consideration without *actual notice*, or against any creditor, unless it be filed for record. See Byers v. Engles, 16 Ark. 543; Hamilton v. Fowlkes, 16 Ark. 340; also Dig. 1874, p. 770, sec. 4288. Mortgages are a lien only from time of filing for record: See Dacoway v. Galt, 20 Ark. 190.

Delaware.— Laws 1874, p. 504, c. 83, secs. 17, 19: As to mortgages, like Arkansas. Deeds must be recorded within *one year*, or else invalid against subsequent fair creditors, mortgagees, or purchasers for a valuable consideration and without notice.

Florida.[s] — Bush's Dig., p. 151: Unless recorded, void as against creditors and subsequent purchasers for value and without notice.

Illinois.[t] — Hurd's Rev. Stats. 1880, p. 271, sec. 30: Unless recorded, are void as against creditors and subsequent purchasers for value without notice.

Vt. 509, 2 Atl. 156; Johnson v. Valido Marble Co., 64 Vt. 337, 25 Atl. 441; Howard v. Clark, 71 Vt. 424, 76 Am. St. Rep. 782; Hunt v. Allen, 73 Vt. 322, 50 Atl. 1103.

(q) *Arizona.*— Rev. Stat., par. 2601, 2621; Reid v. Kleyensteuber, (Ariz.) 60 Pac. 879.

(r) *Arkansas.*— Dig. 1884, sec. 671. See Ford v. Burks. 37 Ark. 91; Dodd v. Parker, 40 Ark. 536; Martin v. Ogden, 41 Ark. 187; Meyer v. Portis, 45 Ark. 420; Turman v. Bell, 54 Ark. 273, 15 S. W. 886, 26 Am. St. Rep. 35; Fincher v. Harregan, 59 Ark. 151, 26 S. W. 821, 24 L. R. A. 543; Allen West Comm. Co. v. Brown, 69 Ark. 163, 61 S. W. 913; Kendall v. J. I. Porter Lumber Co., 69 Ark. 442, 64 S. W. 220; Penrose v. Doherty, 70 Ark. 256, 67 S. W. 398.

(s) *Florida.*—McClellan's Dig. 1881, p. 215; Rogers v. Munnerlyn, 36 Fla. 591, 18 South. 669; McKeown v. Collins, 38 Fla. 276, 21 South. 103; Stockton v. National Bank of Jacksonville, (Fla.) 34 South. 897.

(t) *Illinois.*— Stats. 1889, c. 30, sec. 30. See Carpenter v. Mitchell, 54 Ill. 126; Alvis v. Morrison, 63 Ill. 181, 14 Am. Rep. 117; Shannon v. Hall, 72 Ill. 354, 22 Am. Rep. 146; Hosmer v. Campbell, 98 Ill. 578; Kerfoot v. Cronin, 105 Ill. 609; Warder v. Cornell, 105 Ill. 169; Grundies v. Reid, 107 Ill. 304; Haworth v. Taylor, 108 Ill. 275; Pry v. Pry, 109 Ill. 466; Stokes v. Riley, 121 Ill. 166, 11 N. E. 877; Franklin Sav. Bank v. Taylor, 131 Ill. 376, 23 N. E. 397; Lagger v. Mutual Union L. & B. Assn., 146 Ill. 283, 33 N. E. 946; Hagan v. Varney, 147 Ill. 281, 35 N. E. 219; Stevens v. Shannahan, 160 Ill. 330, 43 N. E. 350; Robertson v. Wheeler, 162 Ill. 566, 44 N. E. 870; Waughop v. Bartlett, 165 Ill. 124, 46 N. E. 124; Lomax v. Pickering, 165 Ill. 431, 46 N. E. 238; Slocum v. O'Day, 174 Ill. 215, 51 N. E. 243;

upon the subject of notice in the place of recording, and its effect is thus left to judicial construction. It would be im-

Iowa.[u] — Miller's Rev. Code 1880, p. 527, sec. 1941: Substantially same as last. See, concerning notice, Senter v. Turner, 10 Iowa, 517; Brinton v. Seevers, 12 Iowa, 389; Dargin v. Beeker, 10 Iowa, 571; Koons v. Grooves, 20 Iowa, 373; Bringholff v. Munzenmaier, 20 Iowa, 513; Gardner v. Cole, 21 Iowa, 205; Willard v. Kramer, 36 Iowa, 22. Subsequent purchasers: Calvin v. Bowman, 10 Iowa, 529; Scoles v. Wilsey, 11 Iowa, 261; Miller v. Bradford, 12 Iowa, 14; Bostwick v. Powers, 12 Iowa, 456; English v. Waples, 13 Iowa, 570; Haynes v. Seachrest, 13 Iowa, 455; Breed v. Conley, 14 Iowa, 269; 81 Am. Dec. 485; Stewart v. Huff, 19 Iowa, 557; Gower v. Doheney, 33 Iowa, 36.

Kansas.[v] — Dassler's Comp. Laws 1879, p. 212, sec. 1043: Filing for record is notice. Until so filed, instruments are not valid except between the parties and as to persons having actual notice. See, concerning notice, School Dist. v. Taylor, 19 Kan. 287; Simpson v. Munder, 3 Kan. 172; Brown v. Simpson, 4 Kan. 76; Claggett v. Crall, 12 Kan. 393, 397; Wickersham v. Chicago etc. Co., 18 Kan. 487; 26 Am. Rep. 784; Johnson v. Clark, 18 Kan. 157, 164; Jones v. Lapham, 15 Kan. 540.

Kentucky.[w] — Gen. Stats. 1873, p. 256, sec. 10: Until filed for record are invalid against subsequent purchasers for value without notice, or against

Mack v. McIntosh, 181 Ill. 633, 54 N. E. 1019; Lanphier v. Desmond, 187 Ill. 370, 58 N. E. 343 (aff. 86 Ill. App. 101); Gardner v. Cohn, 191 Ill. 553, 61 N. E. 492 (aff. 95 Ill. App. 26); Bliss v. Seeley, 191 Ill. 461, 61 N. E. 524; Schaeppi v. Glade, 195 Ill. 62, 62 N. E. 874 (aff. 95 Ill. App. 500); Ogden B. & L. Assn. v. Mensch, 196 Ill. 554, 99 Am. St. Rep. 330, 63 N. E. 1049 (aff. 99 Ill. App. 67); Booker v. Booker, (Ill.) 70 N. E. 709; Mansfield v. Excelsior Refining Co., 135 U. S. 326, 10 S. Ct. 825; Lewis v. Barnhardt, 43 Fed. 854.

(u) *Iowa.*— McClain's Code 1888, sec. 3112. See Jones v. Berkshire, 15 Iowa, 248, 83 Am. Dec. 412; Barney v. McCarthy, 15 Iowa, 510, 83 Am. Dec. 427; Cummings v. Long, 16 Iowa, 41, 85 Am. Dec. 502; Hodgson v. Lovell, 25 Iowa, 97, 95 Am. Dec. 775; Heber v. Bossart, 70 Iowa, 718, 722, 29 N. W. 608; Hibbard v. Zenor, 75 Iowa, 471, 39 N. W. 714, 9 Am. St. Rep. 497; Ætna Life Ins. Co. v. Hesser, 77 Iowa, 381, 42 N. W. 325, 14 Am. St. Rep. 297, 4 L. R. A. 122; Milner v. Nelson, 86 Iowa, 452, 53 N. W. 405, 41 Am. St. Rep. 506; Sims v. Gray, 93 Iowa, 38, 61 N. W. 171; Sherod v. Ewell, 104 Iowa, 253, 73 N. W. 493; Higgins v. Dennis, 104 Iowa, 605, 74 N. W. 9; Pinckney v. Pinckney, 114 Iowa, 441, 87 N. W. 406; Blackman v. Henderson, 116 Iowa, 578, 87 N. W. 655, 56 L. R. A. 902; Koch v. West, 118 Iowa, 468, 96 Am. St. Rep. 374, 92 N. W. 663; Dickinson v. Crowell, 120 Iowa, 254, 94 N. W. 495; Farmers & Merchants' Bank v. Stockdale, (Iowa) 96 N. W. 732.

(v) *Kansas.*— Laws 1885, c. 22, sec. 20. See Miltonville State Bank v. Kuhnle, 50 Kan. 420, 31 Pac. 1057, 34 Am. St. Rep. 129; Wiscomb v. Cubberly, 51 Kan. 580, 33 Pac. 320; Pope v. Nichols, 61 Kan. 230, 59 Pac. 257; American Inv. Co. v. Coulter, 8 Kan. App. 841, 61 Pac. 820.

(w) *Kentucky.*— Gen. Stats. 1887, c. 24, sec. 10. See Conn v. Manifee, 9 Ky. (2 A. K. Marsh.) 396, 12 Am. Dec. 417; Breckenridge v. Todd, 19 Ky. (3 T. B. Mon.) 52, 16 Am. Dec.

possible to give in the text any more exact account of this legislative system, but I have added in the preceding foot-

creditors. See Graves v. Ward, 2 Duvall, 301. Effect of notice: Forepaugh v. Appold, 17 B. Mon. 625, 631.

Maine.— Rev. Stats. 1871, p. 560, c. 73, sec. 8: Unless recorded, are not valid against any one except the grantor, his heirs, devisees, and persons having *actual* notice. See Porter v. Sevey, 43 Me. 519; Goodwin v. Cloudman, 43 Me. 577; Merrill v. Ireland, 40 Me. 569; Hanly v. Morse, 32 Me. 287; Spofford v. Weston, 29 Me. 140; Butler v. Stevens, 26 Me. 484; Roberts v. Bourne, 23 Me. 165; 39 Am. Dec. 614; Veazie v. Parker, 23 Me. 170; Pierce v. Taylor, 23 Me. 246; Rackleff v. Norton, 19 Me. 274; Lawrence v. Tucker, 7 Me. 195; Kent v. Plummer, 7 Me. 464.

Massachusetts.[x] — Gen. Stats., p. 466, c. 89, secs. 1–3: Same as Maine. See Stetson v. Gulliver, 2 Cush. 494, 497; Dole v. Thurlow, 12 Met. 157, 163; Bayley v. Bailey, 5 Gray, 505, 510; Marshall v. Fisk, 6 Mass. 24, 30; 4 Am. Dec. 76; Coffin v. Ray, 1 Met. 212; Flynt v. Arnold, 2 Met. 619; Curtis v. Mundy, 3 Met. 405; Houghton v. Bartholomew, 10 Met. 138; Pomroy v. Stevens, 11 Met. 244; Stewart v. Clark, 13 Met. 79.

Mississippi.[y] — Rev. Code 1871, p. 503. Unless filed for record, are void against creditors and subsequent purchasers for value without notice.

Missouri.[z] — Wagner's Stats. 1872, p. 217, c. 25, secs. 25, 26: Same as Kansas. See Reed v. Ownby, 44 Mo. 204; Valentine v. Harner, 20 Mo. 133; Davis v. Ownsby, 14 Mo. 170; 55 Am. Dec. 105.

83; Garrison v. Haydon, 24 Ky. (1 J. J. Marsh.) 222, 19 Am. Dec. 70; Ward v. Thomas, 81 Ky. 452; Buckner v. Davis, 19 Ky. Law Rep. 1349, 43 S. W. 445; Martin v. Bates, 20 Ky. Law Rep. 1798, 50 S. W. 38; Webb v. Austin, 22 Ky. Law Rep. 764, 58 S. W. 808; Shively v. Gilpin, 23 Ky. Law Rep. 2090, 66 S. W. 763. The notice required to affect an antecedent creditor of a voluntary conveyance must be actual, and constructive notice arising from registration of the deed is insufficient: Ward v. Thomas, 81 Ky. 452.

(x) *Massachusetts.*— Pub. Stats. 1883, c. 120, sec. 4. See Morse v. Curtis, 140 Mass. 112, 54 Am. Rep. 456; Gillespie v. Rogers, 146 Mass. 610, 16 N. E. 711; Toupin v. Peabody, 162 Mass. 473, 39 N. E. 280; Ford v. Ticknor, 169 Mass. 276, 47 N. E. 877.

(y) *Mississippi.*— Code 1880, secs. 1209–1212. See Nugent v. Priebatsch, 61 Miss. 402; Mangold v. Barlow, 61 Miss. 593, 48 Am. Rep. 84; Plant v. Shryock, 62 Miss. 821; Bank of Mobile v. T. Sav. Inst., 62 Miss. 250; Drane v. Newsom, 73 Miss. 422, 19 South. 200; Savings B. & L. Assn. v. Tart, 81 Miss. 276, 32 South. 115; Simmons v. Hutchinson, 81 Miss. 351, 33 South. 21; Henry Marx & Sons v. Jordan, (Miss.) 36 South. 386.

(z) *Missouri.*— Youngblood v. Vastine, 46 Mo. 239, 2 Am. Rep. 509; Wells v. Pressey, 105 Mo. 164, 16 S. W. 670; Trigg v. Vermillion, 113 Mo. 230, 20 S. W. 1047; Fleckenstein v. Baxter, 114 Mo. 493, 21 S. W. 852; Hickman v. Green, (Mo.) 22 S. W. 455; Ford v. Unity Church Soc., 120 Mo. 498, 25 S. W. 394, 41 Am. St. Rep. 711, 23 L. R. A. 561; Geer v. Missouri L. & M. Co., 134 Mo. 85, 56

note an abstract of the statutes, the states being arranged in classes, according to the varying types of their legislation.

Nebraska.[aa] — Comp. Stats. 1881, p. 389, c. 73, sec. 16: Unless recorded, are void against subsequent purchasers and encumbrancers in good faith and without notice who obtain the first record. See, as to constructive notice, Edminster v. Higgins, 6 Neb. 269; Galway v. Malchow, 7 Neb. 289, overruling Bennet v. Fooks, 1 Neb. 465; Metz v. State Bank of Brownville, 7 Neb. 171; Colt v. Du Bois, 7 Neb. 394; Dorsey v. Hall, 7 Neb. 465; Mansfield v. Gregory, 8 Neb. 435; Berkley v. Lamb, 8 Neb. 399. Consideration necessary: Merriman v. Hyde, 9 Neb. 120. Priority: Harral v. Gray, 10 Neb. 189; Lincoln etc. Ass'n v. Hass, 10 Neb. 583: Hooker v. Hammill, 7 Neb. 234; Jones v. Johnson Harvester Co., 8 Neb. 451.

New Mexico.— Comp. Laws 1865, c. 44: Substantially same as Kansas.

Tennessee.[bb] — Code, secs. 2005, 2032. Unless recorded, void against existing or subsequent creditors, or *bona fide* purchasers without notice. Filing for record is notice. See Thomas v. Blackemore, 5 Yerg. 113, 124; Hays v. McGuire, 8 Yerg. 92, 100; Vance v. McNairy, 3 Yerg. 176; 24 Am. Dec. 553; Shields v. Mitchell, 10 Yerg. 8; May v. McKeenon, 6 Humph. 209.

Texas.[cc] — Paschal's Dig., secs. 4334, 4988, 4994: Substantially same as Illinois.

Am. St. Rep. 489, 34 S. W. 1099; Ladd v. Anderson, 133 Mo. 625, 34 S. W. 872; German-Am. Bank v. Carondelet R. E. Co., 150 Mo. 570, 51 S. W. 691; Ozark Land & Lumber Co. v. Franks, 156 Mo. 673, 57 S. W. 540; Smith v. Boyd, 162 Mo. 146, 62 S. W. 439; Green v. Meyers, 98 Mo. App. 438, 72 S. W. 128; Finley v. Babb, 173 Mo. 257, 73 S. W. 180; De Lassus v. Winn, 174 Mo. 636, 74 S. W. 635; Williams v. Butterfield, (Mo.) 81 S. W. 615.

(aa) *Nebraska.*— Traphagen v. Irwin, 18 Neb. 195, 24 N. W. 684; Keeling v. Hoyt, 31 Neb. 453, 48 N. W. 66; Deming v. Miles, 35 Neb. 739, 53 N. W. 665, 37 Am. St. Rep. 464; Burrows v. Hoveland, 40 Neb. 464, 58 N. W. 947; Eggert v. Beyer, 43 Neb. 711, 62 N. W. 57; Sheasley v. Keens, 48 Neb. 57, 66 N. W. 1010; Wehn v. Fall, 55 Neb. 547, 70 Am. St. Rep. 397, 76 N. W. 13; Veeder v. McKinley-Lansing L. & T. Co., 61 Neb. 892, 86 N. W. 982; Ames v. Miller, (Neb.) 91 N. W. 250; Benedict v. T. L. V. Land & Cattle Co., (Neb.) 92 N. W. 210.

(bb) *Tennessee.*— Craig v. Leiper, 2 Yerg. (Tenn.) 193, 24 Am. Dec. 479; Rogers' Lessee v. Cawood, 31 Tenn. (1 Swan) 142, 55 Am. Dec. 729; Harton v. Lyons, 97 Tenn. (13 Pickle) 180, 36 S. W. 851; Hughes v. Powers, 99 Tenn. 480, 42 S. W. 1; Citizens' Bank of Jellico v. McCarty, 99 Tenn. 469, 42 S. W. 4; Cantrell v. Ford, (Tenn. Ch. App.) 46 S. W. 581; Chicago Sugar Ref. Co. v. Jackson Brewing Co. (Tenn. Ch. App.) 48 S. W. 275; Southern B. & L. Assn. v. Rodgers, 104 Tenn. 437, 58 S. W. 234; Whiteside v. Watkins, (Tenn. Ch. App.) 58 S. W. 1107; Parker v. Meredith, (Tenn. Ch. App.) 59 S. W. 167.

(cc) *Texas.*— Taylor v. Harrison, 47 Tex. 454, 26 Am. Rep. 304; Gaston v. Dashiell, 55 Tex. 516; Kennard v. Mabry, 78 Tex. 151, 14 S. W. 272; Clementz v. M. T. Jones Lumber Co., 82 Tex. 424, 18 S. W. 599; Frank v. Heidenheimer, 84 Tex. 642, 19 S. W.

§ 647. (2) General Theory, Scope, and Object of the Statutes.— Under this head I shall explain, without entering into any discussion of details, the general interpretation which

West Virginia.[dd] — Code 1870, c. 74, secs. 5-8: Substantially as Illinois.

Third Class.— The peculiar features of the statutes of this class are, that they require the record to be made within a specified period after execution of the instrument, or else it is void as against subsequent purchasers who are *without notice*, and in some states *creditors* are added. Filing for record is generally made equivalent to an actual recording.

Alabama.[ee] — Code 1867, p. 364, secs. 1557, 1558: Conveyances of unconditional estates, mortgages, and similar instruments to secure *a debt created at the date thereof* are void as to purchasers for a valuable consideration, mortgagees, and judgment creditors, having no notice, unless recorded within *three*

855; Swearingen v. Reed, 2 Tex. Civ. App. 364, 21 S. W. 383; Broussard v. Dull, 3 Tex. Civ. App. 59, 21 S. W. 937; Lignoski v. Crooker, 86 Tex. 324, 24 S. W. 278, 788; Ward v. League, (Tex. Civ. App.) 24 S. W. 986; Kalamazoo Nat. Bank v. Johnson, 5 Tex. Civ. App. 535, 24 S. W. 350; Brown v. Lazarus, 5 Tex. Civ. App. 81, 25 S. W. 71; Maulding v. Coffin, 6 Tex. Civ. App. 416, 25 S. W. 480; Moran v. Wheeler, 87 Tex. 179, 27 S. W. 54; Patterson v. Tuttle, (Tex. Civ. App.) 27 S. W. 758; Laughlin v. Tips, 8 Tex. Civ. App. 649, 28 S. W. 551; Massie v. Yates, (Tex. Civ. App.) 29 S. W. 1132; Brown v. Henderson, (Tex. Civ. App.) 31 S. W. 315; Daugherty v. Yates, 13 Tex. Civ. App. 646, 35 S. W. 937; Murchison v. Mexia, (Tex. Civ. App.) 36 S. W. 828; Texas Consol. C. & M. Assn. v. Dublin C. & M. Co., (Tex. Civ. App.) 38 S. W. 404; Terry v. Cutler, 14 Tex. Civ. App. 520, 39 S. W. 152; Parker v. Walker, 15 Tex. Civ. App. 370, 39 S. W. 611; Southern B. & L. Assn. v. Brackett, (Tex. Civ. App.) 39 S. W. 619; Rork v. Shields, 16 Tex. Civ. App. 640, 42 S. W. 1032; Williams v. Slaughter, (Tex. Civ. App.) 42 S. W. 327; Mattfield v. Huntington, 17 Tex. Civ. App. 716, 43 S. W. 53; Hart v. Patterson, 17 Tex. Civ. App. 591, 43 S. W. 545; Hays v. Tilson, 18 Tex. Civ. App. 610, 45 S. W. 479; Dean v. Gibson, (Tex. Civ. App.) 48 S. W. 57, 58 S. W. 51, 79 S. W. 363; Robertson v. McClay, (Tex. Civ. App.) 48 S. W. 35; White v. McGregor, 92 Tex. 556, 50 S. W. 564, 71 Am. St. Rep. 875; La Pice v. Caddenhead, 21 Tex. Civ. App. 363, 53 S. W. 66; Southwestern Mfg. Co. v. Hughes, 24 Tex. Civ. App. 637, 60 S. W. 684; Turner v. Cochran, 94 Tex. 480, 61 S. W. 923; Neyland v. Texas Yellow Pine Lumber Co., 26 Tex. Civ. App. 417, 64 S. W. 696; Hall v. Read, 28 Tex. Civ. App. 18, 66 S. W. 809; Pierson v. McClintock, (Tex. Civ. App.) 78 S. W. 706; Laufer v. Powell, 30 Tex. Civ. App. 604, 71 S. W. 549.

(dd) *West Virginia.*—Hoult v. Donahue, 21 W. Va. 294; Cox v. Wayt, 26 W. Va. 807; Atkinson v. Miller, 34 W. Va. 115, 11 S. E. 1007, 9 L. R. A. 544; Troy Wagon Co. v. Hutton, 53 W. Va. 154, 44 S. E. 135.

(ee) *Alabama.*— Code 1886, secs. 1810, 1811. See Steiner v. Clisby, 95 Ala. 91, 10 South. 240, 11 South. 294; Chadwick v. Carson, 78 Ala. 116; Wood v. Lake, 62 Ala. 489; Bailey v. Levy, 115 Ala. 565, 22 South. 449; Johnson v. Wilson & Co., 137 Ala. 468, 97 Am. St. Rep. 52, 34

has been put upon this legislation by the courts; its general object, scope, and design; how far it is intended that a record should be constructive notice to those who acquire rights in

months [ff] from their date. Other deeds and mortgages are void as to the same parties, unless recorded before the rights of such parties accrue. See Coster v. Bank of Georgia, 24 Ala. 37; De Vendal v. Malone, 25 Ala. 272; Gray's Adm'rs v. Cruise, 36 Ala. 559. Notice in place of recording: Wallis v. Rhea, 10 Ala. 451; 12 Ala. 646; Jordan v. Mead, 12 Ala. 247; Dearing v. Watkins, 10 Ala. 20; Boyd v. Beck, 29 Ala. 703; Wyatt v. Stewart, 34 Ala. 716. Valid without a record between the parties and against creditors not by judgment: Ohio Life etc. Co. v. Ledyard, 8 Ala. 866; Daniel v. Sorrells, 9 Ala. 436; Andrews v. Burns, 11 Ala. 691; Smith v. Branch Bank, 21 Ala. 125; Center v. P. & M. Bank, 22 Ala. 743. Filing for record creates notice, and a mistake in copying by the recorder does not affect it: Mims v. Mims, 35 Ala. 23.

District of Columbia.— Rev. Stats. 1873, pp. 52, 53: Must be recorded within *six months*, or else void as to all subsequent purchasers without notice.

Georgia.[gg] — Code 1873, secs. 1955–1960: Deeds must be recorded within *one year*, and mortgages within *three months;* otherwise they lose their priority over subsequent deeds, purchases, and liens recorded in time, and without notice of the first. A record after the prescribed period is notice from that time. See Hardaway v. Semmes, 24 Ga. 305. As to notice, Herndon v. Kimball, 7 Ga. 432; 50 Am. Dec. 406; Rushin v. Shields, 11 Ga. 636; 56 Am. Dec. 436; Felton v. Pitman, 14 Ga. 536; Wyatt v. Elam, 19 Ga. 335; Burkhalter v. Ector, 25 Ga. 55; Lee v. Cato, 27 Ga. 637; 73 Am. Dec. 746; Allen v. Holding, 29 Ga. 485; 32 Ga. 418; Williams v. Logan, 32 Ga. 165; Williams v. Adams, 43 Ga. 407.

Ohio.[hh] — 1 Rev. Stats. 1880, p. 1034, secs. 4133, 4134: All instruments for the conveyance or enoumbrance of land must be recorded within *six months;* otherwise are deemed fraudulent as to any subsequent *bona fide* purchaser having at the time of his purchase no knowledge of the existence of such prior instrument. Record made after the six months is notice from the date thereof. See Doe v. Bank of Cleveland, 3 McLean, 140; Smith v. Smith, 13 Ohio St. 532; Lessee of Cunningham v. Buckingham, 1 Ohio, 264; Lessee

South. 392. Equitable interests are not required to be recorded: Bailey v. Timberlake, 74 Ala. 221. A conveyance recorded within the three months allowed by the statute has relation to and takes effect from the day of its execution: Copeland v. Kehoe, 67 Ala. 594.

(ff) Now thirty days.

(gg) *Georgia.*— Code 1895, § 2778. Mortgages must be recorded within thirty days: Code 1882. See Shepherd v. Burkhalter, 13 Ga. 443, 58 Am. Dec. 523; Chatham v. Bradford, 50 Ga. 327, 15 Am. Rep. 692; Wise v. Mitchell, 100 Ga. 614, 28 S. E. 382; New South B. & L. Assn. v. Gann, 101 Ga. 678, 29 S. E. 15; Lytle v. Black, 107 Ga. 386, 33 S. E. 414; Durrence v. Northern Nat. Bank, 117 Ga. 385, 43 S. E. 726.

(hh) *Ohio.*—Rev. St., §§ 4106, 4133; Kemper v. Campbell, 44 Ohio St. 210, 6 N. E. 566; Betz v. Snyder, 48

the same subject-matter; and what kinds and classes of interests are thus affected by a notice.

of Allen v. Parish, 3 Ohio, 107; Northrup's Lessee v. Brehmer, 8 Ohio, 392; Lessee of Irvin v. Smith, 17 Ohio, 226; Spader v. Lawler, 17 Ohio, 371; 49 Am. Dec. 463; Leiby's Ex'rs v. Wolf, 10 Ohio, 83; Price v. Methodist Episcopal Church, 4 Ohio, 515; Stansell v. Roberts, 13 Ohio, 148; 42 Am. Dec. 193; Mayham v. Coombs, 14 Ohio, 428; Bloom v. Noggle, 4 Ohio St. 45; Bercaw v. Cockerill, 20 Ohio St. 163.

South Carolina.[ii] — Rev. Stats. 1873, pp. 422, sec. 1, 424: Conveyances must be recorded within *six months* and mortgages within *sixty days*, or else invalid against subsequent creditors, purchasers, and encumbrancers for value and without notice. See Williams v. Beard, 1 S. C. 309; Boyce v. Shiver, 3 S. C. 515; Steele v. Mansell, 6 Rich. 437; Stokes v. Hodges, 11 Rich. Eq. 135; Bank of State v. S. C. Mfg. Co., 3 Strob. 190; Tact v. Crawford, 1 McCord, 265; Massey v. Thompson, 2 Nott & McC. 105; Dawson v. Dawson, Rice Eq. 243; McFall v. Sherrard, Harp. 295.

Virginia.[jj] — Code 1873, c. 114, secs. 4–9: Mortgages, unless recorded, are void as to creditors and subsequent purchasers for value and without notice. Deeds, unless recorded within *sixty days*, are void as to same parties. See Beverley v. Ellis, 1 Rand. 102; Bird v. Wilkinson, 4 Leigh, 266; Beck's Adm'rs v. De Babtists, 4 Leigh, 349; Lane v. Mason, 5 Leigh, 520; McClure v. Thistle's Ex'rs, 2 Gratt. 182; Glazebrook's Adm'r v. Ragland's Adm'r, 8 Gratt. 344.

Ohio St. 492, 28 N. E. 234, 13 L. R. A. 235; Varwig v. Cleveland, C., C. & St. L. R. Co., 54 Ohio St. 455, 44 N. E. 92; Sternberger v. Ragland, 57 Ohio St. 148, 48 N. E. 811; Amick v. Woodworth, 58 Ohio St. 86, 50 N. E. 437; Wright v. Franklin Bank, 59 Ohio St. 80, 51 N. E. 876; Stivens v. Summers, 68 Ohio St. 421, 67 N. E. 884.

(ii) *South Carolina.*— Gen. Stats. 1882, sec. 1776. The time allowed for recording both mortgages and conveyances is forty days. See Wingo v. Parker, 19 S. C. 9; Mowry v. Crocker, 33 S. C. 436, 12 S. E. 3; Kennedy v. Boykin, 35 S. C. 61, 14 S. E. 809, 28 Am. St. Rep. 838; Arthur v. Screven, 39 S. C. 77, 17 S. E. 640; Trustees of Poor School v. Jennings, 40 S. C. 168, 18 S. E. 257, 891, 42 Am. St. Rep. 855; Interstate B. & L. Assn. v. McCartha, 43 S. C. 72, 20 S. E. 807; Armstrong v. Austin, 45 S. C. 69, 22 S. E. 763, 29 L. R. A. 772; Levi v. Gardner, 53 S. C. 24, 30 S. E. 617; Turpin v. Sudduth, 53 S. C. 295, 31 S. E. 245, 306; Blackwell v. British-Am. Mtge. Co., 65 S. C. 105, 43 S. E. 395. Failure to record does not invalidate the instrument as to the parties thereto: Wingo v. Parker, 19 S. C. 9; Greenwood Loan & G. Co. v. Childs, (S. C.) 45 S. E. 167; McGhee v. Wells, 57 S. C. 280, 76 Am. St. Rep. 567, 35 S. E. 529.

(jj) *Virginia.*— Code 1887, secs. 2463–2469. See Horsley v. Garth, 2 Gratt. 471, 44 Am. Dec. 393; Dobyns v. Waring, 82 Va. 159; Bowden v. Parrish, 86 Va. 67, 9 S. E. 616; Nicholson v. Gloucester Charity School, 93 Va. 101, 24 S. E. 899; Lynchburg P. B. & L. Co. v. Fellers, 96 Va. 337, 31 S. E. 505, 70 Am. St. Rep. 851; Mercantile Co-op. Bank v. Brown, 96 Va. 614, 32 S. E. 64; Price v. Wall's Ex'r, 97 Va. 334, 75 Am. St. Rep. 788, 33 S. E. 599;

§ 648. The English Theory.—A very narrow interpretation has been put upon their local registry acts by the Eng-

Fourth Class.— The statutes of this class resemble those of the last one, in requiring the record to be made within a prescribed period of time after the execution; but they make no mention of the presence or absence of notice in connection with the subsequent purchasers, etc., who obtain a first record.

Indiana.[kk] — Gavin and Hord's Stats., p. 260, sec. 16, p. 261: Every conveyance, etc., not recorded within *ninety days* is void against a subsequent purchaser or mortgagee in good faith and for a valuable consideration. See Reasoner v. Edmundson, 5 Ind. 393.

Maryland.[ll] — Rev. Code 1878, p. 385, secs. 16–19: Instruments must be recorded within *six months*, and then take effect from their date; otherwise they are not valid for purpose of passing title. See Byles v. Tome, 39 Md. 461; Cooke's Lessee v. Kell, 13 Md. 469; Hoopes v. Knell, 31 Md. 550; Building Ass'n v. Willson, 41 Md. 514. Effective from date when recorded: Owens v. Miller. 29 Md. 144; Leppoc v. National Union Bank, 32 Md. 136; Knell v. Building Ass'n, 34 Md. 67; Carson's Adm'rs v. Phelps, 40 Md. 97; Lester v. Hardesty, 29 Md. 50; Estate of Leiman, 32 Md. 225; 3 Am. Rep. 132. Priority: Cockey v. Milne's Lessee, 16 Md. 207; Willard's Ex'rs v. Ramsburg, 22 Md. 206; Nelson v. Hagerstown Bank, 27 Md. 51; Walsh v. Boyle, 30 Md. 267; Glenn v. Davis, 35 Md. 215; 6 Am. Rep. 389; Busey v. Reese, 38 Md. 264; Homer v. Grosholz, 38 Md. 521; Abrams v. Sheehan, 40 Md. 446; Kane v. Roberts, 40 Md. 590.

Florence v. Morien, 98 Va. 26, 34 S. E. 890; National Mutual B. & L. Assn. v. Blair, 98 Va. 490, 36 S. E. 513; Bridgewater Roller Mills Co. v. Strough, 98 Va. 721, 2 Va. Sup. Ct. Rep. 593, 37 S. E. 290; Bankers' L. & I. Co. v. Blair, 99 Va. 606, 39 S. E. 231, 86 Am. St. Rep. 914; Hunton v. Wood, (Va.) 43 S. E. 186. Unrecorded contract for sale of real estate is void as to creditors, whether with or without notice: Dobyns v. Waring, 82 Va. 159.

(kk) *Indiana.*— Rev. Stats. 1888, sec. 2931. Must be recorded within forty-five days. See Lasselle v. Barnett, 1 Blackf. 150, 12 Am. Dec. 217; Gilchrist v. Gough, 63 Ind. 576, 30 Am. Rep. 250; Hutchinson v. First Nat. Bank, 133 Ind. 271, 30 N. E. 952, 36 Am. St. Rep. 537; Fisher v. Bush, 133 Ind. 315, 32 N. E. 924; Walls v. State, 140 Ind. 16, 38 N. E. 177; Frick v. Godare, 144 Ind. 170, 42 N. E. 1015; Johnson v. Schloesser, 146 Ind. 509, 45 N. E. 509, 58 Am. St. Rep. 367, 36 L. R. A. 59; Carson v. Eickhoff, 148 Ind. 596, 47 N. E. 1067; Ellison v. Branstrator, 153 Ind. 146, 54 N. E. 433; National State Bank v. Sandford Fork & Tool Co., 157 Ind. 10, 60 N. E. 699; Kirkham v. Moore, 30 Ind. App. 549, 65 N. E. 1042; Osborn v. Hall, (Ind.) 66 N. E. 457.

(ll) *Maryland.*— Rev. Code 1888, art. 81, secs. 13–16. See Sitler v. McComas, 66 Md. 135, 6 Atl. 527; Hoffman v. Gosnell, 75 Md. 577, 24 Atl. 28; Nickel v. Brown, 75 Md. 172, 23 Atl. 736; South Baltimore H. & I. Co. v. Smith, 85 Md. 537, 37 Atl. 27; Annan v. Hays, 85 Md. 505, 37 Atl. 20; Buchanan v. Lloyd, 88 Md. 642, 41 Atl. 1075; Cissel v. Henderson, 88 Md. 574, 41 Atl. 1068; Dick v. Balch, 33 U. S. (8 Pet.) 30.

lish courts. As the language authorizing a registration is permissive merely, and as the statute is silent respecting

New Jersey.[mm] — Rev., p. 155, sec. 14: No instrument is valid against subsequent purchasers or encumbrancers in good faith, unless filed for record within *fifteen days* from its date.

Oregon.[nn] — Gen. Laws, p. 651, sec. 26: Unless recorded within *five days*, is void against subsequent purchaser in good faith and for value whose instrument is first recorded.

Pennsylvania.[oo] — Purdon's Dig., p. 321, sec. 71: Instruments executed within the state must be recorded within *six months*, those executed out of the state within *one year*, otherwise they do not operate to pass the title. See, as to parties against whom unrecorded instrument is valid, Nice's Appeal, 54 Pa. St. 200; Speer v. Evans, 47 Pa. St. 141; Britton's Appeal, 45 Pa. St. 172; Mellor's Appeal, 32 Pa. St. 121; Adams's Appeal, 1 Pa. St. 447. Priority: Brooke's Appeal, 64 Pa. St. 127; Dungan v. Am. etc. Ins. Co., 52 Pa. St. 253; Bratton's Appeal, 8 Pa. St. 164; Foster's Appeal, 3 Pa. St. 79; Ebner v. Goundie, 5 Watts & S. 49; Poth v. Anstatt, 4 Watts & S. 307; Lightner v. Mooney, 10 Watts, 407. Judgment creditors: Cover v. Black, 1 Pa. St. 493; Stewart v. Freeman, 22 Pa. St. 123. Applies to a *bona fide* purchaser only: Plumer v. Robertson, 6 Serg. & R. 179; Poth v. Anstatt, 4 Watts & S. 307; Bracken v. Miller, 4 Watts & S. 102; Hoffman v. Strohecker, 7 Watts, 90; 32 Am. Dec. 740; Jaques v. Weeks, 7 Watts, 261; Union Canal Co. v. Young, 1 Whart. 432; 30 Am. Dec. 212; Sailor v. Hertzog, 4 Whart. 264; Snider v. Snider, 3 Phila. 160. Notice: Chen v. Barnet, 11 Serg. & R. 389; Harris v. Bell, 10 Serg. & R. 39; Boggs v. Varner, 6 Watts & S. 469; Parke v. Chadwick, 8 Watts & S. 96; Miller v. Cresson, 5 Watts & S. 284; Green v. Drinker, 7 Watts & S. 440; Krider v. Lafferty, 1 Whart. 303;

(mm) *New Jersey*.— Boyd v. Mundorf, 30 N. J. Eq. 545; Cogswell v. Stout, 32 N. J. Eq. 240; Parsons v. Lent, 34 N. J. Eq. 67; Bingham v. Kirkland, 34 N. J. Eq. 229; Lemos v. Terhune, 40 N. J. Eq. 364, 2 Atl. 18; Flemington Nat. Bank v. Jones, 50 N. J. Eq. 244, 486, 24 Atl. 928, 27 Atl. 636; Protection B. & L. Assn. v. Knowles, 54 N. J. Eq. 519, 34 Atl. 1083; Brinton v. Scull, 55 N. J. Eq. 747, 35 Atl. 843; Essex Co. Bank v. Harrison, 57 N. J. Eq. 91, 40 Atl. 209; Von Schuler v. Commercial Inv. B. & L. Assn., 63 N. J. Eq. 388, 51 Atl. 932; Lembeck & Betz Eagle Brewing Co. v. Kelly, 63 N. J. Eq. 401, 51 Atl. 794. A recording in the wrong book is not notice: Parsons v. Lent, 34 N. J. Eq. 66. A lease is a conveyance within the meaning of the statute, and is entitled to be recorded: Spielmann v. Kliest, 36 N. J. Eq. 202; Laws of 1872, p. 93.

(nn) *Oregon*.— Hill's Laws 1887, sec. 3027. See Musgrove v. Bowser, 5 Or. 313, 20 Am. Rep. 737; Watson v. Dundee Mfg. Co., 12 Or. 474, 8 Pac. 548; Meier v. Kelly, 22 Or. 136, 29 Pac. 265; Security Sav. & Tr. Co. v. Loewenberg, 38 Or. 159, 62 Pac. 647; Zorn v. Livesley, (Or.) 75 Pac. 1057. The assignment of a mortgage is not required to be recorded: Watson v. Dundee, etc., Mortgage Co., 12 Or. 474, 8 Pac. 548.

(oo) *Pennsylvania*.—Purd. Dig. 565, 568, 588; 1 Purdon's Dig. 1883, p. 583, sec. 94. See Manufacturers & Mechanics' Bank v. Bank of Penn-

any notice, it is settled that the registry of a deed or conveyance is not of itself a notice so as to affect a subsequent purchaser who has obtained the legal estate.[1] If, however, it

Epley v. Witherow, 7 Watts, 167; Rankin v. Porter, 7 Watts, 387; Kerns v. Swope, 2 Watts, 75; Lewis v. Bradford, 10 Watts, 67; Randall v. Silverthorn, 4 Pa. St. 173; Hetherington v. Clark, 30 Pa. St. 393. Equitable title included: Bellas v. McCarty, 10 Watts, 13. Assignment of mortgage: Philips v. Bank of Lewistown, 18 Pa. St. 394; Mott v. Clark, 9 Pa. St. 399; 49 Am. Dec. 566. Mortgage of personal property: Lightner v. Mooney, 10 Watts, 407; Hoffman v. Strohecker, 7 Watts, 86; 32 Am. Dec. 740.

Wyoming.— Comp. Laws, c. 40: Must be recorded within three months, and is then notice to and takes precedence of subsequent purchasers.

Louisiana.[pp] — Rev. Code 1875, p. 417, sec. 2266: This statute differs much from all others in its language and details, although not much perhaps in its effects. All instruments affecting real property are utterly void as to third persons unless publicly inscribed on the records of the parish, and become effective as to such persons from the time of filing for record; but they are valid as against the parties and their heirs.

[1] Morecock v. Dickins, Amb. 678; Bushell v. Bushell, 1 Schoales & L. 90, 103; Ford v. White, 16 Beav. 120; Underwood v. Lord Courtown, 2 Schoales & L. 40; Wiseman v. Westland, 1 Younge & J. 117; Hodgson v. Dean, 2 Sim. & St. 221. Thus a prior equitable encumbrance, though registered, will not affect a subsequent purchaser without notice who has obtained the legal

sylvania, 7 Watts & S. 335, 42 Am. Dec. 240; Ridgway's Appeal, 15 Pa. St. 177, 53 Am. Dec. 586; McKean & Elk Land Imp. Co. v. Mitchell, 35 Pa. St. (11 Casey) 269, 78 Am. Dec. 335; Lerch's Appeal, 44 Pa. St. 140; Schell v. Stein, 76 Pa. St. (26 P. F. Smith) 398, 18 Am. Rep. 416; Pepper's Appeal, 77 Pa. St. 373; Horning's Ex'r's Appeal, 90 Pa. St. 388; Stockwell v. McHenry, 107 Pa. St. 237, 52 Am. Rep. 475; Green v. Rick, 121 Pa. St. 130, 6 Am. St. Rep. 760, 2 L. R. A. 48; Crouse v. Murphy, 140 Pa. St. 335, 21 Atl. 358, 23 Am. St. Rep. 232, 12 L. R. A. 58; Fries v. Null, 154 Pa. St. 573, 26 Atl. 554, 32 Wkly. Notes Cas. 236 (affirmed, 158 Pa. St. 15, 27 Atl. 867); Foster v. Carson, 159 Pa. St. 477, 28 Atl. 356, 33 Wkly. Notes Cas. 517, 39 Am. St. Rep. 696; Collins v. Aaron, 162 Pa. St. 539, 29 Atl. 724; Farabee v. McKerrehan, 172 Pa. St. 234, 33 Atl. 583, 51 Am. St. Rep. 734; Lulay v. Barnes, 172 Pa. St. 331, 34 Atl. 52, 37 Wkly. Notes Cas. 409; Coleman v. Reynolds, 181 Pa. St. 317, 37 Atl. 543; Huey v. Prince, 187 Pa. St. 151, 40 Atl. 982, 42 Wkly. Notes Cas. 441; In re Ambrose, 187 Pa. St. 178, 41 Atl. 28; Davis v. Monroe, 187 Pa. St. 212, 41 Atl. 44, 67 Am. St. Rep. 581; Pyles v. Brown, 189 Pa. St. 164, 42 Atl. 11, 29 Pittsb. Leg. J. (N. S.) 311, 43 Wkly. Notes Cas. 433, 69 Am. St. Rep. 794; Farmer v. Fisher, 197 Pa. St. 114, 46 Atl. 892; Gillespie v. Buffalo, R. & P. Ry. Co., 204 Pa. St. 107, 53 Atl. 639; McKeen v. Delancey's Lessee, 9 U. S. (5 Cranch) 22.

(pp) *Louisiana.*— Patterson v. De La Ronde, 75 U. S. (8 Wall.) 292; Cucullu v. Hernandez, 103 U. S. 105.

be shown that a subsequent purchaser made a search of the proper records, then it may be presumed that he thereby obtained actual notice of a prior conveyance which was registered.[2] The same restricted and imperfect view was taken by a few of the early American cases, which appear to have held that a record did not operate as an absolute constructive notice to subsequent purchasers, and that the statutes did not embrace conveyances of equitable rights and interests, so that the record of such a conveyance would not be a notice.[3]

estate: Morecock v. Dickins, Amb. 678; Bushell v. Bushell, 1 Schoales & L. 90, 103. The Irish acts seem to be different in this respect: See *ante*, note under § 645, and cases there cited. A prior conveyance of an equitable interest, if registered, would doubtless take precedence of a subsequent *equitable* interest also registered, in pursuance of the general doctrine that among *equities* otherwise equal, the one prior in time must prevail.

2 Hodgson v. Dean, 2 Sim. & St. 221; Lane v. Jackson, 20 Beav. 535.

3 Grimstone v. Carter, 3 Paige, 421, 437; 24 Am. Dec. 230; Doswell v. Buchanan, 3 Leigh, 365; 23 Am. Dec. 280. See also Gouverneur v. Lynch, 2 Paige, 300; De Ruyter v. Trustees etc., 2 Barb. Ch. 556; Ludlow v. Van Ness, 8 Bosw. 178; Swigert v. Bank etc., 17 B. Mon. 268, 290; Corn v. Sims, 3 Met. (Ky.) 348; Walker v. Gilbert, 1 Freem. Ch. 75; Kelly v. Mills, 41 Miss. 267; Jaques v. Weeks, 7 Watts, 261, 268, 272. I add a short extract from the opinion in Grimstone v. Carter, 3 Paige, 421, 437, 24 Am. Dec. 230, which well illustrates this partial theory. A deed had been given, absolute on its face, but really intended as a security for a debt, and it was accompanied by a verbal agreement by the grantee — the creditor — to reconvey upon payment. The land having been conveyed by the grantee to a subsequent purchaser, the question was, how far the latter's rights were affected by the verbal agreement. The court held that the recording or not recording of such agreement was wholly immaterial upon this question; the subsequent purchaser would be bound by the agreement, if he had notice of it, whether it was recorded or not; he would not be bound, in the absence of notice, even though it had been recorded. Chancellor Walworth said: The design of the recording act was "to protect a subsequent *bona fide* purchaser against a previous conveyance of the *legal* estate, or of some part thereof, and which conveyance would be valid as against the subsequent purchaser or mortgagee if the recording act had not been passed. But a subsequent *bona fide* purchaser needed the aid of the registry act to protect him against a prior equity or a mere agreement to convey. Having the legal title under his conveyance, he would be able to defend his title at law; and the plea that he was a *bona fide* purchaser for a valuable consideration would afford him a full protection against an equitable claim of which he had no previous notice." Independently of any judicial construction opposed to this view, it will be seen that the stat-

§ 649. The American Theory.— A broader and more effective interpretation has been established throughout the American states by an overwhelming weight of judicial authority. The recording statutes have been regarded with the utmost favor, and our whole system of conveyancing and of land titles has been based upon them. Indeed, the tendency of modern legislation has been to enlarge their scope and to define their operation, so that they should, in terms, include every kind of instrument by which the ownership and enjoyment of land can be affected. By this theory the object of the legislation is, that the proper record of every such instrument should be absolute notice of its contents, and of all rights, titles, or interests, legal and equitable, created by or embraced within it, to every person subsequently dealing with the subject-matter whose duty or interest it is to make a search of the records.[a] The intention is, to compel every person receiving such an instrument to place it upon the records, in order that he may thereby protect his own rights as well as those of all others who may afterwards acquire an interest in the same property. It was designed that the public records should, in this manner, furnish an accurate and complete transcript and exhibition of all estates, titles, interests, claims, encumbrances, and charges, both legal and equitable, in and upon every parcel of land which had come into private ownership within the territorial limits over which the particular record extends; and that a person about to deal with respect to any parcel of land should be able to discover, or find the means of discovering, every existing and outstanding estate, title, or interest in it which could affect the rights of a *bona fide* purchaser. This is the theory of the legislation as estab-

utes of many states are directly in conflict with it, since they provide in express terms for the recording of agreements to convey and other instruments creating only an equitable interest.

(a) This passage of the text is quoted in Johnson v. Hess, 126 Ind. 298, 25 N. E. 445, 9 L. R. A. 471. This section is cited in Gregg v. Thurber, 69 N. H. 480, 45 Atl. 241.

lished by judicial interpretation; and this general design has, as far as possible, been carried into effect by the courts.[1] It is therefore settled, even independently of the express terms of many state statutes, that equitable estates and interests, as well as legal, are embraced within the intent and operation of the recording acts, and that any instrument creating or conveying such an interest, which is duly recorded, must thereby obtain all the benefits which depend upon or flow from the fact of registration under these statutes.[2] [b]

[1] Bird v. Dennison, 7 Cal. 297; Chamberlain v. Bell, 7 Cal. 292; 68 Am. Dec. 260; Call v. Hastings, 3 Cal. 179; Woodworth v. Guzman, 1 Cal. 203; Dennis v. Burritt, 6 Cal. 670; Hunter v. Watson, 12 Cal. 363; 73 Am. Dec. 543; McCabe v. Grey, 20 Cal. 509; Grant v. Bissett, 1 Caines Cas. 112; Jackson v. Given, 8 Johns. 137; 5 Am. Dec. 328; Jackson v. Van Valkenburgh, 8 Cow. 260; Rounds v. McChesney, 7 Cal. 360; Cook v. Travis, 20 N. Y. 400; Wood v. Chapin, 13 N. Y. 509; 67 Am. Dec. 62; Webster v. Van Steenbergh, 46 Barb. 211; Taylor v. Thomas, 5 N. J. Eq. 331; Losey v. Simpson, 11 N. J. Eq. 246; Routh v. Spencer, 38 Ind. 393; Holbrook v. Dickenson, 56 Ill. 497; Hogden v. Guttery, 58 Ill. 431; Harrington v. Allen, 48 Miss. 493; Ohio L. Ins. Co. v. Ledyard, 8 Ala. 866; Peychaud v. Citizens' Bank, 21 La. Ann. 262; Harang v. Plattsmier, 21 La. Ann. 426.

[2] Digman v. McCollum, 47 Mo. 372, 375, 376; U. S. Ins. Co. v. Shriver, 3 Md. Ch. 381; Alexander v. Webster, 6 Md. 359; Alderson v. Ames, 6 Md. 52; Gen. Ins. Co. v. U. S. Ins. Co., 10 Md. 517; 69 Am. Dec. 174; Bellas v. McCarty, 10 Watts, 13; Russell's Appeal, 15 Pa. St. 319; Siter v. McClanachan, 2 Gratt. 280; Hunt v. Johnson, 19 N. Y. 279; Doyle v. Teas, 4 Scam. 202; Wilder v. Brooks, 10 Minn. 50; 88 Am. Dec. 49; Dickenson v. Glenney, 27 Conn. 104; Parkist v. Alexander, 1 Johns. Ch. 394; Boyce v. Shiver, 3 S. C. 515. A mortgage by a vendee of his equitable interest under a land contract: Bank of Greensboro v. Clapp, 76 N. C. 482; Crane v. Turner, 7 Hun, 357; 67 N. Y. 437. In U. S. Ins. Co. v. Shriver, 3 Md. Ch. 381, the court stated the doctrine as follows: The legislative intent was, "that all rights, encumbrances, or conveyances touching, connected with, or in any way concerning land should appear upon the public records. It followed that conveyances of equitable interests in land were within the registry acts; and that a conveyance of such an interest which, though subsequent in date, is first recorded must be preferred, unless the grantee had actual notice of the prior unregistered deed."

As illustrations: A subsequent purchaser has constructive notice of a prior recorded encumbrance,— e. g., a mortgage or a deed of trust,— even though the encumbrancer's own title, which was a mere agreement to convey, was not recorded: Digman v. McCollum, 47 Mo. 372, 375, 376. An agreement in writ-

(b) Edwards v. McKernan, 55 Mich. 521, 22 N. W. 20.

§ 650. (3) Requisites of the Record, in Order that It may be a Constructive Notice.— Since the constructive notice arising from a registration is unknown to the common law, and is entirely a creation of the statute, it is plain that the provisions of the statute must be exactly complied with, or else there will be no resulting notice. Certain requisites are prescribed by the legislation; they are all essential; without them, the object of the proceeding would wholly fail. I purpose to state and explain these requisites as they have been inferred from the statutory provisions, and settled by the decisions. They relate to the form, execution, and contents of the instrument, and to the form and manner of the registration.

§ 651. The Form and Kind of Instrument.— The record operates as a constructive notice only when the instrument itself is one of which the registration is required or authorized by the statute. The voluntary recording, therefore, of an instrument, when not authorized by the statute, would be a mere nullity, and would not charge subsequent purchasers with any notice of its contents or of any rights arising under it.[1] [a]

ing to convey land, though not under seal, creating an equitable interest, is protected by a record: Brotherton v. Livingston, 3 Watts & S. 334; Schutt v. Large, 6 Barb. 373; Kiser v. Heuston, 38 Ill. 252; and see cases cited at the commencement of this note. The record of a voluntary conveyance or deed without consideration is notice to a subsequent purchaser, and tends to remove the presumption of bad faith or fraud as against such purchaser: Beal v. Warren, 2 Gray, 447; Mayor v. Williams, 6 Md. 235; Williams v. Bank, 11 Md. 198; Cooke's Lessee v. Kell, 13 Md. 469, 493.

The doctrine stated in the text and sustained by the decisions cited in this note has been affirmed by several state statutes, which, in terms, provide for the recording of contracts for the sale of land, and other instruments creating a mere equitable interest. See *ante*, note under § 646.

[1] As examples: The entry upon a certain record-book in the county clerk's office of lands sold by the United States, being required by the statute only for purposes of taxation, is not a constructive notice to subsequent pur-

(a) Benedict v. T. L. V. Land & C. Co., (Nebr.) 92 N. W. 210; Chadwick v. Gulf States L. & I. Co., 74 Fed. 616, 41 U. S. App. 39, 20 C. C. A. 563 (record of deed void by statute, in Louisiana, when taxes have not been paid); Middle Creek Ditch Co. v. Henry, 15 Mont. 558, 39 Pac.

§ 652. **Execution of the Instrument.**— The record does not operate as a constructive notice, unless the instrument is duly executed, and properly acknowledged or proved, so as to entitle it to be recorded. The statutes generally require, as a condition to registration, that the instrument should be legally executed, and that it should be formally acknowledged or proved, and a certificate thereof annexed. If a writing should be placed upon the records with any of these preliminaries entirely omitted or defectively performed, such a record would be a mere voluntary act, and would

chasers of the facts contained in it: Betser v. Rankin, 77 Ill. 289.[b] The record of a deed transferring personal property is not a constructive notice of such transfer, even when the deed was also a conveyance of land, and as such was entitled to be recorded: Pitcher v. Barrows, 17 Pick. 361; 28 Am. Dec. 306; Boggs v. Varner, 6 Watts & S. 469.[c] The same is true of the recording of an assignment of a mortgage when not authorized by the statute:[d] James v. Morey, 2 Cow. 246; 14 Am. Dec. 475; Mott v. Clark, 9 Pa. St. 400; 49 Am. Dec. 566; see also Graves v. Graves, 6 Gray, 391; Villard v. Robert, 1 Strob. Eq. 393; Bossard v. White, 9 Rich. Eq. 483; Galpin v. Abbott, 6 Mich. 17; Reed v. Coale, 4 Ind. 283; Brown v. Budd, 2 Ind. 442; Commonwealth v. Rodes, 6 B. Mon. 171, 181; Parret v. Shaubhut, 5 Minn. 323; Burnham v. Chandler, 15 Tex. 441; Lewis v. Baird, 3 McLean, 56.

1054 (recording acts do not apply to appropriation of usufruct of water of a stream); Spielmann v. Kliest, 36 N. J. Eq. 202 (a lease for years is a "conveyance" entitled to record); Pry v. Pry, 109 Ill. 466 (forged deed); Burck v. Taylor, 152 U. S. 634, 14 Sup. Ct. 696 (same); Terry v. Cutler, 14 Tex. Civ. App. 520, 39 S. W. 152 (void sheriff's deed); Chicago Sugar Ref. Co. v. Jackson Brewing Co., (Tenn. Ch. App.) 48 S. W. 275 (record of assignment of chose in action not notice). But that the record operates as notice in cases where the conveyances are merely authorized as well as where they are required to be registered, see Neslin v. Wells, 104 U. S. 434; Pepper's Appeal, 77 Pa. St. 373.

(b) See, also, Lewis v. Barnhart, 145 U. S. 56, 12 Sup. Ct. 772, 43 Fed. 854 (Illinois); Lomax v. Pickering, 165 Ill. 431, 46 N. E. 238.

(c) See, also, Scott v. Sierra Lumber Co., 67 Cal. 71, 7 Pac. 131.

(d) See, also, Howard v. Shaw, 10 Wash. 151, 38 Pac. 746, citing this section of the text; Watson v. Dundee, 12 Or. 474, 8 Pac. 548, citing this section of the text; Adler v. Sargent, 109 Cal. 42, 41 Pac. 799. In many states, the assignment of a mortgage is held to be a "conveyance" within the meaning of the recording acts: see *ante*, § 646, note; Henniges v. Paschke, 9 N. Dak. 489, 84 N. W. 350, 81 Am. St. Rep. 588. A similar rule as to the assignment of a lease was laid down in Crouse v. Mitchell, 130 Mich. 347, 90 N. W. 32, 97 Am. St. Rep. 479.

have no effect upon the rights of subsequent purchasers or encumbrancers.[1] [a]

[1] This rule has been applied under a great variety of circumstances, and to many kinds of defects and imperfections: Pringle v. Dunn, 37 Wis. 449, 460, 461; 19 Am. Rep. 772; Brown v. Lunt, 37 Me. 423; De Witt v. Moulton, 17 Me. 418; Stevens v. Morse, 47 N. H. 532; Isham v. Bennington Iron Co., 19 Vt. 230; Blood v. Blood, 23 Pick. 80; Sumner v. Rhodes, 14 Conn. 135; Carter v. Champion, 8 Conn. 548; 21 Am. Dec. 695; Parkist v. Alexander, 1 Johns. Ch. 394; Green v. Drinker, 7 Watts & S. 440; Heister v. Fortner, 2 Binn. 40; 4 Am. Dec. 417; Strong v. Smith, 3 McLean, 362; Cockey v. Milne, 16 Md. 200; Johns v. Reardon, 3 Md. Ch. 57; 5 Md. 81; Herndon v. Kimball, 7 Ga. 432; 50 Am. Dec. 406; Work v. Harper, 24 Miss. 517; Thomas v. Grand Gulf Bank, 9 Smedes & M. 201; Graham v. Samuel, 1 Dana, 166; Halstead v. Bank of Kentucky, 4 J. J. Marsh. 554; White v. Denman, 1 Ohio St. 110; Reynolds v. Kingsbury, 15 Iowa, 238; Barney v. Little, 15 Iowa, 527; Brinton v. Seevres, 12 Iowa, 389; Hodgson v. Butts, 3 Cranch, 140; Shults v. Moore, 1 McLean, 521; Harper v. Reno, 1 Freem. Ch. 323. The legislature, however, may provide that a defective acknowledgment shall not invalidate a record, and may even cure such a defect by a retroactive statute as between the parties, but not as against one who has already purchased the land in good

(a) This section is quoted in Lynch v. Murphy, 161 U. S. 247, 16 Sup. Ct. 523. See, also, Parmelee v. Simpson, 5 Wall. (72 U. S.) 81 (record of undelivered deed not notice); Lewis v. Barhart, 145 U. S. 56, 12 Sup. Ct. 772 (record of foreign will insufficiently certified); Prentice v. Duluth Storage & F. Co., 58 Fed. 437, 7 C. C. A. 293 (foreign deed insufficiently certified); McKeown v. Collins, 38 Fla. 276, 21 South. 103; Williams v. Butterfield, (Mo.) 81 S. W. 615 (not acknowledged); Salvage v. Haydock, 68 N. H. 484, 44 Atl. 696 (record of insufficiently attested deed); McKean, etc., Imp. Co. v. Mitchell, 35 Pa. St. (11 Casey) 269, 78 Am. Dec. 335; Cook v. Cook, (R. I.) 43 Atl. 537 (undelivered deed); Arthur v. Screven, 39 S. C. 77, 17 S. E. 640; Texas Consol. C. & M. Assn. v. Dublin C. & M. Co., (Tex. Civ. App.) 38 S. W. 404; Morrill v. Morrill, 53 Vt. 74, 38 Am. Rep. 659.

Record of Defectively Acknowledged Instrument not Notice. See Reid v. Kleyensteuber, (Ariz.) 60 Pac. 899; Cumberland B. & L. Assn. v. Sparks, 111 Fed. 647, 49 C. C. A. 510 (in Arkansas, improperly acknowledged mortgage creates no lien against third parties, although they have actual notice of its existence and knowledge of its contents); Wolf v. Fogarty, 6 Cal. 224, 65 Am. Dec. 509; Emeric v. Alvarado, 90 Cal. 444, 478, 27 Pac. 356; Lee v. Murphy, 119 Cal. 364, 51 Pac. 549; Milner v. Nelson, 86 Iowa 452, 53 N. W. 405, 41 Am. St. Rep. 506, 19 L. R. A. 279 (defect which could be supplied by reference to the body of the instrument not fatal); Sherod v. Ewell, 104 Iowa 253, 73 N. W. 493; Koch v. West, 118 Iowa 468, 92 N. W. 663, 96 Am. St. Rep. 394; Farmers & Merchants' Bank v. Stockdale, (Iowa) 96 N. W. 732; Wiscomb v. Cubberly, 51 Kan. 580, 33 Pac. 320; Sitler v. McComas, 66 Md. 135, 6 Atl. 527; Tweto v. Burau, (Minn.) 97 N. W. 128; German-American Bank v. Carondelet R. E. Co., 150 Mo. 570, 51 S. W. 691; Finley v. Babb, 173 Mo. 257, 73 S. W. 180 (forged ac-

§ 653. **Form and Manner of the Record.**— Furthermore, the record of an instrument which is itself duly executed and entitled to be registered does not operate as a constructive notice, unless it is made in the proper form and manner, in the proper book, as required by the statute. The policy of the recording acts is, that those persons who are affected with constructive notice should be able to obtain an actual notice, and even full knowledge, by means of a search. A search could not *ordinarily* be successful and lead the party to the knowledge which he seeks, if the instrument were recorded in a wrong book. This rule, therefore, instead

faith: [b] Watson v. Mercer, 8 Pet. 88; Gillespie v. Reed, 3 McLean, 377; Barnet v. Barnet, 15 Serg. & R. 72; Tate v. Stooltzfoos, 16 Serg. & R. 35; 16 Am. Dec. 546; Hughes v. Cannon, 2 Humph. 589; Reed v. Kemp, 16 Ill. 445; Allen v. Moss, 27 Mo. 354; Brown v. Simpson, 4 Kan. 76; Wallace v. Moody, 26 Cal. 387. The statutes in a few states provide that an instrument filed for record shall be a notice, although not properly acknowledged, but that the record cannot be used as evidence without the acknowledgment.[c]

knowledgment); Keeling v. Hoyt, 31 Nebr. 453, 48 N. W. 66; Brinton v. Scull, 55 N. J. Eq. 747, 35 Atl. 843; Bradley v. Walker, 138 N. Y. 291, 33 N. E. 1079; Long v. Crews, 113 N. C. 256, 18 S. E. 499; Bernhardt v. Brown, 122 N. C. 587, 65 Am. St. Rep. 725, 29 S. E. 884; Amick v. Woodworth, 58 Ohio St. 86, 50 N. E. 437; Murgrove v. Bowser, 5 Oreg. 313, 20 Am. Rep. 737; Cannon v. Deming, 3 S. Dak. 421, 53 N. W. 863; Citizens' Bank v. McCarty, 99 Tenn. 469, 42 S. W. 4; Stiles v. Japhet, 84 Tex. 91, 19 S. W. 450; Kalamazoo Nat. Bank v. Johnson, 5 Tex. Civ. App. 535, 24 S. W. 350; Daugherty v. Yates, 13 Tex. Civ. App. 646, 35 S. W. 937 (notary neglected to attach seal); Nicholson v. Gloucester Charity School, 93 Va. 101, 24 S. E. 899; Hunton v. Wood, (Va.) 43 S. E. 186; Bowden v. Parrish, 86 Va. 67, 19 Am. St. Rep. 873, 9 S. E. 616.

Where the acknowledgment is regular on its face, though irregular in fact, as where it was taken by an officer who was disqualified by interest, but this disqualification does not appear from the record, it is generally held to be sufficient for the purpose of imparting constructive notice: Ogden B. & L. Ass'n v. Mensch, 196 Ill. 554, 63 N. E. 1049, 89 Am. St. Rep. 330; Benson Bank v. Hove, 45 Minn. 40, 47 N. W. 449; Roussain v. Norton, 53 Minn. 560, 55 N. W. 747; Southwestern Mfg. Co. v. Hughes, 24 Tex. Civ. App. 637, 60 S. W. 684; but in a few states the rule is otherwise, and such secret irregularity in the acknowledgment destroys the effect of the record as notice: Blackman v. Henderson, (Iowa) 87 N. W. 655, and Iowa cases cited.

(b) Blackman v. Henderson, (Iowa) 87 N. W. 655; Williams v. Butterfield, (Mo.) 77 S. W. 729.

(c) See, also, Carpenter v. Dexter, 8 Wall. 513.

of being arbitrary and technical, is absolutely essential to any effective working of the statutory system.[1][a] For the

[1] Pringle v. Dunn, 37 Wis. 449, 460, 461; 19 Am. Rep. 772; Van Thorniley v. Peters, 26 Ohio St. 471. If the law prescribes that deeds should be recorded in certain books,—"books of deeds,"—and that mortgages should be entered in another set of books,—"books of mortgages,"—the record of a mortgage in a "book of deeds," or of a deed in a "book of mortgages," would be wholly inoperative as a *constructive* notice: Luch's Appeal, 44 Pa. St. 140; Calder v. Chapman, 52 Pa. St. 359; 91 Am. Dec. 163; McLanahan v. Reeside, 9 Watts, 508; 36 Am. Dec. 136; Colomer v. Morgan, 13 La. Ann. 202; Succession of Cordeviolle v. Dawson, 26 La. Ann. 534; Fisher v. Tunnard, 25 La. Ann. 179; Verges v. Prejean, 24 La. Ann. 78; Grimstone v. Carter, 3 Paige, 421; 24 Am. Dec. 230. In Luch's Appeal, 44 Pa. St. 140, a peculiar instrument which was actually given as security for a debt, and was therefore held to be a mortgage, and not an absolute conveyance, had been recorded in a book of deeds; this record was held to be inoperative as a notice. In McLanahan v. Reeside, 9 Watts, 508, 36 Am. Dec. 136, a deed absolute on its face was given, accompanied by a separate written defeasance, both constituting a mortgage. They were both recorded in the same book, but at different pages, several pages intervening between the two. The court held that no notice was thereby given of the instrument *as a mortgage*, because a party making a search, and finding the deed absolute on its face, would be misled, and suppose that there was no other instrument affecting the title: Viele v. Judson, 82 N. Y. 32.

(a) Cady v. Purser, 131 Cal. 552, 63 Pac. 844, 82 Am. St. Rep. 391; Chamberlain v. Bell, 7 Cal. 293, 68 Am. Dec. 260; Williams v. Hyde, 98 Mich. 152, 57 N. W. 98; Gordon v. Constantine Hydraulic Co., 117 Mich. 620, 76 N. W. 142; Parsons v. Lent, 34 N. J. Eq. 67; Sawyer v. Adams, 8 Vt. 172, 30 Am. Dec. 459 (recorder fraudulently recorded on back leaf of a book which had been filled for twelve years, and omitted entry in index, with purpose to conceal).

Notice from Time of Filing for Record.— The statutes in many of the states contain provisions to the effect that the recording is deemed to be complete and to become operative from the moment the instrument is left with the proper officer for record. In these states it would seem to follow, and it has been repeatedly so decided, that no subsequent error or omission of the officers whose duty it is to make the record, will destroy the effectiveness of the recording as constructive notice. The person filing the instrument, it is held, discharges his full duty when he delivers it to the recording officer with directions how to record it: Breckenridges v. Todd, 19 Ky. (3 T. B. Mon.) 52, 16 Am. Dec. 83; Gillespie v. Rogers, 146 Mass. 610, 16 N. E. 711; Heim v. Ellis, 49 Mich. 241; Mangold v. Barlow, 61 Miss. 593, 48 Am. Rep. 84; Deming v. Miles, 35 Nebr. 739, 53 N. W. 665, 37 Am. St. Rep. 464; VonSchuler v. Commercial Inv. B. & L. Ass'n. 63 N. J. Eq. 388, 51 Atl. 932; Durrence v. Northern Nat. Bank, 117 Ga. 385, 43 S. E. 726; Buckner v. Davis, 19 Ky. Law Rep. 1349, 43 S. W. 445; Webb v. Austin, 22 Ky. Law Rep. 764, 58 S. W. 808; Farabee v. McKerrihan, 172 Pa. St. 234, 33 Atl. 583, 51 Am. St. Rep.

same reason the operation of a record as constructive notice is limited territorially. A record is not a notice with re-

It might be supposed that the same rule should apply to a proper indexing. But in Mut. Life Ins. Co. v. Dake, 1 Abb. N. C. 381, it was expressly held that the index is not an essential part of the record; that a mortgage otherwise

734; Metts v. Bright, 4 Dev. & B. 173, 32 Am. Dec. 173; Legnoski v. Crooker, 86 Tex. 324, 24 S. W. 278; Throckmorton v. Price, 28 Tex. 605, 91 Am. Dec. 334; Freiberg v. Magale, 70 Tex. 116, 7 S. W. 684; Hudson v. Randolph, 66 Fed. 216, 13 C. C. A. 402, 23 U. S. App. 681 (Texas); Bigelow v. Topliff, 25 Vt. 273, 60 Am. Dec. 264. The recording of a mortgage in a "book of deeds," is, therefore, operative as notice: Farabee v. McKerrihan, 172 Pa. St. 234, 33 Atl. 583, 51 Am. St. Rep. 734, overruling Luch's Appeal, 44 Pa. St. 140, cited by the author. Where two instruments are filed for record at the same time, the officer cannot affect their priority by the numbers that he gives to them: Schaeppi v. Glade, 195 Ill. 62, 62 N. E. 874. But in order to protect himself from the effect of the recorder's mistake in recording the instrument in the wrong book, it seems that the person depositing it for record must indicate its true character as a chattel mortgage, a mortgage of realty, etc.: Benedict v. T. L. V. Land & Cattle Co., (Nebr.) 92 N. W. 210; Hunt v. Allen, 73 Vt. 322, 50 Atl. 1103. It has been held to follow from the statutory provision that where the grantee's agent filed the deed for record and afterwards, without authority, took it back before it was spread upon the records, the original filing was effective as notice: Parrish v. Mahany, 10 S. Dak. 276, 66 Am. St. Rep. 715, 73 N. W. 97. In general, however, the withdrawal of the instrument before it is actually recorded defeats its effect as notice: the grantee's exemption from prejudice by the misconduct of the clerk does not extend to his *own* acts: Turman v. Bell, 54 Ark. 273, 15 S. W. 886, 26 Am. St. Rep. 35; Webb v. Austin, 22 Ky. Law Rep. 764, 58 S. W. 808; Johnson v. Burden, 40 Vt. 567, 94 Am. Dec. 436; Mercantile Co-op. Bank v. Brown, 96 Va. 614, 32 S. E. 64; and a deed is not "filed for record," within the meaning of the statute, when it is merely left by the grantee with the recorder with a direction not to record it until ordered to do so: Haworth v. Taylor, 108 Ill. 275.

The courts of several states, on the other hand, in a number of well considered cases, have been able so to construe their statutes as to reach a conclusion in harmony with the text. This result is obtained by taking the provisions of the general recording statute in connection with entirely distinct statutes prescribing in detail the duties of the recording officer. Thus, in California, Civ. Code, § 1170, relating to the "Mode of Recording," provides that "an instrument is deemed to be recorded when . . . it is deposited . . . for record;" § 1213, relating to the "Effect of Recording," that "every conveyance of real property acknowledged . . . *and recorded as prescribed by law*, from the time it is filed with the recorder for record, is constructive notice of the contents thereof to subsequent purchasers and mortgagees." These sections are construed as follows: "For the pur-

spect to any land situated in a different county from that in which the registration is made. The statutes uniformly

duly recorded is notice, although not indexed. To the same effect are Curtis v. Lyman, 24 Vt. 338; 58 Am. Rep. 174; Bishop v. Schneider, 46 Mo. 472; 2 Am. Rep. 533; Throckmorton v. Price, 28 Tex. 605; 91 Am. Dec. 334; Board

pose of complying with a statutory requirement, as in the case of official bonds or certificates of marriage, where the evident purpose of the statute is to make the instrument a matter of public record, or when the recording of an instrument is an essential step in perfecting some right or completing some act of the party, as in the case of a declaration of homestead, or an assignment for the benefit of creditors, the depositing of the instrument in the recorder's office is sufficient; but, when merely making a record of the instrument is not the ultimate purpose of the party, but the recording of the instrument is the means by which his ultimate purpose is to be carried into effect, as when his purpose is to give notice of his interest in real estate, section 1213 requires not only that the instrument shall be filed with the recorder for record, but that it shall also be 'recorded as prescribed by law,'" that is to say, as prescribed by the County Government Act, which lays down in detail the recorder's duties. An instrument, therefore, is not recorded, for purposes of notice, until it has been transcribed into the proper book: Cady v. Purser, 131 Cal. 552, 63 Pac. 844, 82 Am. St. Rep. 391. Similarly, a statute prescribing the recorder's duties is treated as controlling the provision of the recording act that deeds and mortgages "shall be valid as against *bona fide* purchasers, from the date of their filing *or* recording in said office, and when so filed *or* recorded shall be notice to all the world," and it is inferred that the index is an essential part of the record: Ritchie v. Griffiths, 1 Wash. 429, 25 Pac. 341, 22 Am. St. Rep. 155, 12 L. R. A. 384 (a very instructive opinion). Other cases repudiate this method of statutory construction, and refuse to read the recording act in the light of separate statutes prescribing the recorder's duties: thus, in Armstrong v. Austin, 45 S. C. 69, 22 S. E. 763, 29 L. R. A. 772, it is argued that "the failure of the officer to perform a duty imposed upon him by a separate statutory provision, while it may subject him to an action at the instance of a party who may suffer by his default, yet cannot affect the validity or effect of the recording." See, also, Davis v. Whitaker, 114 N. C. 279, 19 S. E. 699, 41 Am. St. Rep. 793; Farabee v. McKerrihan, 172 Pa. St. 234, 33 Atl. 583, 51 Am. St. Rep. 734.

The opinion in Mangold v. Barlow, 61 Miss. 593, 48 Am. Rep. 84, enumerates many of the earlier cases on this vexed question, and adheres to what it considers the minority view, that the grantee who lodges the deed for record cannot be prejudiced by a mistake or omission on the recorder's part; citing, (Alabama) McGregor v. Hall, 3 Stew. 397; Mines v. Mines, 35 Ala. 23; (Connecticut) Franklin v. Cannon, 1 Root, 500; Judd v. Woodruff, 2 Root, 298; (Illinois) Merrick v. Wallace, 19 Ill. 486; (Pennsylvania) Glading v. Frick, 88 Pa. St. 460; Clader v. Thomas, 89 Pa. St. 343; (Rhode Island) Nichols v. Reynolds, 1 R. I.

require the instrument to be registered in the same county

of Commissioners v. Babcock, 5 Or. 472. And the same as to a mistake in indexing: Green v. Garrington, 16 Ohio St. 548; but see, *per contra*, Speer v. Evans, 47 Pa. St. 141, per Woodward, J.[b]

30, 36 Am. Dec. 238; (Virginia) Beverly v. Ellis, 1 Rand. 102; and in support of the contrary view, that subsequent purchasers are bound only by what the records show, citing, (California) Chamberlain v. Bell, 7 Cal. 292, 68 Am. Dec. 260; (Georgia) Shepherd v. Burkhalter, 13 Ga. 443, 58 Am. Dec. 523; (Iowa) Meller v. Bradford, 12 Iowa, 14; (Michigan) Barnard v. Campau, 29 Mich. 162; (Maryland) Brydon v. Campbell, 40 Md. 331; (Missouri) Terrell v. Andrew Co., 44 Mo. 309; (New York) Beekman v. Frost, 18 Johns. 544, 9 Am. Dec. 246; Frost v. Beekman, 1 Johns. Ch. 288; (Tennessee) Lally v. Holland, 1 Swan, 396; Baldwin v. Marshall, 2 Humph. 116; (Vermont) Sawyer v. Adams, 8 Vt. 172, 30 Am. Dec. 459; Sanger v. Craigue, 10 Vt. 555; (Wisconsin) Pringle v. Dunn, 37 Wis. 449, 19 Am. Rep. 772.

Destruction of the Records.—After the recording has once been accomplished, it is quite uniformly held that its effectiveness is not defeated by the subsequent careless or accidental loss of the records, as by fire: Paxson v. Brown, (C. C. A.) 61 Fed. 874 (Arkansas); Deming v. Miles, 35 Nebr. 739, 53 N. W. 665, 37 Am. St. Rep. 464; Alvis v. Morrison, 63 Ill. 181, 14 Am. Rep. 117; Shannon v. Hall, 72 Ill. 354, 22 Am. Rep. 146; Franklin Sav. Bank v. Taylor, 131 Ill. 376, 23 N. E. 397; Geer v. Missouri L. & M. Co., 134 Mo. 85, 54 Am. St. Rep. 489, 34 S. W. 1099; Mattfield v. Huntington, 17 Tex. Civ. App. 716, 43 S. W. 53; Franklin Sav. Bank v. Taylor, 53 Fed. 854, 4 C. C. A. 55, 9 U. S. App. 406 (but the record is superseded by a decree subsequently rendered giving the terms of the instrument incorrectly). See Tolle v. Alley, (Ky.) 24 S. W. 113 (negligence in failing for five years to restore the record of a mortgage, as authorized by statute, will destroy its lien as against an innocent purchaser from the mortgagor after the destruction of the record).

(b) **Index.**— In further support of the usual rule that a failure to index the instrument, or a mistake in indexing, does not defeat the effect of the record as notice, see Chatham v. Bradford, 50 Ga. 327, 15 Am. Rep. 692; Mutual Life Ins. Co. v. Dake, 87 N. Y. 257; Davis v. Whitaker, 114 N. C. 279, 19 S. E. 699, 41 Am. St. Rep. 793; Hampton Lumber Co. v. Ward, 95 Fed. 3 (North Carolina); Schell v. Stein, 76 Pa. St. (26 P. F. Smith) 398, 18 Am. Rep. 416; Stockwell v. McHenry, 107 Pa. St. 237, 52 Am. Rep. 475; Armstrong v. Austin, 45 S. C. 69, 22 S. E. 763, 29 L. R. A. 772; Greenwood Loan & Guarantee Co. v. Childs, (S. C.) 45 S. E. 167.

In a few states the index is an essential part of the record: Ætna Life Ins. Co. v. Hesser, 77 Iowa 381, 42 N. W. 325, 14 Am. St. Rep. 297, 4 L. R. A. 122 (judgment against "Hesser" was indexed under name of "Hesse"); Koch v. West, 113 Iowa, 468, 92 N. W. 663, 96 Am. St. Rep. 394; Barney v. McCarthy, 15 Iowa, 510, 83 Am. Dec. 427; Hibbard v. Zenor, 75 Iowa, 471, 9 Am. St. Rep. 497, 39 N. W. 714; Ritchie v. Griffiths, 1 Wash. 429, 25 Pac. 341, 22 Am. St. Rep. 155, 12 L. R. A. 384; Malborn v. Grow, 15 Wash.

in which the land is situated; a record in a different county is therefore inoperative as a constructive notice.[2] [c]

§ 654. Contents of the Record.— A record is a constructive notice only when and so far as it is a true copy, sub-

[2] King v. Portis, 77 N. C. 25. If a deed or mortgage covered lands situated in two different counties, and it was recorded in one of them only, it would be effective as to part of the land conveyed, but inoperative as a notice with respect to the other part: Astor v. Wells, 4 Wheat. 466; Lewis v. Baird, 3 McLean, 56; Stevens v. Brown, 3 Vt. 420; 23 Am. Dec. 215; Perrin v. Reed, 35 Vt. 2; Kerns v. Swope, 2 Watts, 75; Hundley v. Mount, 8 Smedes & M. 387; Crosby v. Huston, 1 Tex. 203; St. John v. Conger, 40 Ill. 535; Stewart v. McSweeney, 14 Wis. 468.

In Kerns v. Swope, 2 Watts, 75, a prior deed of land lying in two counties had been recorded in one of them only, and so was not constructive notice with respect to the land situated in the other. A subsequent purchaser bought and took a conveyance of both tracts. The court held that while this purchaser was not charged with *constructive* notice with respect to the land situated in one of the counties, there arose a *presumption of fact* that he had examined the record, and had thus obtained *actual* notice of the deed of both parcels; that a jury might rely upon such presumption of fact, and might find as a fact that he had received actual notice from such a search of the records. In my opinion, this decision pushes the doctrine of actual notice based upon indirect evidence to the furthest extreme. I seriously doubt its correctness. See *ante*, § 600, and note thereunder.

301, 46 Pac. 330; Congregational Church Building Society v. Scandinavian Free Church, 24 Wash. 433, 64 Pac. 750 (mistake as to name of grantor); Hiles v. Atlee, 80 Wis. 219, 49 N. W. 816, 27 Am. St. Rep. 32. Under this rule it is held that the index need not contain a full description of the land; it is a sufficient description if it "challenges attention": Malborn v. Grow, 15 Wash. 301, 46 Pac. 330.

In the following cases an index in the name of the husband only of deeds executed by the husband and wife was held sufficient: Jones v. Berkshire, 15 Iowa, 248, 83 Am. Dec. 412; Hodgson v. Lovell, 25 Iowa, 97, 95 Am. Dec. 775.

(c) See De Lassus v. Winn, 174 Mo. 636, 74 S. W. 635; Jackson v. Rice, 3 Wend. 180, 20 Am. Dec. 683; Horsley v. Garth, 2 Gratt. 471, 44 Am. Dec. 393. The deed must be recorded in the county in which the land lies at the time it is deposited for registration. Garrison v. Haydon, 24 Ky. (1 J. J. Marsh.) 222, 19 Am. Dec. 70. And see Broussard v. Dull, 3 Tex. Civ. App. 59, 21 S. W. 937. Under a statute providing that conveyances shall be recorded in the county where the land or a part thereof is situated, it has been held that where one tract of land is situated in two counties, a record in one is sufficient to impart notice to creditors: Brown v. Lazarus, 5 Tex. Civ. App. 81, 25 S. W. 71. In Kentucky a deed conveying land in two counties may be recorded in the county in which the greater part of the land lies, and is then constructive notice: Shively v. Gilpin, 23 Ky. Law Rep. 2090, 66 S. W. 763.

stantially even if not absolutely correct, of the instrument which purports to be registered, and of all its provisions. Any material omission or alteration will certainly prevent the record from being a constructive notice *of the original instrument,* although it may appear on the registry books to be *an* instrument perfect and operative in all its parts. The test is a plain and simple one. It is, whether the record, if examined and read by the party dealing with the premises, would be an *actual* notice to him of the original instrument and of all its parts and provisions. By the policy of the recording acts, such a party is called upon to search the records, and he has a right to rely upon what he finds there entered as a true and complete transcript of any and every instrument affecting the title to the lands with respect to which he is dealing. A record can only be a constructive notice, at most, of whatever is contained within itself.[1] [a]

[1] As illustrations of such mistakes affecting the operation of the record as a constructive notice would be an error in the description or location of the premises included in the original deed or mortgage; an error in the name of a grantor or mortgagor; an error in the amount of the debt for which a mort-

(a) This passage is quoted in Johnson v. Hess, 126 Ind. 298, 25 N. E. 445, 9 L. R. A. 471; Interstate B. & L. Ass'n v. McCartha, 43 S. C. 72, 20 S. E. 807. As was shown in the editor's note to the last paragraph, the statutes of many states which make the notice date from the filing of the instrument for record are interpreted as exempting the person filing the instrument from prejudice by any error or omission on the recorder's part; an erroneous record, by this interpretation of these statutes, is constructive notice of the original: Zear v. Boston Safe Dep. & T. Co., 2 Kan. App. 505, 43 Pac. 977; Hudson v. Randolph, 66 Fed. 216, 13 C. C. A. 402, 23 U. S. App. 681 (Texas); Meherin v. Oaks, 67 Cal. 57, 7 Pac. 47; Mangold v. Barlow, 61 Miss. 593, 48 Am. Rep. 84, reviewing the earlier cases.

Error in Name.— That an error in the initial of the middle name does not invalidate the record, see Fincher v. Hanegan, 59 Ark. 151, 26 S. W. 821, 24 L. R. A. 543, and note. That the record of a general judgment against William M. is not constructive notice of a judgment against H. W. M., see Johnson v. Hess, 126 Ind. 298, 25 N. E. 445, 9 L. R. A. 471. And see Ridgway's Appeal, 15 Pa. St. 177, 53 Am. Dec. 586 (judgment docketed but Christian names of debtors omitted; no notice); Cummings v. Long, 16 Iowa, 41, 85 Am. Dec. 502; but see Green v. Meyers, (Mo. App.) 72 S. W. 128, for a case where the mistake was immaterial (doctrine of *idem sonans* applied). See, also, Pinney v. Russell, 52 Minn. 447, 54 N. W. 484; Roberson v. Downing Co., (Ga.) 48 S. E. 429, and cases cited. For other examples of errors

Finally, the record will not be a notice, unless it and the original instrument of which it is a copy correctly and suffi-

gage is a security, and the like:[b] Jennings v. Wood, 20 Ohio, 261; Miller v. Bradford, 12 Iowa, 14; Hughes v. Debnam, 8 Jones, 127; Wyatt v. Barwell, 19 Ves. 439. In one case a mortgage was given to secure three thousand dollars. In recording it, by a mistake of the clerk or copyist in the registry office, the record was made to read only three hundred dollars. It was held to be a constructive notice only to the extent of three hundred dollars, and to constitute a lien only for that amount as against a subsequent grantee or mortgagee who had no actual notice, and who, it was held, had a right to rely on the record as correctly stating the amount of the debt and the extent of the lien: Peck v. Mallams, 10 N. Y. 509; Beekman v. Frost, 18 Johns. 544; 9 Am. Dec. 246; Terrell v. Andrew Co., 44 Mo. 309; Jennings v. Wood, 20 Ohio, 261.[c]

or variances in the record as to the initials of the grantor's, judgment debtor's, or mortgagor's name sufficient to defeat the effect of the record as notice, see Bankers' Loan & I. Co. v. Blair, 99 Va. 606, 39 S. E. 231, 86 Am. St. Rep. 914, citing this section of the text; Johnson v. Wilson & Co., 137 Ala. 468, 34 South. 392, 97 Am. St. Rep. 52.

Failure to Copy Acknowledgment.—A failure of the recorder to copy the acknowledgment has been held sufficient to prevent the record from being notice: Taylor v. Harrison, 47 Tex. 454, 26 Am. Rep. 304; Dean v. Gibson, (Tex. Civ. App.) 48 S. W. 57, 58 S. W. 51, 79 S. W. 363.

Omission of Copy of Seal.—This is not a fatal error in the record of an instrument required to be sealed, if it otherwise appears from the record that the instrument was sealed: Beardsley v. Day, 52 Minn. 451, 55 N. W. 46. But where the record does not show that the notary had affixed his seal to the acknowledgment, it is insufficient: Girardin v. Lampe, 58 Wis. 267, 16 N. W. 614.

Failure to Copy Signature.—No notice: Shepherd v. Burckhalter, 13 Ga. 443, 58 Am. Dec. 523.

Omission of a Clause in a Trust Deed giving Power to Appoint a Substitute Trustee does not prevent the record from being notice: Hart v. Patterson, (Tex. Civ. App.) 43 S. W. 545, citing this section of the text.

In Royster v. Lane, 118 N. C. 156, 24 S. E. 796, the register had made a mistake in copying the name of the mortgagor, but the debt was correctly described, referring to the proper name, and the index contained the proper name. It was held that the record was sufficient to impart notice. Sinclair v. Slawson, 44 Mich. 123, 6 N. W. 207, 38 Am. Rep. 235, was also a case where the mistake was held immaterial. The statute required the recorder to keep an entry book and to record at length in another. In the entry book the names of the mortgagor and the mortgagee appeared, but in the record the name of the mortgagee was omitted. The court placed its decision upon the ground that the record and the entry book together furnished all the necessary information.

(b) See Johnson v. Hess, 126 Ind. 298, 25 N. E. 445, 9 L. R. A. 471, quoting from this note.

(c) See, also, Osborn v. Hall, 160 Ind. 153, 66 N. E. 457; Gilchrist v. Gough, 63 Ind. 576, 30 Am. Rep. 250 (the fact that the amount secured by the mortgage was correctly

ciently describe the premises which are to be affected, and correctly and sufficiently state all the other provisions which are material to the rights and interests of subsequent par-

In this connection the question has arisen concerning the effect of a deed of land absolute on its face, but accompanied by a written defeasance, and thus constituting in reality a mortgage. It is held that both must be recorded together as a mortgage, in order that the registry may be constructive notice of the whole instrument as a mortgage. If the deed alone is recorded, without the accompanying defeasance, it is clear that the record will not be constructive notice of the entire instrument in its intended character as a mortgage; so far as the registry would operate, the instrument, *as a mortgage*, would be in the position of a wholly unrecorded mortgage, as against subsequent purchasers and encumbrancers:[d] Brown v. Dean, 3 Wend. 208; James v. Morey, 2 Cow. 246; 14 Am. Dec. 475; Dey v. Dunham, 2 Johns. Ch. 182; Friedley v. Hamilton, 17 Serg. & R. 70; 17 Am. Dec. 638; Jaques v. Weeks, 7 Watts, 261, 287; Edwards v. Trumbull, 50 Pa. St. 509; Hendrickson's Appeal, 24 Pa. St. 363. In this last-mentioned case, Black, J., said, concerning such a record: "A mortgage, when in the shape of an absolute conveyance with a separate defeasance, the former being recorded and the latter not, gives the holder *no* rights against a subsequent encumbrancer. *It is good for nothing as a conveyance*, because it is in fact not a conveyance; and it is equally worthless as a mortgage, because it does not appear by the record to be a mortgage." To the same effect is Corpman v. Baccastow, 84 Pa. St. 363. This *dictum* concerning the effect of such a record as a conveyance is certainly opposed to the doctrine which generally prevails through the states, and to the policy of the recording acts. A subsequent purchaser for a valuable consideration from the grantee, under such circumstances, would, according to the generally accepted doctrine, obtain a good title as against the grantor and all persons claiming through him, as was held in Cogan v. Cook, 22 Minn. 137. The statutes in most states contain an express provision concerning the recording of absolute deeds accompanied by a defeasance.[e]

stated in the index is immaterial); Hill v. McNicholl, 76 Me. 314.

(d) Manufacturers & Mech. Bank v. Bank of Pennsylvania, 7 Watts & S. 335, 42 Am. Dec. 240. *Contra*, Security Sav. & Tr. Co. v. Loewenberg, 38 Oreg. 159, 62 Pac. 647, arguing that "the condition of the record is such as to put one dealing with the grantor upon inquiry as to the grantee's claim. If he contends, or has reason to believe, that the deed is not what it purports to be, it is his duty to pursue the inquiry, and ascertain the actual claim of the grantee, and whether, notwithstanding the deed, the grantor still retains an interest in the property, and, if so, what it is;" Kennard v. Mabry, 78 Tex. 151, 14 S. W. 272; Marston v. Williams, 45 Minn. 116, 47 N. W. 644, 22 Am. St. Rep. 719; Bank of Mobile v. Tishomingo Sav. Inst., 62 Miss. 250; Kemper v. Campbell, 44 Ohio St. 210, 6 N. E. 566.

(e) As to what constitutes a valid defeasance under such statutes, the record of which can operate as no-

ties. The premises should at least be so described or identified that a subsequent purchaser or encumbrancer would have the means of ascertaining with accuracy what and where they were.[2f] The same rule applies to the record of

[2] Partridge v. Smith, 2 Biss. 183, 185, 186; Galway v. Malchow, 7 Neb. 285; Herman v. Deming, 44 Conn. 124; Murphy v. Hendricks, 57 Ind. 593; Thorp v. Merrill, 21 Minn. 336; Sanger v. Craigue, 10 Vt. 555; Brotherton v. Livingston, 3 Watts & S. 334; Banks v. Ammon, 27 Pa. St. 172; Mundy v. Vawter, 3 Gratt. 518; Lally v. Holland, 1 Swan, 396: Martindale v. Price, 14 Ind. 115; Rodgers v. Kavanaugh, 24 Ill. 583; Nelson v. Wade, 21 Iowa, 49; Jones v. Bamford, 21 Iowa, 217. In Partridge v. Smith, 2 Biss. 183, 185, 186, a deed was recorded in a county where the land conveyed was situated. The description was erroneous in some important particulars; but there were no other premises in the county which *at all* answered to the description. The court, while admitting the general rule as stated in the text, held that there was sufficient in the record to put a subsequent purchaser on an inquiry, and it therefore operated as a notice that the land had been conveyed. See also Thornhill v. Burthe, 29 La. Ann. 639; Slater v. Breese, 36 Mich. 77; Shepard v. Shepard, 36 Mich. 173; Boon v. Pierpont, 28 N. J. Eq. 7,—which are illustrations of mistakes and omissions immaterial because the other portions of the description are reasonably sufficient to enable any one to identify the

tice, see Holmes v. Newman, (Kan.) 75 Pac. 501 (bond for title not equivalent to a defeasance, and does not, when recorded, give notice that the obligee therein is in effect a mortgagor).

(f) The text is quoted in Johnson v. Hess, 126 Ind. 298, 25 N. E. 445, 9 L. R. A. 471; Interstate B. & L. Ass'n v. McCartha, 43 S. C. 72, 20 S. E. 807; and cited, in Davis v. Ward, 109 Cal. 186, 41 Pac. 1010, 50 Am. St. Rep. 29; Simmons v. Hutchinson, 81 Miss. 351, 33 South. 21; Bankers' Loan & I. Co. v. Blair, 99 Va. 606, 39 S. E. 231, 86 Am. St. Rep. 914. See, also, Annie C. Gold-Min. Co. v. Marks, 13 Colo. App. 248, 58 Pac. 404; Slocum v. O'Day, 174 Ill. 215, 51 N. E. 243; Farmers' & Merchants' Bank v. Stockdale, (Iowa) 96 N. W. 732; American Inv. Co. v. Coulter, 8 Kan. App. 841, 61 Pac. 820; Thurlough v. Dresser, 98 Me. 161, 56 Atl. 654; Ozark Land & Lumber Co. v. Franks, 156 Mo. 673, 57 S. W. 540; Bank of Ada v. Gullickson, 64 Minn. 91, 66 N. W. 131; Bailey v. Galpin, 40 Minn. 319, 41 N. W. 1054; Henry Marx & Sons v. Jordan, (Miss.) 36 South. 386; Baker v. Bartlett, 18 Mont. 446, 45 Pac. 1084, 56 Am. St. Rep. 594; Southern B. & L. Assn. v. Rodgers, 104 Tenn. 437, 58 S. W. 234; Pierson v. McClintock, (Tex. Civ. App.) 78 S. W. 706; Neyland v. Texas Yellow Pine Lumber Co., 26 Tex. Civ. App. 417, 64 S. W. 696; Laughlin v. Tips, 8 Tex. Civ. App. 649, 28 S. W. 551. But see Gillespie v. Rogers, 143 Mass. 610, 16 N. E. 711 (the registry of a deed executed by J. N. H., in which he calls himself J. H., by which latter name he is equally well known, is not such a mistake as will prevent the registry operating as constructive notice).

mortgages and all other encumbrances which can be recorded. The language, both of the original and of the record, must be such that if a subsequent purchaser or encum-

land. Slater v. Breese, 36 Mich. 77, is an especially instructive decision on this point.[g]

(g) See, also, Rea v. Haffenden, 116 Cal. 596, 48 Pac. 716; Frick v. Godare, 114 Ind. 170, 42 N. E. 1015 (where correct boundaries are given, description sufficient though the land is stated to be in the N. W. instead of the N. E. quarter section); Miltonville State Bank v. Kuhnle, 50 Kan. 420, 31 Pac. 1057, 34 Am. St. Rep. 129; Anderson v. Baughman, 7 Mich. 69, 74 Am. Dec. 699 (word "lot" used where "block" intended. The court said that "no man of ordinary intelligence could have been deceived as to the land intended"); Kennedy v. Boykin, 35 S. C. 61, 14 S. E. 809, 28 Am. St. Rep. 838 (where correct boundaries given, error in number of acres unimportant); Swearingen v. Reed, 2 Tex. Civ. App. 364, 21 S. W. 383; Florence v. Morien, 98 Va. 26, 34 S. E. 890 ("All the right, title and interest of said R. K. M. and wife in and to all the real estate lying in the county of H. of which R. M. died seised and possessed", held sufficient), citing this section of the text. In Bright v. Buckman, 39 Fed. 247, this rule was thus stated: "The description of the property upon which the mortgage is an encumbrance must be such as reasonably to enable subsequent purchasers to identify the land; otherwise the record of the mortgage is not notice of any encumbrance upon it. If the description in the mortgage is erroneous, and it is apparent what the error is, then the record is constructive notice of the mortgage upon the lots intended to be described; but if it is not apparent what the error is, the record is not constructive notice. . . . The premises should at least be so described or identified that a subsequent purchaser would have the means of ascertaining with accuracy what and where they were. The language, both of the mortgage and of the record of it, must be such that if a subsequent purchaser should examine the instrument itself he would obtain thereby an actual notice of all the rights which were intended to be created or conferred by it." This section of the text is cited.

It is held in a number of cases that where it is evident from an inspection of the records that a mistake has been made, the subsequent purchaser is put upon inquiry as to the true facts: Cable v. Minneapolis Stock-Yards & P. Co., 47 Minn. 417, 50 N. W. 528; Walls v. State, 140 Ind. 16, 38 N. E. 177; Vercruysse v. Williams, 112 Fed. 206, 50 C. C. A. 486 (Kansas; the land, as described, would be situated in another county). *Contra*, that the record "has no operation in the way of putting him upon inquiry as to what premises were intended to be conveyed, unless they be substantially described therein": Simmons v. Hutchinson, 81 Miss. 351, 33 South. 21 (recorded incumbrance on "the ½ of" a certain quarter section no notice of intention to incumber the East ½ of such quarter section). In Laughlin v. Tips, 8 Tex. Civ. App. 649, 28 S. W. 551, the principle is stated as follows: "Purchasers are only charged with constructive notice of

brancer should examine the instrument itself, he would obtain thereby an actual notice of all the rights which were intended to be created or conferred by it.[3 h] It seems also to result from the terms of the statute that the recording of a copy is not equivalent to the record of the original instrument, and is not operative as a notice.[4 i]

§ 655. (4) Of What the Record is a Notice.— The doctrine formulated under this head is merely the summing up and result of the various special rules which have been stated in the preceding paragraphs. When all the foregoing requisites to a valid registration have been complied with,— when an instrument is one entitled to be recorded, and has been duly executed and acknowledged or proved, and has been recorded in the proper manner and in the proper county,— then such record becomes a constructive notice not

3 Youngs v. Wilson, 27 N. Y. 351; reversing 24 Barb. 510; Babcock v. Bridge, 29 Barb. 427; Bell v. Fleming, 12 N. J. Eq. 13, 490; Pettibone v. Griswold, 4 Conn. 158; 10 Am. Dec. 106; Hart v. Chalker, 14 Conn. 77; Viele v. Judson, 82 N. Y. 32 (record of an assignment of a mortgage).

4 Ladley v. Creighton, 70 Pa. St. 490. Unless the recording is done in pursuance of the express provisions of a statute permitting a copy to be proved and recorded when the original is lost.

the facts actually exhibited by the record, and not with such facts as might have been ascertained by such inquiries as an examination of the record might have induced a prudent man to make."

(h) The text is quoted in Johnson v. Hess, 126 Ind. 298, 25 N. E. 445, 9 L. R. A. 471. The debt must be described with sufficient certainty to enable subsequent purchasers and creditors to ascertain, either by the condition of the deed or by inquiry *aliunde*, the extent of the incumbrance: Booth v. Barnum, 9 Conn. 286, 23 Am. Dec. 339. The mortgage need not expressly state the amount of the indebtedness, if it states facts from which that amount can be computed; as where it stated the amount and rate of interest, so that the ascertainment of the principal sum was merely a matter of computation: Gardner v. Colin, 191 Ill. 553, 61 N. E. 492; and see Clementz v. M. T. Jones Lumber Co., 82 Tex. 424, 18 S. W. 599. Where the mortgage purports to recite the terms of the bond or note, persons consulting the records have a right to presume that the bond or note is correctly set forth in the mortgage: Interstate B. & L. Assn. v. McCartha, 43 S. C. 72, 20 S. E. 807, quoting this section of the text; Hall v. Read, 28 Tex. Civ. App. 18, 66 S. W. 809.

(i) See, also, Mack v. McIntosh, 181 Ill. 633, 54 N. E. 1019, and Illinois cases cited.

only of the fact that the instrument exists, but of its contents, and of all the estates, rights, titles, and interests, legal and equitable, created or conferred by it or arising from its provisions.[1 a] The inquiry therefore remains, To what classes of persons does this notice extend?

[1] Bancroft v. Consen, 13 Allen, 50; Orvis v. Newell, 17 Conn. 97; Bush v. Golden, 17 Conn. 594; Harrison v. Cachelin, 23 Mo. 117, 127; Mesick v. Sunderland, 6 Cal. 297; George v. Kent, 7 Allen, 16; Hetherington v. Clark, 30 Pa. St. 393; Morris v. Wadsworth, 17 Wend. 103; Thomson v. Wilcox, 7 Lans. 376; Youngs v. Wilson, 27 N. Y. 351; Dimon v. Dunn, 15 N. Y. 498; Parkist v. Alexander, 1 Johns. Ch. 394; Humphreys v. Newman, 51 Me. 40; Hall v. McDuff, 24 Me. 311; Tripe v. Marcy, 39 N. H. 439; Leach v. Beattie, 33 Vt. 195; Bolles v. Chauncey, 8 Conn. 389; Peters v. Goodrich, 3 Conn. 146; Barbour v. Nichols, 3 R. I. 187; Souder v. Morrow, 33 Pa. St. 83; Clabaugh v. Byerly, 7 Gill, 354; 48 Am. Dec. 575; Grandin v. Anderson, 15 Ohio St. 286; Kyle v. Thompson, 11 Ohio St. 616; Leiby v. Wolf, 10 Ohio, 83; Doyle v. Stevens, 4 Mich. 87; Buchanan v. International Bank, 78 Ill. 500; Ogden v. Walters, 12 Kan. 282; McCabe v. Grey, 20 Cal. 509; Dennis v. Burritt, 6 Cal. 670; Montefiore v. Browne, 7 H. L. Cas. 241. Viele v. Judson, 82 N. Y. 32 (as to the effect of record of an assignment of a mortgage; it is notice of the rights of the assignee as against any subsequent acts of the mortgagee affecting the mortgage; it protects as well against a discharge as against an assignment by the mortgagee).

(a) This section is cited in Johnson v. Hess, 126 Ind. 298, 25 N. E. 445, 9 L. R. A. 471; Bankers' Loan & I. Co. v. Blair, 99 Va. 606, 39 S. E. 231, 86 Am. St. Rep. 914. See, also, Scott v. Mineral Development Co., (C. C. A.) 130 Fed. 497; Meyer v. Portis, 45 Ark. 420; Warder v. Cornell, 105 Ill. 169; Stokes v. Riley, 121 Ill. 166, 11 N. E. 877; Dickinson v. Crowell, 120 Iowa, 254, 94 N. W. 495; Geib v. Reynolds, 35 Minn. 331, 28 N. W. 923 (mortgage unsatisfied of record, although the notes secured are in mortgagor's hands); Sioux City & St. P. R. Co. v. Singer, 49 Minn. 301, 51 N. W. 905 (condition subsequent in deed); Lovejoy v. Raymond, 58 Vt. 509, 2 Atl. 156; Mansfield v. Excelsior Refining Co., 135 U. S. 326, 10 Sup. Ct. 825 (record of a trust-deed is notice of subsequent proceedings thereunder).

The record may disclose, by the dates of the instruments, the parties to successive instruments, etc., that a breach of trust or a constructive fraud has been committed: Lagger v. Mutual Union L. & B. Ass'n, 143 Ill. 283, 33 N. E. 946; Fisher v. Bush, 133 Ind. 315, 32 N. E. 924; Veeder v. McKinley-Lanning L. & T. Co., 61 Nebr. 892, 86 N. W. 982; Gaston v. Dashiell, 55 Tex. 516; Lombard v. La Dow, 126 Fed. 119; — but see Branch v. Griffin, 99 N. C. 173, 5 S. E. 393, 398; Otis v. Kennedy, 107 Mich. 312, 65 N. W. 219 (where records show that month elapsed between purchase at executor's sale and reconveyance to the executor, subsequent purchasers not put on inquiry); — as where it shows that a trustee under a deed of trust released the grantor before the maturity of the note and thus gained

§ 656. (5) To Whom the Record is a Notice.— What classes of persons are thus charged with constructive notice by a regular and lawful registration? The answer to this question must depend upon the language of the recording acts. While the terms of the various state statutes may differ, in respect to this matter, in some of their subordinate and qualifying phrases, they all agree in the main and substantial provision; they all declare that an unrecorded conveyance is invalid only as against *subsequent* purchasers or encumbrancers, and, as a necessary inference, that the record only operates as a notice to the same persons.[1] In several of the statutes the qualification is added that the subsequent purchaser who is thus protected must be one " in good faith and for a valuable consideration "; in many of them this language is absent; but whether expressed or omitted by the legislature, it has uniformly entered into and formed a part of the judicial interpretation. In some instances " creditors " are expressly added.

§ 657. Not to Prior Parties.— It is a fundamental proposition, therefore, established with complete unanimity, that a registration properly made does not operate as constructive notice to all the world, but only to those persons who, under the policy of the legislation, are compelled to search the records in order to protect their own interests.[1] It is equally well settled that such record is not notice to the holders of antecedent rights,— that is, to those who have acquired their

§ 656, [1] Hunter v. Watson, 12 Cal. 363; 73 Am. Dec. 543; Dennis v. Burritt, 6 Cal. 670.

§ 657, [1] See Maul v. Rider, 59 Pa. St. 167, 171. This language, often used by the courts, is, however, a vicious reasoning in a circle, and does not really determine who are charged with notice. It simply says: " Those persons are affected with notice who are compelled to search the records in order to protect their own interests; and on the other hand, those persons who are charged with notice must make a search of the records." We are thus simply carried round in a circle.

title: Appelman v. Gara, 22 Colo. 397, 45 Pac. 366; and see McPherson v. Rollins, 107 N. Y. 322, 14 N. E. 411, 1 Am. St. Rep. 826; Kirsch v. Tozier, 143 N. Y. 390, 38 N. E. 375, 42 Am. St. Rep. 729.

rights before the time when the record is made,— and this is so even when the antecedent right may, in pursuance of the statute, be defeated by the fact of the prior record. In other words, the registration of an instrument does not act *as a notice* backwards in time.[2] [a]

[2] Birnie v. Main, 29 Ark. 591; Ward's Ex'r v. Hague, 25 N. J. Eq. 397; Leach v. Beattie, 33 Vt. 195; Kyle v. Thompson, 11 Ohio St. 616. There is an important difference between the operation of a registration, under the express terms of a statute, to defeat an antecedent conveyance which is unrecorded, and the effect of a registration *as a notice* which has been established by the courts as a necessary inference from these provisions of the statute. Indeed, it is solely because the registration of a conveyance *does*, in compliance with the statute, defeat a prior unrecorded title that the record of a prior title is held to be a constructive notice to *subsequent* purchasers. As illustrations of the proposition stated in the text, see Stuyvesant v. Hall, 2 Barb. Ch. 151; Stuyvesant v. Hone, 1 Sand. Ch. 419; Taylor v. Maris's Ex'rs, 5 Rawle, 51. The doctrine, and the circumstances under which it may be applied, are so well explained by the case reported in 1 Sand. Ch. 419, and 2 Barb. Ch. 151, that a quotation will be instructive. The facts were, briefly, as follows: A tract of land was mortgaged to Stuyvesant, and his mortgage was duly recorded. Hone subsequently acquired a lien thereon by a second mortgage, which he foreclosed by a suit in chancery, and the land, which had been divided into fifty-six building lots, was sold under the decree to Thorne. T. afterwards gave a mortgage upon part of these lots back to H. All the conveyances and mortgages growing out of these proceedings were duly recorded, but S. had no notice of the foreclosure suit nor of any of the proceedings. Afterwards H. foreclosed T.'s mortgage by a suit in chancery, and filed the statutory notice of *lis pendens*. During the pendency of the suit, S., who had no notice of it, released to T. forty-two of the fifty-six lots from his own (S.'s) mortgage. The fourteen lots left subject to S.'s mortgage were part of those which T. had mortgaged to H., and all of T.'s lots not mortgaged to H. were released by S. S. now brings a suit to foreclose his own mortgage, and it was claimed in defense that by his releasing the forty-two lots he had destroyed the lien of his mortgage on the remaining fourteen lots. The court held,— 1. That S. was not charged with constructive notice of the first suit, nor of the sale under the decree in it; 2. That neither the second suit, nor the notice of *lis pendens* filed in it, operated as notice to S.; 3. That the recording of the subsequent deeds of T. and of T.'s mortgages was not notice to S.; and that S. on releasing was not bound to search the records for subsequent conveyances or encumbrances. The vice-chancellor said on the question (1 Sand. Ch. 419, 425): "Notice by the recording of conveyances is created by the statutes, and its effect is to be learned from their provisions, and the adjudications thereon. The statute enacts that every conveyance not recorded shall be

(a) See, also, Waughop v. Bartlett, 165 Ill. 124, 46 N. E. 197; Stivens v. Summers, 68 Ohio St. 421, 67 N. E. 884, citing §§ 656–658 of the text; Trustees of Poor School v. Jennings, 40 S. C. 168, 40 S. E. 257, 891, 42

§ 658. Only to Purchasers under Same Grantor. Effect of Perfect Record Title — Break in Record Title.— It is not, however, every subsequent purchaser who comes within the pur-

void as against any subsequent purchaser in good faith, etc., whose conveyance shall be first recorded. Neither the provision itself nor the objects of a registry law have any reference to prior encumbrances already recorded. The effect of recording a conveyance is not retrospective, nor was it designed to change rights already vested and secured by a recorded deed or mortgage. *It simply protects a purchaser who takes the precaution to search the records and record his own conveyance against prior unrecorded conveyances of which he had no notice.*" The vice-chancellor then refers to Cheesebrough v. Millard, 1 Johns. Ch. 414, 7 Am. Dec. 494, and also shows that there is nothing in the case of Guion v. Knapp, 6 Paige, 42, 29 Am. Dec. 741, opposed to the conclusion at which he had arrived. This decision was affirmed by Chancellor Walworth, in 2 Barb. Ch. 151, 157, 158; and his opinion upon the question substantially repeats the reasoning of the vice-chancellor, that a deed subsequently made and recorded by the mortgagor is not notice to a prior mortgagee whose mortgage is on record, so that he may release part of the premises without destroying his lien. See also Howard Ins. Co. v. Halsey, 8 N. Y. 271; 59 Am. Dec. 478; Hill v. McCarter, 27 N. J. Eq. 41; Hoy v. Bramhall, 19 N. J. Eq. 563; 97 Am. Dec. 687; Vanorden v. Johnson, 14 N. J. Eq. 376; 82 Am. Dec. 254; Blair v. Ward, 10 N. J. Eq. 126; George v. Wood, 9 Allen, 80; 85 Am. Dec. 741; Taylor v. Maris, 5 Rawle, 51; Leiby v. Wolf, 10 Ohio, 83; James v. Brown, 11 Mich. 25; Cooper v. Bigly, 13 Mich. 463; Doolittle v. Cook, 75 Ill. 354; Iglehart v. Crane, 42 Ill. 261; Deuster v. McCamus, 14 Wis. 307; Straight v. Harris, 14 Wis. 509; Halsteads v. Bank of Kentucky, 4 J. J. Marsh. 558.

Am. St. Rep. 855. As is shown in the author's note, and *post*, § 1226, the record of a subsequent conveyance of a parcel of the mortgaged premises by the mortgagor is not a constructive notice to the mortgagee, so as to prevent him from affecting the equities of the grantee by his release of other portions of the premises: Woodward v. Brown, 119 Cal. 283, 51 Pac. 2, 542, 63 Am. St. Rep. 108, citing this and the preceding section of the text; Hosmer v. Campbell, 98 Ill. 578; Dewey v. Ingersoll, 42 Mich. 18, 3 N. W. 235; Meier v. Meier, 105 Mo. 411, 16 S. W. 223; Cogswell v. Stout, 32 N. J. Eq. 240; Norman v. Halsey, 132 N. C. 6, 43 S. E. 473; Sarles v. McGee, 1 N. Dak. 365, 48 N. W. 231, 26 Am. St. Rep. 633; Horning's Ex'rs' Appeal, 90 Pa. St. 388; Lynchburg P. B. & L. Co. v. Fellers, 96 Va. 337, 31 S. E. 505, 70 Am. St. Rep. 851, citing this and the preceding section of the text; Bridgewater Roller-Mills Co. v. Strough, 98 Va. 721, 37 S. E. 290, quoting the text. The record of a subsequent mortgage by the mortgagor, or judgment against the mortgagor, is not notice to the mortgagee senior in record: Annan v. Hays, 85 Md. 505, 37 Atl. 20; Norton v. Metropolitan Life Ins. Co., 74 Minn. 484, 77 N. W. 298, 539; Sarles v. McGee, 1 N. Dak. 365, 48 N. W. 231, 26 Am. St. Rep. 633; Johnson v. Valido Marble Co., 64 Vt. 337, 25 Atl. 441; Howard v. Clark, 71 Vt. 424, 45 Atl. 1042, 76 Am. St. Rep. 782;

view of the statute. The mere fact that, subsequently to the registering of a deed of certain premises, a third person purchases the same premises, from *any* source of title, from any grantor whatsoever claiming to own them, does not render the purchaser necessarily chargeable with notice of the prior recorded conveyance.[1] The only subsequent pur-

[1] This is clearly shown by the uniform mode in which the records of deeds, mortgages, etc., are *indexed* in the public offices of record. The indexes are never arranged according to the parcels of land, so that a person making search follows the ownership of a particular parcel irrespective of the sources of title; they are always arranged according to the grantors and grantees,

as to mortgages to secure future advances, see *post*, § 1199; Ackerman v. Hunsicker, 85 N. Y. 43, 49, 39 Am. Rep. 621. A vendee in possession under his contract, the possession being equivalent to a record, is not affected with notice of a subsequent judgment docketed against his vendor: Wihn v. Fall, 55 Nebr. 547, 76 N. W. 13, 70 Am. St. Rep. 397; or execution levied: Corey v. Smalley, 106 Mich. 257, 64 N. W. 13, 58 Am. St. Rep. 474; or will recorded affecting his vendor's title: Lewis v. Barnhardt, 43 Fed. 854. The record of a deed is not notice to the grantor of a mistake therein: Davis v. Monroe, 187 Pa. St. 212, 41 Atl. 44, 67 Am. St. Rep. 581. The record of the assignment of a mortgage is not generally notice to the mortgagor: *post*, § 733 and notes. Similarly, the record of the assignment of a judgment is not notice to the judgment debtor: Johnson v. Boice, 40 La. Ann. 273, 4 South. 163, 8 Am. St. Rep. 528. Where a mortgage, recorded prior to the recording of a deed by the mortgagor, is paid and returned to the mortgagor, and is afterwards delivered to a third person to secure a pre-existing debt, such third person is not a "prior party." As to him, the mortgage takes effect from its delivery to him, and is postponed to the deed made and recorded prior to such delivery: Lamphier v. Desmond, 187 Ill. 370, 58 N. E. 343, affirming 86 Ill. App. 101.

It seems that the protection of the rule as to prior parties extends to *bona fide* purchasers from them. By the "subsequent purchasers" to whom the record is notice, is meant only those the *origin* of whose title from the original grantor is subsequent to the title of the grantee in the recorded deed. A conveyed to B, whose deed was recorded; later the premises were sold on execution against A, and a sheriff's deed to C was made and recorded. The record of this latter deed was not notice of its existence to D, a subsequent *bona fide* purchaser from B, or of the fact that the original deed to B was made in fraud of creditors: White v. McGregor, 92 Tex. 556, 50 S. W. 564, 71 Am. St. Rep. 875; Hooker v. Pierce, 2 Hill (N. Y.), 650. This case is to be distinguished from that described in § 760, where it is shown that it is the duty of the purchaser to search against each grantor in his chain of title for conveyances *made* by such grantor before, but recorded after, the deed through which the searcher claims from him.

chaser who is charged with notice of the record of a conveyance is one who claims under the same grantor from the same source of title. If two titles to the same land are distinct and conflicting, the superiority between them depends, not upon their being recorded, but upon their intrinsic merits. It is a settled doctrine, therefore, that a record is only a constructive notice to subsequent purchasers deriving title from the same grantor.[2] [a] Intimately connected with,

mortgagors and mortgagees. The records can only disclose the title to a particular tract, so far as they enable one making search to trace the ownership from one grantor or mortgagor to another. Records are only constructive notice of a title of which they enable a party to obtain *actual* notice or knowledge by means of a search.

2 Baker v. Griffin, 50 Miss. 158; Tilton v. Hunter, 24 Me. 29; Bates v. Norcross, 14 Pick. 224; George v. Wood, 9 Allen, 80; 85 Am. Dec. 741; Murray v. Ballou, 1 Johns. Ch. 566; Embury v. Conner, 2 Sand. 98; Stuyvesant v. Hall, 2 Barb. Ch. 151, 158; Page v. Waring, 76 N. Y. 463; Cook v. Travis, 20 N. Y. 402; Farmers' L. & T. Co. v. Maltby, 8 Paige, 361; Calder v. Chapman, 52 Pa. St. 359; 91 Am. Dec. 163; Woods v. Farmere, 7 Watts, 382; 32 Am. Dec. 772; Lightner v. Mooney, 10 Watts, 412; Hetherington v. Clark, 30 Pa. St. 393, 395; Keller v. Nutz, 5 Serg. & R. 246; Hoy v. Bramhall, 19 N. J. Eq. 563; 97 Am. Dec. 687; Losey v. Simpson, 11 N. J. Eq. 246; Whittington v. Wright, 9 Ga. 23; Brock v. Headen, 13 Ala. 370; Dolin v. Gardner, 15 Ala. 758; Leiby v. Wolf, 10 Ohio, 80, 83; Blake v. Graham, 6 Ohio St. 580; 67 Am. Dec. 360; Iglehart v. Crane, 42 Ill. 261; St. John v. Conger, 40 Ill. 535; Crockett v. Maguire, 10 Mo. 34; Long v. Dollarhide, 24 Cal. 218, 453. Chancellor Walworth thus states the doctrine in Stuyvesant v. Hall, 2 Barb. Ch. 151: "The recording of a deed or mortgage, therefore, is constructive notice only to those who have subsequently acquired some interest or right in the property *under the grantor or mortgagor.*" While this general doctrine is accepted with complete unanimity, and is indeed essential to any just working of the registry system, there is some difference of judicial opinion in its application to particular conditions of fact. In the case, which is not uncommon, where A conveys to B, and the deed is not recorded, and B then conveys the land to C, who puts his deed upon record, it is held in many decisions that this registration of the second deed is not a constructive notice to one who subsequently purchases from A; both parties, it is said, do not claim under the same grantor, B, and the records do not furnish any clew to the true chain of title: Roberts v. Bourne, 23 Me. 165; 39 Am. Dec. 614; Harris v. Arnold, 1 R. I. 125; Cook v. Travis, 22 Barb. 338; 20 N. Y. 402; Losey v. Simpson, 11 N. J. Eq. 246; Lightner v. Mooney, 10 Watts, 407; Calder v. Chapman, 52 Pa. St. 359; 91 Am. Dec. 163; Fenne v. Sayre, 3 Ala. 478; Chicago v.

(a) The text is cited and followed in Garber v. Gianella, 98 Cal. 527, 529, 33 Pac. 458. See, also, Satterfield v. Malone, 35 Fed. 445; Boyton v. Haggart, 120 Fed. 819 (C. C. A.); Lehman v. Collins, 69 Ala. 127;

and indeed a branch of, this same doctrine, is the question, How far back is a purchaser bound to search the record title of his own vendor? If the records show a good title vested in the vendor at a certain date, and nothing done by him after that time to impair or encumber the title, it would

Witt, 75 Ill. 211. In this last case A, a grantee in an *unrecorded* deed, conveyed to B, and B to C; these two latter deeds were both recorded; but neither of them referred to A's deed, nor contained any recital of it. Held, that the record of these two deeds was not notice of the unrecorded deed to A. In like manner, and for a like reason, if A conveys to B by a deed which is not put upon record, and B gives a mortgage on the land, even a purchase-money mortgage, back to his grantor, A, and this mortgage is recorded, the record, it is held, is not a constructive notice to a subsequent purchaser from A, either of the mortgage itself, or of the conveyance to B:[b] Veazie v. Parker,

Tennessee Coal, I. & R. Co. v. Gardner, 131 Ala. 599, 32 South. 622; Scotch Lumber Co. v. Sage, 132 Ala. 598, 90 Am. St. Rep. 932, 32 South. 607; Turman v. Sanford, 69 Ark. 95, 61 S. W. 167; Kerfoot v. Cronin, 105 Ill. 609; Grundies v. Reid, 107 Ill. 304; Booker v. Booker, (Ill.) 70 N. E. 709; Herber v. Bossart, 70 Iowa, 718, 722, 29 N. W. 608; Prest v. Black, 63 Kan. 682, 66 Pac. 1017; Robertson v. Rentz, 71 Minn. 489, 74 N. W. 133; Hart v. Gardner, 81 Miss. 650, 33 South. 442; Becker v. Stroeher, 167 Mo. 306, 66 S. W. 1083; Shackleton v. Allen Chapel, A. M. E. Church, 25 Mont. 421, 65 Pac. 428; Traphagen v. Irwin, 18 Nebr. 195, 24 N. W. 684; Tarbell v. West, 86 N. Y. 280 (record of conveyance of an equitable interest not notice to purchaser of legal title from one who appears by the record to be the real owner); Doran v. Dazey, 5 N. Dak. 167, 64 N. W. 1023, 57 Am. St. Rep. 550; Sternberger v. Ragland, 57 Ohio St. 148, 48 N. E. 811; Collins v. Aaron, 162 Pa. St. 539, 29 Atl. 724; Pyles v. Brown, 189 Pa. St. 164, 42 Atl. 11, 69 Am. St. Rep. 794; Frank v. Heidenheimer, 84 Tex. 642, 19 S. W. 855; Fullenwider v. Ferguson, 30 Tex. Civ. App. 156, 70 S. W. 222; Ward v. League, (Tex. Civ. App.) 24 S. W. 986; McCreary v. Reliance Lumber Co., 16 Tex. Civ. App. 45, 41 S. W. 485; Williams v. Slaughter, (Tex. Civ. App.) 42 S. W. 327; Sayward v. Thompson, 11 Wash. 706, 40 Pac. 379; Hoult v. Donahue, 21 W. Va. 294; Mackey v. Cole, 79 Wis. 426, 48 N. W. 920, 24 Am. St. Rep. 728 (mortgage executed under a fictitious name). But notice of the unrecorded instrument may be supplied by the possession of the person holding thereunder; and the subsequent purchaser is bound to search for incumbrances created by such person: Balen v. Mercier, 75 Mich. 42, 42 N. W. 666. And actual knowledge that an instrument out of the chain of title is on record puts the purchaser on inquiry as to the title of the maker of the instrument: Doran v. Dazey, 5 N. Dak. 167, 64 N. W. 1023, 57 Am. St. Rep. 550.

(b) Sternberger v. Ragland, 57 Ohio St. 148, 48 N. E. 811; Pyles v. Brown, 189 Pa. St. 164, 42 Atl. 11, 69 Am. St. Rep. 794; Frank v. Heidenheimer, 84 Tex. 642, 19 S. W. 855

seem that the policy of the registry acts is thereby accomplished; the purchaser is protected; he is not bound to inquire farther back, and to ascertain whether the vendor has done acts which may impair his title prior to the time at which it was vested in him as indicated by the records. This view is supported by many decisions,— it seems by the weight of authority,— which hold that a purchaser need not prosecute a search for deeds or mortgages made by his own vendor, farther back than the time at which the title is shown by the records to have been vested in such vendor; or in other words, a purchaser is not bound by the registry of deeds or mortgages from his vendor made prior to that time.[3 d] The record title is so far a protection under the

23 Me. 170; Pierce v. Taylor, 23 Me. 246; Felton v. Pitman, 14 Ga. 530. It is a well-settled application of the law of estoppel that if A, having no title, conveys or mortgages to B, with covenant of title, and afterwards acquires the title, this title will inure to the benefit of B by operation of the estoppel; and in some states the same effect is produced without any covenant of warranty. If, therefore, A thus conveys or mortgages to B, and B's deed or mortgage is duly recorded, and if after A acquired the title he gives another deed or mortgage to C, and C's deed or mortgage and the conveyance of title to A are recorded together, it is settled that the estoppel binds A's assignee, C, as well as himself, and that through the estoppel B obtains the precedence over C: Pike v. Galvin, 29 Me. 183; Wark v. Willard, 13 N. H. 389; Kimball v. Blaisdell, 5 N. H. 533; 22 Am. Dec. 476; Jarvis v. Aikens, 25 Vt. 635; White v. Patten, 24 Pick. 324; Somes v. Skinner, 3 Pick. 52; Tefft v. Munson, 57 N. Y. 97; Doyle v. Peerless Pet. Co., 44 Barb. 239; Farmers' L. & T. Co. v. Maltby, 8 Paige, 361.[c]

3 Farmers' Loan Co. v. Maltby, 8 Paige, 361; Page v. Waring, 76 N. Y. 463, 467–469; Hetzel v. Barber, 69 N. Y. 1; Doswell v. Buchanan, 3 Leigh, 365, 381; 23 Am. Dec. 280; Calder v. Chapman, 52 Pa. St. 359; 91 Am. Dec. 163; Buckingham v. Hanna, 2 Ohio St. 551; Losey v. Simpson, 11 N. J. Eq. 246. In Farmers' Loan Co. v. Maltby, 8 Paige, 361, a vendee in a contract for the purchase of land which was unrecorded — the mere equitable owner — gave a mortgage on the premises to one A, which was immediately put on record. This vendee afterwards obtained the legal title by a deed from his

(recorded reconveyance by B to A); Advance Thresher Co. v. Esteb, 41 Oreg. 469, 69 Pac. 447. But see Van Diviere v. Mitchell, 45 S. C. 127, 22 S. E. 759.

(c) See, also, Bernardy v. Colonial & U. S. Mortgage Co., (S. Dak.) 98 N. W. 166; Philly v. Sanders, 11 Ohio St. 490, 78 Am. Dec. 316.

(d) This passage of the text is quoted in Bernardy v. Colonial & U. S. Mortgage Co., (S. Dak.) 98 N. W. 166, dissenting opinion. See, also, Wheeler v. Young, (Conn.) 55 Atl.

statutes to purchasers relying upon it, that if an instrument appearing on its face to be an absolute conveyance is recorded, a subsequent purchaser in good faith and for a valuable consideration from the grantee named in it ob-

vendor, which deed was at once recorded; he then conveyed the land to the defendant, B, for a valuable consideration, and this second deed was also recorded. The court held that the recording of the mortgage to A, being prior to the time when the title, as appeared by the record, was vested in the mortgagor, did not operate as constructive notice to the grantee, B, who took his deed after the legal title was vested in his grantor. Chancellor Walworth said, in substance, that as the mortgagor had not the legal title when the mortgage to A was given, but only a contract to purchase the land from one S., it followed that the defendant, B, was not charged with constructive notice by the record of such mortgage. In taking a conveyance, B would not search for mortgages by his grantor prior to the date of his deed from S. See, however, Digman v. McCollum, 47 Mo. 372, 375, 376, which appears to be in direct conflict with the rule as stated in the text, and with the foregoing cases cited in this note. It holds that a subsequent purchaser has a constructive notice of a recorded encumbrance,— a mortgage,— although the mortgagor's title was unrecorded and was purely equitable,— e. g., an unregistered agreement to convey the land. For the case where a grantee or mortgagee in good faith, and holding a record title which appears to be perfect, may really have no title because a grantor or mortgagor in the chain of title had knowledge of a prior unrecorded deed or mortgage, see *post*, § 760, and cases there cited; Flynt v. Arnold, 2 Met. 619; Mahoney v. Middleton, 41 Cal. 41, 50; Fallas v. Pierce, 30 Wis. 443; Sims v. Hammond, 33 Iowa, 368; Van Rensselaer v. Clark, 17 Wend. 25; 31 Am. Dec. 280; Goelet v. McManus, 1

670; Elder v. Derby, 98 Ill. 228; Balen v. Mercier, 75 Mich. 42, 42 N. W. 666; Schoch v. Birdsall, 48 Minn. 441, 51 N. W. 382; Ford v. Unity Church Society, 120 Mo. 498, 25 S. W. 394, 41 Am. St. Rep. 711, 23 L. R. A. 561, citing this section of the text; Boyd v. Mundorf, 30 N. J. Eq. 545; Bingham v. Kirkland, 34 N. J. Eq. 229; Protection B. & L. Ass'n v. Chickering, 54 N. J. Eq. 519, 34 Atl. 1083, affirmed, 55 N. J. Eq. 822, 41 Atl. 1116; Daly v. N. Y. & G. L. R. Co., (N. J. Eq.) 38 Atl. 202; Oliphant v. Burns, 146 N. Y. 218, 40 N. E. 980 (recording a contract to sell, when the vendor has no title, not notice to a mortgagee whose mortgage taken after the vendor acquired title). In Boyd v. Mundorf, *supra*, it was held that a grantor who takes back a purchase-money mortgage, which is recorded at the same time as the deed to the grantee, is entitled to priority over a prior recorded mortgage executed by the grantee on the same land; the grantor was not obliged to search for encumbrances created by his grantee before title was acquired by the latter. For other cases to the same effect, see *post*, § 725, editor's note. It should be noted that in the situation described in the text it is the subsequent purchaser's duty to search for conveyances by his vendor back to the time when, as shown by the record, *title vested* in the vendor,

tains a title free from all secret trusts, and from all outstanding equities not appearing on the record, which, if recorded or otherwise disclosed, might have shown the instrument to be in reality a mortgage.[4]

Hun, 306; Ring v. Richardson, 3 Keyes, 450; Schutt v. Large, 6 Barb. 373.e These cases overrule the earlier decisions in Connecticut v. Bradish, 14 Mass. 296, 303; Trull v. Bigelow, 16 Mass. 406; 8 Am. Dec. 144; Gliddon v. Hunt, 24 Pick. 221; Ely v. Wilcox, 20 Wis. 523, 530; 91 Am. Dec. 436. See also *post*, § 761, when a purchaser may be charged with notice of a prior unrecorded conveyance, though there is a break in the chain of record title: Crane v. Turner, 7 Hun, 357; 67 N. Y. 437.

[4] For example, if a deed absolute on its face is accompanied by a written defeasance, and the deed is recorded, but the defeasance is not, this rule applies; also, if such a deed is accompanied by a verbal agreement or defeasance which, in equity at least, might render it a mortgage. The same is true with a deed absolute on its face, but accompanied with such parol acts as constitute the grantee a constructive trustee or trustee *in invitum* for the benefit of the grantor, or of some third person: Jaques v. Weeks, 7 Watts, 261, 271; Orvis v. Newell, 17 Conn. 97; Bush v. Golden, 17 Conn. 594; Harrison v. Cachelin, 23 Mo. 117, 126; Mesick v. Sunderland, 6 Cal. 297; Hart v. Farmers' and Merchants' Bank, 33 Vt. 252; Bailey v. Myrick, 50 Me. 171.

not merely to the hour and minute at which the evidence of the title was filed for record; he is, therefore, charged with notice of the vendor's recorded dealings with the property intermediate between the vendor's acquisition and recording of title: Higgins v. Dennis, 104 Iowa, 605, 74 N. W. 9; Coleman v. Reynolds, 181 Pa. St. 317, 37 Atl. 543; but see *contra*, Continental I. & L. Soc. v. Wood, 168 Ill. 421, 48 N. E. 221; and it appears from Semon v. Terhune, 40 N. J. Eq. 364, 2 Atl. 18, that he must take notice of a mortgage *recorded* by his vendor after the vendor's acquisition and before the vendor's recording of title, although such mortgage was executed before title vested in the vendor; in this case, A's mortgage to B was dated Sept. 17, and recorded Oct. 15, while the deed to A was dated Sept. 30 and recorded Nov. 24; a subsequent purchaser from A took with notice from this record of the mortgage to B.

In Dickerson v. Bridges, 147 Mo. 235, 48 S. W. 825, it was held that a record of a mortgage made before the issuance of a patent but after the date of the original entry by the homesteader is notice; and in Bernardy v. Colonial & U. S. Mortgage Co., (S. Dak.) 98 N. W. 166, it was held, by virtue of the statute whereby a grantor's after-acquired title passes, by operation of law, to his grantee, that the record of a voluntary deed made and recorded before the issuance of a patent to the grantor is notice to his mortgagee, by mortgage made after the patent issued: that any other rule would practically nullify the statute.

(e) See, also, Woods v. Garnett, 72 Miss. 78, 16 South. 390; Van Aken v. Gleason, 34 Mich. 477; Erwin v. Lewis, 32 Wis. 276. But see *contra*, Day v. Clark, 25 Vt. 397;

§ 659. (6) **Effect of Other Kind of Notice, in the Absence of a Registration.**— May any other kind of notice, actual or constructive, supply the want of a registration? In other words, if a subsequent purchaser for a valuable consideration has put his conveyance upon record, but at the time of his purchase was affected with notice that there was a prior outstanding but unregistered conveyance of the same premises from the same grantor, would he be protected by his record notwithstanding the notice? or would the notice operate, like the constructive notice arising from a registry, to postpone his own interest to that conferred by the prior unregistered instrument? This question was presented to the English courts of chancery at an early day, and was settled by them in accordance with the general principles of equity; and their decisions have with great uniformity been adopted and followed by the American courts. It is the established doctrine that a notice of some kind, of an existing, prior, unrecorded conveyance, operates, like the constructive notice arising from a registry, to postpone a subsequent and recorded instrument. If a subsequent purchaser, even for a valuable consideration, had received notice of a prior unrecorded instrument, then he cannot acquire or retain the precedence from a registration of his own conveyance; his conveyance, though recorded, is subordinate and postponed to the prior unrecorded one of which he had received notice.[1] This conclusion, reached originally

[1] This doctrine, which is nakedly stated in the text without its reasons, was settled by Lord Hardwicke (A. D. 1747), in the celebrated case of Le Neve v. Le Neve, Amb. 436; 2 Lead. Cas. Eq., 4th Am. ed., 109; Davis v. Earl of Strathmore, 16 Ves. 419, per Lord Eldon; Greaves v. Tofield, L. R. 14 Ch. Div. 563; Credland v. Potter, L. R. 10 Ch. 8; Rolland v. Hart, L. R. 6 Ch. 678; Chadwick v. Turner, L. R. 1 Ch. 310; Hine v. Dodd, 2 Atk. 275; Wyatt v. Barwell, 19 Ves. 435; Benham v. Keane, 3 De Gex, F. & J. 318; Ford v. White, 16 Beav. 120, 123, 124.

Morse v. Curtis, 140 Mass. 112, 2 N. E. 929, 54 Am. Rep. 456. In the last case the case of Flynt v. Arnold, cited in the author's note, was considered, and the court held that it does not overrule the earlier cases except by way of *dictum*. It would seem that this settles the Massachusetts law in accord with the earlier authorities. See, further, *post*, § 760, notes.

by the court of chancery, has, in England, furnished a rule for that tribunal alone, and has not been accepted by the courts of law;[2] in this country it is recognized and enforced alike by the courts of equity and of law, for the reason that both have jurisdiction in matters of fraud.[3] The doctrine is, in fact, a mere application of the broader general principle that a person who purchases an estate, although for a valuable consideration, after notice of a prior equitable right, makes himself a *mala fide* purchaser, and will be held a trustee for the benefit of the person whose right he sought to defeat.[4]

§ 660. Fraud the Foundation of the Rule.— In the very earliest cases which first established the rule concerning the effect of notice of a prior unregistered conveyance to a subsequent purchaser who had put his deed or mortgage upon record, the decision was expressly based upon the positively fraudulent character of the purchaser's conduct. It was said in the plainest terms that the act of the purchaser in endeavoring to obtain a precedence through the operation of the statute, while he had knowledge or notice of the prior right held by another person, was in itself a fraud,— an attempt to obtain a fraudulent advantage,— and to uphold it would be suffering the statute to be used as a means of accomplishing a fraudulent purpose. The same theory has

2 Doe v. Allsop, 5 Barn. & Ald. 142. It must be, however, since the provision of the Supreme Court of Judicature Act, giving the rules of equity a binding efficacy wherever they conflict with those of the law concerning the same matter, that the doctrine is now enforced in legal as well as in equitable suits by the English courts.

3 Tuttle v. Jackson, 6 Wend. 213, 227; 21 Am. Dec. 306; Britton's Appeal, 45 Pa. St. 172. See *post*, § 759.

4 Thus a deed which for any defect does not convey the legal title, or a mortgage which is inoperative as a valid legal mortgage, may be good in equity as an agreement to convey or to mortgage, and a subsequent purchaser with notice of such an equitable right will take the property subject thereto: See Le Neve v. Le Neve, Amb. 436, per Lord Hardwicke; Davis v. Earl of Strathmore, 16 Ves. 419, 428; Jennings v. Moore, 2 Vern. 609; Mackreth v. Symmons, 15 Ves. 349.

been reaffirmed by the succeeding decisions of the English courts down to the present day.[1] It is especially important in its bearing upon the question whether a constructive as well as an actual notice of a prior unregistered conveyance will affect the rights of a subsequent purchaser who has complied with the requirements of the recording acts. In fact, all of the doubt, confusion, and conflict of opinion with reference to the respective effects of constructive and of actual notice in connection with registration has arisen from the adoption of this theory, and the attempt to make it of universal application.[2] The important differences which exist in the various American statutes have already been pointed out.[3] In those states whose legislatures have employed substantially the same language which is found in the English registry acts, the courts, while adopting the rule concerning the effect of notice laid down by Lord Hardwicke in Le Neve v. Le Neve, have also adopted the reasons which he there gave for it, and have found in the fraud imputed to

1 In the leading case of Le Neve v. Le Neve, Amb. 436, Lord Hardwicke used language which has been either quoted or approved in almost every subsequent English case: See quotation *ante*, § 591. See also Davis v. Earl of Strathmore, 16 Ves. 419; Wyatt v. Barwell, 19 Ves. 435; Hine v. Dodd, 2 Atk. 275; Ford v. White, 16 Beav. 120, 123, 124; Benham v. Keane, 3 De Gex, F. & J. 318; Chadwick v. Turner, L. R. 1 Ch. 310, 319; Rolland v. Hart, L. R. 6 Ch. 678, 681, 684; Greaves v. Tofield, L. R. 14 Ch. Div. 563, 571, 575, 577. In Rolland v. Hart, L. R. 6 Ch. 678, Lord Hatherley thus sums up the doctrine: "It is not perhaps very easy to see the exact shades of distinction between the cases; but this appears to be decided from the time of Hine v. Dodd, 2 Atk. 275, downwards, that a mere suspicion of fraud is not enough, and there must be actual notice implying fraud in the person registering the second encumbrance to deprive him of priority thereby gained over the first encumbrance. In all these cases, down to Wyatt v. Barwell, 19 Ves. 435, the expression is, that there must be actual notice amounting to fraud. It has been very well put, that it must be actual notice which renders it fraudulent to attempt to obtain priority, or to advance money when knowing that another person has already advanced money upon the same security, and afterwards unrighteously to attempt to deprive him of the benefit of that security by taking advantage of the registration act." See also a passage from the opinion of Bramwell, L. J., in Greaves v. Tofield, L. R. 14 Ch. Div. 563, quoted in vol. 1, in note 3, under § 431.

2 See *post*, §§ 662–664.

3 See *ante*, § 646, and abstracts of statutes in note thereunder.

the subsequent purchaser its sufficient foundation. In several of the states, the precedence over a prior unregistered conveyance obtained by recording a subsequent instrument is given in express terms only to "purchasers in good faith"; in others it is given only to purchasers "without notice," or "without actual notice."[4] Wherever such language has been employed, the rule under consideration is, of course, a necessary and direct consequence of the legislative enactment, and is not merely a judicial interpretation demanded by the general principles of equity.[5] It should be observed, in concluding this topic, that a legislature may declare that no notice, either actual or constructive, shall supply the want of a registration; that a subsequent purchaser shall acquire absolute precedence by recording his own instrument, even though he had full notice of a prior unregistered conveyance; and this effect may be stated in express terms, or it may be a necessary inference from the whole scope of the statute.[6]

§ 661. (7) What Kind of Notice is Sufficient to Produce this Effect.— The doctrine, being thus established in England and throughout this country, that some notice of a prior unregistered conveyance may supply the want of a registration, the inquiry finally remains, What species or amount of notice will avail to produce this effect? Or, to put the question in its most practical form, whether an *actual* notice is requisite, or whether a *constructive* notice may also be sufficient. It is plain, if the theory is accepted in its full and literal sense, that the positive *fraud* of the subsequent purchaser in endeavoring to obtain a precedence by registering his own instrument while he has notice of the prior conveyance is the sole foundation of the doctrine, that it is difficult

4 See *ante*, in note under § 646.

5 See cases cited *ante*, in note under § 659.

6 Such, in fact, appears to be the construction given to the peculiar language of one or two state statutes: See White v. Denman, 1 Ohio St. 110; 16 Ohio, 59; Bloom v. Noggle, 4 Ohio St. 45; Holliday v. Franklin Bank, 16 Ohio, 533; Stansell v. Roberts, 13 Ohio, 148; 42 Am. Dec. 193; Jackson v. Luce, 14 Ohio, 514; Mayham v. Coombs, 14 Ohio, 428.

to escape from the conclusion that the notice which shall thus render his conduct fraudulent, and destroy the efficacy of his registration, must be an actual one. It is not in accordance with general principles to pronounce a person guilty of fraud by reason of knowledge constructively imputed to him,— knowledge which he may in fact never have acquired, but which he is, from considerations of policy, *presumed* to have acquired, treated as having acquired.

§ 662. **English Rule.**— The earlier English decisions, adopting the theory of the second purchaser's fraud in all its features, accepted without hesitation the logical results of this theory with reference to the kind of notice. They not only held affirmatively that the notice must be actual, and proved by clear, positive, and direct evidence, but negatively that a constructive notice was not sufficient. The same rule has even been repeated by way of a *dictum* in one or two of the very latest decisions.[1] In the modern English cases, the judges, while still insisting upon fraud as the sole basis of the doctrine, hold that the same effect may be produced by a constructive notice as by an actual one upon a subsequent purchaser who has registered his conveyance. The inquiry no longer seems to be, whether the notice was actual or constructive, but whether the evidence was sufficiently definite, and the circumstances were sufficient to affect the conscience of the purchaser as a fact, and not merely as a possible inference.[2] [a]

1 Hine v. Dodd, 2 Atk. 275; Jolland v. Stainbridge, 3 Ves. 478; Wyatt v. Barwell, 19 Ves. 435; Chadwick v. Turner, L. R. 1 Ch. 310, 319.

2 In Rolland v. Hart, L. R. 6 Ch. 678, 681-683, a second mortgagee was held to be affected with notice of a prior unregistered mortgage, by means of information or knowledge obtained by his attorney in the transaction, although it appeared very clearly that the knowledge had not in fact been communicated by the attorney to his client. It is true, the court called the notice "actual," but to treat such notice imputed to a principal on account of information acquired by an agent as actual is to disregard the essential distinction between the two species. A subsequent purchaser whose conveyance

(a) See, also, Sydney & S. M. B. & L. I. Ass'n, Lim., v. Lyons, [1894] App. Cas. 260 (Privy Council).

§ 663. American Rules.— The same diversity and fluctuation of opinion appear among the decisions made by the courts of the various states, and in some instances between the earlier and later decisions of the same court. In one class of cases, an actual notice rendering the second purchaser's conduct positively fraudulent is held to be essential. In another class, no distinction, in respect to the operation of notice, is recognized between the subsequent purchaser under the recording acts and any other subsequent purchaser; the rights of both are treated as being equally affected by a constructive notice.[1] Two causes have operated to produce this conflict. It has resulted in part from the different terms which the legislatures of various states have employed in the most important clauses of the recording acts.[2] It has resulted in greater part, I think, from a lack of unanim-

was registered has been charged with notice of a prior equitable mortgage arising from the non-production of title deeds, and his failure to inquire for them: Wormald v. Maitland, 35 L. J. Ch., N. S., 69; In re Allen, 1 I. R. Eq. 455; and see Whitehead v. Jordan, 1 Younge & C. 303. When a subsequent purchaser or encumbrancer for a valuable consideration has paid or parted with the consideration without any notice of a prior unregistered deed or mortgage, and then registers his own instrument after obtaining such notice, the notice does not defeat the precedence acquired under the statute by his registration: Elsey v. Lutyens, 8 Hare, 159; Essex v. Baugh, 1 Younge & C. Ch. 620.

[1] See Dey v. Dunham, 2 Johns. Ch. 182, 190; Dunham v. Dey, 15 Johns. 555; 8 Am. Dec. 282; Jackson v. Van Valkenburg, 8 Cow. 260; Tuttle v. Jackson, 6 Wend. 213; 21 Am. Dec. 306; Grimstone v. Carter, 3 Paige, 421; 24 Am. Dec. 230; Williamson v. Brown, 15 N. Y. 354; Norcross v. Widgery, 2 Mass. 505; McMechan v. Griffing, 3 Pick. 149; 15 Am. Dec. 198; U. S. Ins. Co. v. Shriver, 3 Md. Ch. 381; General Life Ins. Co. v. U. S. Ins. Co., 10 Md. 517, 525; 69 Am. Dec. 174; Fleming v. Burgin, 2 Ired. Eq. 584; Noyes v. Hall, 97 U. S. 34, 38; Cabeen v. Breckenridge, 48 Ill. 91; Truesdale v. Ford, 37 Ill. 210; Brinkman v. Jones, 44 Wis. 498, 519; White v. Foster, 102 Mass. 375; Lamb v. Pierce, 113 Mass. 72; Crassen v. Swoveland, 22 Ind. 427, 434; Wilson v. Hunter, 30 Ind. 466, 472; Lawton v. Gordon, 37 Cal. 202, 205; Maupin v. Emmons, 47 Mo. 304, 306; Brown v. Volkening, 64 N. Y. 76, 82. These cases, taken from a large number of similar ones, sufficiently show the diversity and fluctuation of opinion among the American decisions spoken of in the text.

[2] As has been shown in a former paragraph (§ 646), there are several distinct types of the statute. These changes in the language of the statutes have naturally affected their judicial interpretation: See Williamson v. Brown, 15 N. Y. 354.

ity in the meanings given by the courts to "actual" and to "constructive" notice respectively; from a confusion and misconception with respect to the essential distinctions which exist between the two species. The conflict is therefore more apparent than real.

§ 664. **Actual or Constructive Notice.**— As this question is one which depends, in great measure, upon the local law, either local statutes or decisions, I have placed in the foot-note cases selected from all the states, and representing both types of legislation and of judicial interpretation,— one class embracing those in which an actual notice is required; the other, those in which a constructive notice is sufficient.[1]

[1] For classification and abstract of the state statutes, and some further decisions under them, see note *ante*, § 646. I have, in the present note, selected and arranged well-considered and authoritative cases from nearly every state. It would be impossible, within any reasonable limits, to make a strict classification of decisions which *require* actual notice, properly so called, and those which permit constructive notice. There is a great confusion or uncertainty as to what particular kinds are embraced within these *genera*. In nearly all the states whose statutes in terms demand an "actual" notice, the courts admit the operation of those species which are uniformly regarded as belonging to the *genus* constructive, viz., notice arising from *lis pendens*, recitals in title papers, between principal and agent, and even possession. The courts of the same states hold that the "actual" notice of the statute does not mean knowledge, and may be shown by any kind of circumstances which would put a reasonable man upon an inquiry. Practically, it seems very difficult to distinguish "actual" notice so defined from constructive notice. See, upon this subject, the able opinion of Taylor, J., in Brinkman v. Jones, 44 Wis. 498, 519; and Maupin v. Emmons, 47 Mo. 304, 306. The courts of a few states have interpreted their statutes more literally, and have established a more stringent rule requiring an actual notice proved by direct evidence. Of this class are Massachusetts, Maine, Missouri, and perhaps Maryland and Indiana. I have arranged the cases by states, and have placed together those in each state which treat of notice by *possession*. From the decisions here collected, taken in connection with the abstract of statutes and further cases in the note under § 646, I hope that the reader will be able to form an accurate notion of the law on this confused subject as it is settled in each commonwealth.[a]

Alabama.[b] — Lambert v. Newman, 56 Ala. 623, 625; Corbett v. Clenny, 52 Ala. 480, 483; Dudley v. Witter, 46 Ala. 664, 694; Campbell v. Roach, 45 Ala.

(a) For the recent cases on notice by possession as a substitute for recording, see *ante*, §§ 614–625, editor's notes.

(b) *Alabama.*— Chadwick v. Carson, 78 Ala. 116.

While the rule is settled in all the states composing the first class, that in order to postpone a subsequent purchaser or encumbrancer who has obtained the first record, he must have received an actual notice of a prior unrecorded instru-

667; Ponder v. Scott, 44 Ala. 241, 244; Newsome v. Collins, 43 Ala. 656, 663; Burch v. Carter, 44 Ala. 115, 117; Witter v. Dudley, 42 Ala. 616, 621; Wyatt v. Stewart, 34 Ala. 716; Boyd v. Beck, 29 Ala. 703; Johnson v. Thweatt, 18 Ala. 741; Dearing v. Watkins, 16 Ala. 20; Walter v. Rhea, 10 Ala. 451; 12 Ala. 646; Boyd v. Beck, 29 Ala. 703; De Vandal v. Malone's Ex'rs, 25 Ala. 272; Center v. P. & M. Bank, 22 Ala. 743; Hoole v. Att'y-Gen., 22 Ala. 190; Smith's Heirs v. Branch Bank, 21 Ala. 125. *Possession:* Chapman v. Holding, 60 Ala. 522; Bernstein v. Humes, 60 Ala. 582; 31 Am. Rep. 52; Lindsey v. Veasy, 62 Ala. 421.

Arkansas.[c] — Stidham v. Mathews, 29 Ark. 650, 659; Holman v. Patterson's Heirs, 29 Ark. 357; Haskell v. State, 31 Ark. 91. *Possession:* Byers v. Engles, 16 Ark. 543.

California.[d] — Lawton v. Gordon, 37 Cal. 202; Galland v. Jackman, 26 Cal. 79, 87; 85 Am. Dec. 172. *Possession:* Jones v. Marks, 47 Cal. 242, 248; Fair v. Stevenot, 29 Cal. 486; O'Rourke v. O'Connor, 39 Cal. 442; Smith v. Yule, 31 Cal. 180; 89 Am. Dec. 167; Thompson v. Pioche, 44 Cal. 508, 516; Moss v. Atkinson, 44 Cal. 3, 17.

e.

Connecticut.— Blatchley v. Osborn, 33 Conn. 226, 233; Clark v. Fuller, 39 Conn. 238; Bank of New Milford v. New Milford, 36 Conn. 94; Sigourney v. Munn, 7 Conn. 324; Hamilton v. Nutt, 34 Conn. 501; Bush v. Golden, 17 Conn. 594; Wheaton v. Dyer, 15 Conn. 307.

Florida.[f] — *Possession:* Doe v. Roe, 13 Fla. 602.

Georgia.[g] — Virgin v. Wingfield, 54 Ga. 451, 454; Bryant v. Booze, 55 Ga. 438; Poulet v. Johnson, 25 Ga. 403; Downs v. Yonge, 17 Ga. 295; Seabrook v. Brady, 47 Ga. 650; Brown v. Wells, 44 Ga. 573, 575; Williams v. Adams,

(c) *Arkansas.*— Cumberland B. & L. Ass'n v. Sparks, 111 Fed. 647, 49 C. C. A. 510, citing many Arkansas cases (unacknowledged but recorded mortgage creates no lien as against third parties, although they have actual notice of its existence and knowledge of its contents). To the effect that actual notice will not supply the place of record of a mortgage, see Ford v. Burks, 37 Ark. 91; Dodd v. Parker, 40 Ark. 536; Martin v. Ogden, 41 Ark. 187.

(d) *California.*— Donald v. Beals, 57 Cal. 399; Prouty v. Devlin, 118 Cal. 258, 50 Pac. 380; County Bank of San Luis Obispo v. Fox, 119 Cal. 61, 51 Pac. 11. *Possession.*— McNeil v. Polk, 57 Cal. 323. But on account of a peculiarity of the homestead statute, a homestead is superior to a prior unrecorded mortgage, although there is actual notice: Lee v. Murphy, 119 Cal. 364, 51 Pac. 549.

(e) *Colorado.*— Board of Commissioners v. Ingram, 31 Colo. 319, 73 Pac. 37.

(f) *Florida.*—*Possession.*— Stockton v. National Bank of Jacksonville, (Fla.) 34 South. 897.

(g) *Georgia.*—Wise v. Mitchell, 100 Ga. 614, 28 S. E. 382.

ment, it is equally well settled that this notice need not be established by direct and positive evidence: it may be shown by indirect evidence,— by proof of circumstances sufficient

43 Ga. 407; Allen v. Holden, 32 Ga. 418; Allen v. Holding, 29 Ga. 485; Lee v. Cato, 27 Ga. 637; 73 Am. Dec. 748; Doe v. Roe, 25 Ga. 55. *Possession:* Helms v. May, 29 Ga. 121; Wyatt v. Elam, 19 Ga. 335.

Illinois.[h] — Frye v. Partridge, 82 Ill. 267, 270; Chicago etc. R. R. v. Kennedy, 70 Ill. 350, 361; Redden v. Miller, 95 Ill. 336; Shepardson v. Stevens, 71 Ill. 646; Erickson v. Rafferty, 79 Ill. 209, 212; Chicago v. Witt, 75 Ill. 211; Morris v. Hogle, 37 Ill. 150; 87 Am. Dec. 243; Dunlap v. Wilson, 32 Ill. 517; Ogden v. Haven, 24 Ill. 57. *Possession:* Noyes v. Hall, 97 U. S. 34, 38; Tunison v. Chamblin, 88 Ill. 378, 390; Illinois Central R. R. v. McCullough, 59 Ill. 166; Warren v. Richmond, 53 Ill. 52; Bayles v. Young, 51 Ill. 127; Bogue v. Williams, 48 Ill. 371; Cabeen v. Breckenridge, 48 Ill. 91; Truesdale v. Ford, 37 Ill. 210; McVey v. McQuality, 97 Ill. 93; Partridge v. Chapman, 31 Ill. 137; Lumbard v. Abbey, 73 Ill. 177.

Indiana.[i] — Crassen v. Swoveland, 22 Ind. 427, 432; Wiseman v. Hutchinson, 20 Ind. 40; Croskey v. Chapman, 26 Ind. 333; Wilson v. Hunter, 30 Ind. 466, 472; Paul v. Connersville etc. R. R., 51 Ind. 527, 530; Kirkpatrick v. Caldwell's Adm'rs, 32 Ind. 299; Brose v. Doe, 2 Ind. 666; Ricks v. Doe, 2 Blackf. 346. *Possession:* Clouse v. Elliott, 71 Ind. 302; Campbell v. Brackenridge, 8 Blackf. 471.

Iowa.— Smith v. Denton, 42 Iowa, 48; Watson v. Phelps, 40 Iowa, 482; Blanchard v. Ware, 43 Iowa, 530; 37 Iowa, 305; Jones v. Bamford, 21 Iowa, 217; Mitchell v. Peters, 18 Iowa, 119; Wilson v. Miller, 16 Iowa, 111; Hopping v. Burnam, 2 Iowa, 39. *Possession:* Rogers v. Hussey, 36 Iowa, 664; Phillips v. Blair, 38 Iowa, 649; Hubbard v. Long, 20 Iowa, 149; Baldwin v. Thompson, 15 Iowa, 504; Moore v. Pierson, 6 Iowa, 279; 71 Am. Dec. 409.

Kansas.[j] — Jones v. Lapham, 15 Kan. 540, 545; Setter v. Alvey, 15 Kan. 157; Kirkwood v. Koester, 11 Kan. 471. *Possession:* Johnson v. Clark, 18 Kan. 157, 164; School Dist. v. Taylor, 19 Kan. 287; Greer v. Higgins, 20 Kan. 420; Lyons v. Bodenhamer, 7 Kan. 455.

Kentucky.— Mueller v. Engeln, 12 Bush, 441, 444; Hardin v. Harrington, 11 Bush, 367; Hopkins v. Garrard, 7 B. Mon. 312; Forepaugh v. Appold, 17 B. Mon. 631; Vanmeter v. McFaddin, 8 B. Mon. 442; Honore v. Bakewell, 6 B. Mon. 67; 43 Am. Dec. 147; Thornton v. Knox, 6 B. Mon. 74; Johnston v. Gwathmey, 4 Litt. 317; 14 Am. Dec. 135. *Possession:* Russell v. Moore, 3 Met. 437; Hackwith v. Damron, 1 T. B. Mon. 235.

(h) *Illinois.*—Robertson v. Wheeler, 162 Ill. 566, 44 N. E. 870 (proof of notice must be beyond a reasonable doubt); Warder v. Cornell, 105 Ill. 169; Pry v. Pry, 109 Ill. 466. *Possession.*— Haworth v. Taylor, 108 Ill. 275.

(i) *Indiana.*— Ellison v. Branstrator, 153 Ind. 146, 54 N. E. 433. *Possession.*— Kirkham v. Moore, 30 Ind. App. 549, 65 N. E. 1042.

(j) *Kansas.*— Pope v. Nichols, 61 Kan. 230, 59 Pac. 257.

to put any reasonably prudent man upon an inquiry. Indeed, in some of the states where an actual notice is expressly demanded by statute, it has been decided that open and notorious possession under a prior unrecorded convey-

Louisiana.— Moore v. Jourdan, 14 La. Ann. 414; Smith v. Lambeth, 15 La. Ann. 566; Swan v. Moore, 14 La. Ann. 833; Bell v. Haw, 8 Martin, N. S., 243. *Possession:* Winston v. Prevost, 6 La. Ann. 164; Splane v. Mitcheltree, 2 La. Ann. 265.

Maine.— Hull v. Noble, 40 Me. 459, 480; Goodwin v. Cloudman, 43 Me. 577; Rich v. Roberts, 48 Me. 548; Porter v. Sevey, 43 Me. 519; Merrill v. Ireland, 40 Me. 569; Hanley v. Morse, 32 Me. 287; Spofford v. Weston, 29 Me. 140; Butler v. Stevens, 26 Me. 484; Kent v. Plummer, 7 Me. 464; Webster v. Maddox, 6 Me. 256.

Maryland.— Green v. Early, 39 Md. 223, 229; Matter of Leiman, 32 Md. 225; 3 Am. Rep. 132; Gen. Life Ins. Co. v. U. S. Ins. Co., 10 Md. 517, 526; 69 Am. Dec. 174; Mayor etc. v. Williams, 6 Md. 235; Johns v. Scott, 5 Md. 81; Winchester v. Balt. etc. R. R., 4 Md. 231; Price v. McDonald, 1 Md. 403; 54 Am. Dec. 657; Baynard v. Norris, 5 Gill, 483; U. S. Ins. Co. v. Shriver, 3 Md. Ch. 385.

Massachusetts.[k] — Lamb v. Pierce, 113 Mass. 72; Connihan v. Thompson, 111 Mass. 270; White v. Foster, 102 Mass. 375; Sibley v. Leffingwell, 8 Allen, 584; George v. Kent, 7 Allen, 16; Dooley v. Wolcott, 4 Allen, 406; Parker v. Osgood, 3 Allen, 487; Buttrick v. Holden, 13 Met. 355, 357; Curtis v. Mundy, 3 Met. 405; Lawrence v. Stratton, 6 Cush. 163, 166; Hennessey v. Andrews, 6 Cush. 170; Mara v. Pierce, 9 Gray, 306; Pingree v. Coffin, 12 Gray, 288.

Michigan.[l] — Reynolds v. Ruckman, 35 Mich. 80; Munroe v. Eastman, 31 Mich. 283; Shotwell v. Harrison, 30 Mich. 179; Barnard v. Campau, 29 Mich. 162; Baker v. Mather, 25 Mich. 51; Case v. Erwin, 18 Mich. 434; Fitzhugh v. Barnard, 12 Mich. 105; Waldo v. Richmond, 40 Mich. 380; Stetson v. Cook, 39 Mich. 750; Hosley v. Holmes, 27 Mich. 416. *Possession:* Russell v. Sweezey, 22 Mich. 235, 239; Hommel v. Devinney, 39 Mich. 522.

Minnesota.[m] — Coy v. Coy, 15 Minn. 119, 126; Roberts v. Grace, 16 Minn. 126; Ross v. Worthington, 11 Minn. 438; 88 Am. Dec. 95; Doughaday v. Paine, 6 Minn. 443. *Possession:* Smith v. Gibson, 15 Minn. 89, 99; Morrison v. March, 4 Minn. 422; Seagar v. Burns, 4 Minn. 141; Minor v. Willoughby, 3 Minn. 225.

Mississippi.—Allen v. Poole, 54 Miss. 323; Wasson v. Connor, 54 Miss. 351; Deason v. Taylor, 53 Miss. 697, 701; Loughridge v. Bowland, 52 Miss. 546, 553; Buck v. Paine, 50 Miss. 648, 655; Avent v. McCorkle, 45 Miss. 221; Parker v. Foy, 43 Miss. 260; 55 Am. Rep. 484; McLeod v. First Nat. Bank,

(k) *Massachusetts.*— Ford v. Tiicknor, 169 Mass. 276, 46 N. E. 877. *Possession* does not amount to "actual" notice: Toupin v. Peabody, 162 Mass. 473, 39 N. E. 280, and cases cited.

(l) *Michigan.*—Balen v. Mercier, 75 Mich. 42, 42 N. W. 666; Dennis v. Dennis, 119 Mich. 380, 78 N. W. 333.

(m) *Minnesota.*— St. Paul Title Ins. & T. Co. v. Berkey, 52 Minn. 497, 55 N. W. 60.

ance constitutes a sufficient notice. In the states composing the second class the rule admitting the sufficiency of a constructive notice is well established. To constitute such a notice under the recording acts, it must be shown by evi-

42 Miss. 99, 112. *Possession:* Strickland v. Kirk, 51 Miss. 795, 797; Perkins v. Swank, 43 Miss. 349, 361.

Missouri.[n] — Maupin v. Emmons, 47 Mo. 304, 306; Real Estate Sav. Inst. v. Collonious, 63 Mo. 290, 294; Ridgway v. Holliday, 59 Mo. 444; Eck v. Hatcher, 58 Mo. 235; Fellows v. Wise, 55 Mo. 413, 415; Major v. Bukley, 51 Mo. 227, 231; Digman v. McCollum, 47 Mo. 372, 375; Speck v. Riggin, 40 Mo. 405; Muldrow v. Robison, 58 Mo. 331; Rhodes v. Outcalt, 48 Mo. 367; Roberts v. Moseley, 64 Mo. 507; Masterson v. West End etc. R. R., 5 Mo. App. 64. *Possession:* Shumate v. Reavis, 49 Mo. 333; Beatie v. Butler, 21 Mo. 313; 64 Am. Dec. 234.

Nebraska.— Possession: Uhl v. May, 5 Neb. 157.

Nevada.— Grellett v. Heilshorn, 4 Nev. 526; Gilson v. Boston, 11 Nev. 413; Hardy v. Harbin, 4 Saw. 536; Norton v. Meader, 8 Saw. 603.

New Hampshire.— Warner v. Swett, 31 N. H. 332; Rogers v. Jones, 8 N. H. 264; Colby v. Kenniston, 4 N. H. 262; Patten v. Moore, 32 N. H. 382, 384; Heit v. Russell, 56 N. H. 559; Bell v. Twilight, 22 N. H. 500; Brown v. Manter, 22 N. H. 468. *Possession:* Bank of Newberry v. Eastman, 44 N. H. 431; Hadduck v. Wilmarth, 5 N. H. 181; 20 Am. Dec. 570.

New Jersey.[o] — Van Keuren v. Cent. R. R., 38 N. J. L. 165, 167 (possession); Raritan Water Co. v. Veghte, 21 N. J. Eq. 463, 478; 19 N. J. Eq. 142; Hoy v. Bramhall, 19 N. J. Eq. 563; 97 Am. Dec. 687; Holmes v. Stout, 10 N. J. Eq. 419; 4 N. J. Eq. 492; Van Doren v. Robinson, 16 N. J. Eq. 256; Smith v. Vreeland, 16 N. J. Eq. 199; Smallwood v. Lewin, 15 N. J. Eq. 60. *Possession:* Losey v. Simpson, 11 N. J. Eq. 246; Coleman v. Barklew, 27 N. J. L. 357.

New York.— Griffith v. Griffith, 1 Hoff. Ch. 153; Williamson v. Brown, 15 N. Y. 354; Cambridge Valley Bank v. Delano, 48 N. Y. 326, 336, 339; Acer v. Westcott, 46 N. Y. 384; 7 Am. Rep. 355; Gibert v. Peteler, 38 N. Y. 165; 97 Am. Dec. 785; Howard Ins. Co. v. Halsey, 8 N. Y. 271; 49 Am. Dec. 478; Page v. Waring, 76 N. Y. 463; Acer v. Westcott, 1 Lans. 193, 197. *Possession:* Brown v. Volkening, 64 N. Y. 76, 82; Westbrook v. Gleason, 79 N. Y. 23.

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(n) *Missouri.*— Finley v. Babb, 173 Mo. 257, 73 S. W. 180.

(o) *New Jersey.*— Essex Co. Bank v. Harrison, 57 N. J. Eq. 91, 40 Atl. 209; Green v. Morgan, (N. J. Eq.) 21 Atl. 857.

(p) *North Carolina.*—Actual notice will not take the place of registration: Killebrew v. Hines, 104 N. C. 182, 10 S. E. 159, 251, 17 Am. St. Rep. 672; Hinton v. Leigh, 102 N. C. 28, 8 S. E. 890; Duke v. Markham, 105 N. C. 131, 10 S. E. 1017, 18 Am. St. Rep. 889; Davis v. Inscoe, 84 N. C. 396; Madox v. Arp, 114 N. C. 585, 19 S. E. 665; Quinnerly v. Quinnerly, 114 N. C. 145, 19 S. E. 99; Barber v. Wadsworth, 115 N. C. 29, 20 S. E. 178; McAllister v. Purcell, 124 N. C. 262, 32 S. E. 715;

dence clear and reliable that the party has received information of facts and circumstances which are sufficient, *in contemplation of law,* to put any reasonably prudent man

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Ohio.[r] — Morris v. Daniels, 35 Ohio St. 406; McKinzie v. Perrill, 15 Ohio St. 162.

Oregon.[s] — Carter v. City of Portland, 4 Or. 339, 350; Stannis v. Nicholson, 2 Or. 332. *Possession:* Bohlman v. Coffin, 4 Or. 313.

Pennsylvania.— Butcher v. Yocum, 61 Pa. St. 168, 171; 100 Am. Dec. 625; Lahr's Appeal, 90 Pa. St. 507; Parke v. Neeley, 90 Pa. St. 52; Maul v. Rider, 59 Pa. St. 167, 171; Nice's Appeal, 54 Pa. St. 200; York Bank's Appeal, 36 Pa. St. 458; Smith's Appeal, 47 Pa. St. 128; Britton's Appeal, 45 Pa. St. 172; Speer v. Evans, 47 Pa. St. 141; Ripple v. Ripple, 1 Rawle, 386. *Possession:* Krider v. Lafferty, 1 Whart. 303; Randall v. Silverthorn, 4 Pa. St. 173; Meehan v. Williams, 48 Pa. St. 238; Sailor v. Hertzog, 4 Whart. 259; Lightner v. Mooney, 10 Watts, 407.

Rhode Island.— Tillinghast v. Champlin, 4 R. I. 173, 215; 67 Am. Dec. 510; Harris v. Arnold, 1 R. I. 125.

South Carolina.[t] — Wallace v. Craps, 3 Strob. 266; Martin v. Sale, 1 Bail. Eq. 1, 24; City Council v. Page, 1 Speers Eq. 159, 212; Cabiness v. Mahon, 2 McCord, 273.

Tennessee.— Murrell v. Watson, 1 Tenn. Ch. 342; Tharpe v. Dunlap, 4 Heisk. 674, 686.

Texas.[u] — Littleton v. Giddings, 47 Tex. 109; Willis v. Gay, 48 Tex. 463; 26 Am. Rep. 328; Allen v. Root, 39 Tex. 589; Rodgers v. Burchard, 34 Tex. 441; 7 Am. Rep. 283. *Possession:* Watkins v. Edwards, 23 Tex. 443; Ponton v. Ballard, 24 Tex. 619; Mullins v. Wimberly, 50 Tex. 457, 464; Hawley v. Bullock, 29 Tex. 216; Mainwarring v. Templeman, 51 Tex. 205.

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Vermont.[w] — Blaisdell v. Stevens, 16 Vt. 179; Stafford v. Ballou, 17 Vt. 329; Corliss v. Corliss, 8 Vt. 373; Brackett v. Wait, 6 Vt. 411. *Possession:* Griswold v. Smith, 10 Vt. 452; Shaw v. Beebe, 35 Vt. 205; Pinney v. Fellows, 15 Vt. 525.

Cowen v. Withrow, 116 N. C. 771, 21 S. E. 676; Collins v. Davis, 132 N. C. 106, 43 S. E. 579.

(q) *North Dakota.*—Doran v. Dazey, 5 N. Dak. 167, 64 N. W. 1023, 57 Am. St. Rep. 550.

(r) *Ohio.*—Varwig v. Cleveland, C., C. & St. L. R. Co., 54 Ohio St. 455, 44 N. E. 92 (notice from facts putting on inquiry does not supply the place of record).

(s) *Oregon.*— Musgrove v. Bowser, 5 Oreg. 313, 20 Am. Rep. 737.

(t) *South Carolina.*— McGhee v. Wells, 57 S. C. 280, 35 S. E. 529, 76 Am. St. Rep. 567; Wingo v. Parker, 19 S. C. 9.

(u) *Texas.*— Mattfield v. Huntington, 17 Tex. Civ. App. 716, 43 S. W. 53; Maulding v. Coffin, 6 Tex. Civ. App. 416, 25 S. W. 480.

(v) *Utah.*— *Possession.*— Stahn v. Hall, 10 Utah, 400, 37 Pac. 585; Toland v. Corey, 6 Utah, 392, 24 Pac. 190.

(w) *Vermont.*— Willis v. Adams, 66 Vt. 223, 28 Atl. 1033.

upon an inquiry, so that the inquiry, if prosecuted with due diligence, would lead to a discovery of the truth. A constructive notice, under this system, can never be a matter of mere possible inference; there must be enough brought home to the knowledge of the party to impose a duty upon his conscience according to the theory of equity jurisprudence.[aa] Subject to this general limitation, the constructive notice, under the recording statutes, may arise in any of the modes recognized by the settled doctrines of equity,— from extraneous facts putting one upon an inquiry, from possession, from *lis pendens,* from recitals in title papers, from information communicated to an agent.

§ 665. **Rationale of Notice in Place of a Record.**— I shall conclude this subject by an attempt to ascertain the true *rationale* of the rule concerning notice as a substitute for an actual registration. If the fraud of the second purchaser is adopted as the only explanation, it seems impossible to hold with consistency that anything less than actual notice, or even actual knowledge, of the prior conveyance acquired

Virginia.[x] — Wood v. Krebbs, 30 Gratt. 708; Burwell's Ex'rs v. Fauber, 21 Gratt. 446; Long v. Weller's Ex'rs, 29 Gratt. 347; Cordova v. Hood, 17 Wall. 1; Brush v. Ware, 15 Pet. 93, 114; Vest v. Michie, 31 Gratt. 149; 31 Am. Rep. 722; Mundy v. Vawter, 3 Gratt. 518; McClure v. Thistle, 2 Gratt. 182; Doswell v. Buchanan's Ex'rs, 3 Leigh, 365; 23 Am. Dec. 280; Newman v. Chapman, 2 Rand. 93.

West Virginia.[y] — Cox v. Cox, 5 W. Va. 335. *Possession:* Western etc. Co. v. Peytona C. Coal Co., 8 W. Va. 406.

Wisconsin.[z] — Brinkman v. Jones, 44 Wis. 498, 519; Helms v. Chadbourne, 45 Wis. 60, 71, 73; Pringle v. Dunn, 37 Wis. 449, 460; 19 Am. Rep. 772; Hoppin v. Doty, 25 Wis. 573, 591; Gilbert v. Jess, 31 Wis. 110; Ely v. Wilcox, 20 Wis. 523; 91 Am. Dec. 436; Fallass v. Pierce, 30 Wis. 443; Hoxie v. Price, 31 Wis. 82. *Possession:* Wickes v. Lake, 25 Wis. 71; Fery v. Pfeiffer, 18 Wis. 510. It will be remembered that in Ohio and North Carolina, under the construction given to the recording acts, no notice can take the place of a record.

(x) *Virginia.*— Dobyns v. Waring, 82 Va. 159; National Mut. B. & L. Assn. v. Blair, 98 Va. 490, 36 S. E. 513.

(y) *West Virginia.*— Cox v. Wayt, 26 W. Va. 807.

(z) *Wisconsin.*—Mueller v. Brigham, 53 Wis. 173, 10 N. W. 336.

(aa) See Green v. Morgan, (N. J. Eq.) 21 Atl. 857.

by him, should avail in place of the record. We have seen, however, that the vast majority of the decisions, even while nominally requiring an actual notice, do not demand actual knowledge, but are satisfied with a notice proved by indirect evidence and inferred from circumstances. Is fraud, then, a necessary or even proper foundation upon which to base the rule in all its applications? I submit that it is not, and think that there is one other *rationale* which fully explains the doctrine in all of its phases, and which produces a real harmony among all the decisions. It should be remembered — and the fact is very important in its bearing upon this discussion — that the English statutes do not speak of the registry as constituting any notice, nor has the rule which makes it a constructive notice ever been adopted in England. The statutory language was peremptory, that every unregistered conveyance should be deemed fraudulent and void as against a subsequent purchaser who had complied with the statute. The English judges, in the earliest decisions, were required to find some reason or excuse, in the settled principles of equity, for evading and disregarding this mandatory language. This reason and excuse they found in the theory of fraud imputed to the second purchaser who attempted to gain a preference by registering, although he had notice of the prior right. But in the very case of Le Neve v. Le Neve,[1] where Lord Hardwicke first formulated this theory of imputed fraud, the purchaser was charged with notice simply because his agent in the transaction had received information *which was not in fact communicated to the principal.* The purchaser's conduct was thus pronounced fraudulent, although he had personally no knowledge of the prior conveyance, and had acted in perfect good faith, and the notice to him was in every respect constructive. It seems, therefore, to be using an inconsistent or else unmeaning formula to speak of fraud as the essential foundation of the rule, and at the same time to

[1] Amb. 436.

hold purchasers chargeable with notice of a prior right when they have not received the slightest information of its existence,— as, for example, when they have been affected with notice by a *lis pendens,* by a recital in a title deed, which perhaps they never saw or heard of, or even by the possession of a stranger. Throughout the United States the doctrine is settled that the registration of an instrument in pursuance of the recording acts operates as a constructive notice to all subsequent purchasers. Whatever be the language of any state statute, this result of a registration — that it should be a constructive notice — is uniformly regarded as the most important object of the entire legislation — the final purpose for which the whole system of recording was established. By this American doctrine, the constructive notice given by a registration stands on exactly the same footing, produces the same effects, and is of the same nature as any other species of absolute constructive notice recognized by equity,— as, for example, that arising from a *lis pendens* or from a recital, or that operating upon a principal through his agent. In all these instances the notice is a conclusive presumption of the law, and it is immaterial whether or not any information of the prior right was actually brought home to the consciousness of the party affected thereby. As, therefore, the one important and necessary effect of a registration, in pursuance of the American statutes, is to create and impose upon subsequent purchasers a constructive notice of a recorded instrument, it seems to be the natural and inevitable consequence of this view, that any other species of notice, either constructive or actual, should, in the absence of a record, produce the same effect upon the rights of a subsequent purchaser. The registration of an instrument is a constructive notice; and this result was the main design of the legislation. It is therefore natural, just, and equitable that if a subsequent purchaser has received any other kind of notice, actual or constructive, the same effect upon his rights should be produced as would have followed from the single species of

constructive notice occasioned by the statute. In this manner, all kinds of constructive notice are, with respect to their effects upon the rights of subsequent purchasers, harmonized and placed upon the same footing. In my opinion, this view furnishes a complete, adequate, and true *rationale* of the doctrine under discussion. It dispenses with the notion of fraud as a necessary element, which in very many admitted instances of notice must be a mere figment of judicial logic; it avoids all the inconsistencies which are incidents of that notion; and finally, it accords with the intent and purpose of the recording acts as recognized by the vast majority of American decisions.

§ 666. 7. That between Principal and Agent[a] — General Rule.— The general rule is fully established, that notice to an agent in the business or employment which he is carrying on for his principal is a constructive notice to the principal himself, so far as the latter's rights and liabilities are involved in or affected by the transaction. This rule alike includes and applies to the positive information or knowledge obtained or possessed by the agent in the transaction, and to actual or constructive notice communicated to him therein.[1 b] The *rationale* of the rule has been differently

[1] Le Neve v. Le Neve, Amb. 436; 2 Lead. Cas. Eq., 4th Am. ed., 109, 133; Saffron etc. Soc. v. Rayner, L. R. 14 Ch. Div. 406; Ex parte Larking, L. R. 4 Ch. Div. 566; Boursot v. Savage, L. R. 2 Eq. 134, 142; Atterbury v. Wallis, 8 De Gex, M. & G. 454; Rickards v. Gledstanes, 3 Giff. 298; Dryden v. Frost, 3 Mylne & C. 670; Kennedy v. Green, 3 Mylne & K. 699; Tunstall v. Trappes, 3 Sim. 301, 305; Sheldon v. Cox, 2 Eden, 224; Newstead v. Searles, 1 Atk. 265; Allen v. Poole, 54 Miss. 323; Suit v. Woodhall, 113 Mass. 391; Owens v. Roberts, 36 Wis. 258; Distilled Spirits, 11 Wall. 356; Astor v. Wells, 4 Wheat. 466; Griffith v. Griffith, 9 Paige, 315; 1 Hoff. Ch. 153; Westervelt v. Haff, 2 Sand. Ch. 98; Jackson v. Leek, 19 Wend. 339; Hovey v. Blanchard, 13 N. H. 145; Jones v. Bamford, 21 Iowa, 217; Myers v. Ross, 3 Head, 59; Holden v. New York and Erie Bank, 72 N. Y. 286; Ames v. New York Union Ins. Co., 14 N. Y. 253; Bierce v. Red Bluff Hotel Co., 31 Cal. 160; Russell v. Sweezey, 22 Mich. 235; National Security Bank v. Cushman, 121 Mass. 490; Smith v.

(a) §§ 666–676 are cited in Akers v. Rowan, 33 S. C. 451, 12 S. E. 165, 10 L. R. A. 705.

(b) For a brief and admirably clear resumé of the subject see the opinion of Peters, C. J., in Fairfield

stated by different judges; by some it has been rested entirely upon the presumption of an actual communication between the agent and his principal; by others, upon the legal

Denton, 42 Iowa, 48; First National Bank of Milford v. Town of Milford, 36 Conn. 93; Tagg v. Tennessee National Bank, 9 Heisk. 479; Farrington v. Woodward, 82 Pa. St. 259; Ward v. Warren, 82 N. Y. 265. The very recent case of Saffron etc. Soc. v. Rayner, L. R. 14 Ch. Div. 406, is a very important decision, showing the tendency of the courts not to extend the species of constructive notice, and especially how far the rule applies to solicitors or attorneys at law employed by a client in purely professional legal business. The decision is so important that I shall quote passages from the opinions. The plaintiff had taken a mortgage from the devisees (the *cestuis que trustent* ultimately entitled) of a certain interest in a testator's estate, and gave notice of the mortgage to a firm of solicitors who were acting as attorneys for the executors and trustees under the will in a chancery suit to which the testator had been a party, and who were employed generally by such trustees in all matters relating to the testator's estate in which professional assistance was necessary. The notice to these attorneys was very clear and complete, and was clearly proved. The only question was, whether it operated as constructive notice to the principals, — that is, the trustees and executors, — so as to bind them. The court of appeal held that it did not, reversing the decision of the court below, which is reported in L. R. 10 Ch. Div. 696. James, L. J., after stating the substance of the decision appealed from, — namely, that the notice given by the plaintiff to the solicitors who were acting as attorneys for the trustees and executors, was in itself a sufficient notice to make the trustees liable to the same extent as if it had been given to them personally, — proceeds (p. 409): "That appears to me a startling proposition. I cannot see any principle leading to such a conclusion. I have had occasion several times to express my opinion about the fallacy of supposing that there is such a thing as the office of solicitor, — that is to say, that a man has got a solicitor, not as a person whom he is employing to do some particular business for him, either conveyancing, or conducting an action, but as an official solicitor, — and that because the solicitor has been in the habit of acting for him, or been employed to do something for him, such solicitor is his agent to bind him by anything he says, or to bind him by receiving notices or information. There is no such officer known to the law. A man has no more a solicitor in that sense than he has an accountant, or a baker, or butcher. A person is a man's accountant, or baker, or butcher, when the man chooses to employ him or deal with him, *and in the matter in which he is so employed.* Beyond that the solicitorship does not extend. . . . . I am prepared, therefore, to say that before a notice of this kind can have the slightest validity, it must be given, if given to a solicitor, to a solicitor who is actually, *either expressly or impliedly, authorized as agent to receive such notices.*" Bramwell, L. J., added (p. 415): "As Lord Justice James has said,

Sav. Bank v. Chase, 72 Me. 226, 39 Am. Rep. 319. The note to this case in the American Reports contains excerpts from many of the English and American cases. For illustrations of the general rule, chiefly

conception that for many purposes the agent and principal are regarded as one.[2] Whatever explanation be adopted as the true one, the rule itself is both unquestionable and neces-

there is no such thing as a standing relation of solicitor to a man. A man is solicitor for another only when that other has occasion to employ him. That employment may be either to conduct a suit or to advise him about some matter in which legal advice is required; but there is no such general relationship as that of solicitor and client of a standing and permanent character upon all occasions and for all purposes."

[2] See Lord Brougham's remarks in the often-quoted case of Kennedy v. Green, 3 Mylne & K. 699. In the case of Boursot v. Savage, L. R. 2 Eq. 134, 142, Kindersley, V. C., said: "It is a moot question upon what principle this doctrine rests. It has been held by some that it rests on this: that the probability is so strong that the solicitor would tell his client what he knows himself, that it amounts to an irresistible presumption that he did tell him; and so you must presume actual knowledge on the part of the client. I confess my own impression is, that the principle on which the doctrine rests is this: that my solicitor is *alter ego;* he is myself; I stand in precisely the same position as he does in the transaction, and therefore his knowledge is my knowledge; and it would be a monstrous injustice that I should have the advantage of what he knows, without the disadvantage. But whatever be the principle upon which the doctrine rests, the doctrine itself is unquestionable." If in this extract "agent" and "principal" are substituted for "solicitor" and "client," we shall have a statement of the *rationale* in its most general form.

recent, see, in addition to the cases in the following notes, Kettlewell v. Watson, L. R. 21 Ch. Div. 685, 705; Smith v. Ayer, 101 U. S. 320; Rogers v. Palmer, 102 U. S. 263; Stanley v. Schawalby, 162 U. S. 255, 16 Sup. Ct. 754; Chew v. Henrietta M. & I. Co., 2 Fed. 5; Lakin v. Sierra B. G. M. Co., 25 Fed. 337; Satterfield v. Malone, 35 Fed. 445, 1 L. R. A. 45; Howison v. Alabama Coal & Iron Co., 70 Fed. 683, 17 C. C. A. 339, 30 U. S. App. 473; City of Denver v. Sherret, 88 Fed. 226, 31 C. C. A. 499; Robinson v. Pebworth, 71 Ala. 240; Overall v. Taylor, 99 Ala. 12, 11 South. 738; Smith v. Southern Express Co., 104 Ala. 387, 16 South. 62; Russell v. Peavy, 131 Ala. 563, 32 South. 492; Goodbar v. Daniel, 88 Ala. 583, 7 South. 254, 16 Am. St. Rep. 76; Donald v. Beals, 57 Cal. 399; Watson v. Sutro, 86 Cal. 500, 24 Pac. 172, 25 Pac. 64; Blood v. La Serena L. & W. Co., 134 Cal. 361, 66 Pac. 317; Schollay v. Moffitt-West Drug Co., (Colo. App.) 67 Pac. 182; Sweeney v. Pratt, 70 Conn. 274, 39 Atl. 182, 66 Am. St. Rep. 101; Githens v. Murray, 92 Ga. 748, 18 S. E. 975; Strickland v. Vance, 99 Ga. 531, 27 S. E. 152, 59 Am. St. Rep. 241; Singer Mfg. Co. v. Holdfodt, 86 Ill. 455, 29 Am. Rep. 43; Haas v. Sternbach, 156 Ill. 44, 41 N. E. 51; Mullanphy Sav. Bank v. Schott, 135 Ill. 655, 26 N. E. 640, 25 Am. St. Rep. 401; Weber v. Clark, 136 Ill. 256, 26 N. E. 360; Marion Mfg. Co. v. Harding, 155 Ind. 648, 58 N. E. 194; Blair v. Whitaker, (Ind. App.) 69 N. E. 182; Dorrance v. McAlester, 1 Ind. T. 473, 45 S. W. 141; Noyes v. Tootle, 2 Ind. T. 144,

sary; the ordinary business affairs of life could not be safely conducted without it.

§ 667. Scope and Applications.— This general rule is of wide application. It embraces in its operation not only or-

48 S. W. 1031; Allen v. McCalla, 25 Iowa, 464, 96 Am. Dec. 56; Furry v. Ferguson, 105 Iowa, 231, 74 N. W. 903; Hawley v. Smeiding, 3 Kan. App. 159, 42 Pac. 841; Bramblett v. Henderson, 19 Ky. Law Rep. 692, 41 S. W. 575; Blake v. Clary, 83 Me. 154, 21 Atl. 841; Shartzer v. Mountain Lake Park Assn., 86 Md. 335, 37 Atl. 786; Price v. Bassett, 168 Mass. 598, 47 N. E. 243; Low v. Low, 177 Mass. 306, 59 N. E. 57; Taylor v. Young, 56 Mich. 285, 22 N. W. 799; Morgan v. Michigan A. L. R. Co., 57 Mich. 430, 25 N. W. 161, 26 N. W. 865; Macomb v. Wilkinson, 83 Mich. 486, 47 N. W. 336; Sponable v. Hanson, 87 Mich. 204, 49 N. W. 644; Littauer v. Houck, 92 Mich. 162, 52 N. W. 464, 31 Am. St. Rep. 572; Wilson v. Minnesota, etc., Ins. Assn., 36 Minn. 112, 29 N. W. 887. 1 Am. St. Rep. 659; Jefferson v. Leithauser, 60 Minn. 251, 62 N. W. 277; Bates v. A. E. Johnson Co., 79 Minn. 354, 82 N. W. 649; Ross v. Houston, 25 Miss. (3 Cushm.) 591, 59 Am. Dec. 231; Illinois Cent. R. Co. v. Bryant, 70 Miss. 665, 12 South. 592; Edwards v. Hillier, 70 Miss. 803, 13 South. 692; Bergeman v. Indianapolis & St. L. R. Co., 104 Mo. 77, 15 S. W. 992; O'Neill v. Blase, 94 Mo. App. 648, 68 S. W. 764; Babbitt v. Kelly, 96 Mo. App. 529, 70 S. W. 385; American B. & L. Assn. v. Rainbolt, 48 Neb. 434, 67 N. W. 493; Butler v. Morse, 66 N. H. 429, 23 Atl. 90; Foss v. Boston & M. R. Co., 66 N. H. 256, 21 Atl. 222, 49 Am. St. Rep. 609, 11 L. R. A. 367 (knowledge of conductor); Jackson v. Sharp, 9 Johns. 163, 6 Am. Dec. 267; Cragie v. Hadley, 99 N. Y. 131, 52 Am. Rep. 9; Dollard v. Roberts, 130 N. Y. 269, 14 L. R. A. 238, 29 N. E. 104; Cowan v. Withrow, 111 N. C. 306, 16 S. E. 397; State v. Kittelle, 110 N. C. 560, 28 Am. St. Rep. 698, 15 L. R. A. 694, 15 S. E. 103; Rayburn v. Davisson, 22 Or. 242, 29 Pac. 738; In re Heckman's Estate, 172 Pa. St. 185, 33 Atl. 552, 37 Wkly. Notes Cas. 376; Salinas v. Turner, 33 S. C. 231, 11 S. E. 702; Peeples v. Warren, 51 S. C. 560, 29 S. E. 659; Sparkman v. Supreme Council American Legion of Honor, 57 S. C. 16, 35 S. E. 391; American Freehold Land Mortg. Co. v. Felder, 44 S. C. 478, 22 S. E. 598; McCormick Harvesting Mach. Co. v. Yankton Sav. Bank, 15 S. Dak. 196, 87 N. W. 974; Nashville, etc., R. R. Co. v. Elliott, 1 Cold. 611, 78 Am. Dec. 506; Bank of Rome v. Haselton, 83 Tenn. (15 Lea) 216; Major v. Stone's River Nat. Bank, (Tenn. Ch. App.) 64 S. W. 352; Kauffman v. Robey, 60 Tex. 30, 48 Am. Rep. 264; Collins & Armstrong Co. v. U. S. Ins. Co., 7 Tex. Civ. App. 579, 27 S. W. 147; U. S. v. Schwalby, 8 Tex. Civ. App. 679, 29 S. W. 90, 87 Tex. 604, 30 S. W. 435; Missouri, K. & T. Ry. Co. v. Bacon, (Tex. Civ. App.) 80 S. W. 572; Baldwin v. Root, (Tex. Civ. App.) 38 S. W. 630; Ferguson v. McCrary, 20 Tex. Civ. App. 529, 50 S. W. 472; Bexar B. & L. Assn. v. Lockwood, (Tex. Civ. App.) 54 S. W. 253; Schreckhise v. Wiseman, (Va.) 45 S. E. 745; Knott v. Tidyman, 86 Wis. 164, 56 N. W. 632; Johnson v. First Nat. Bank, 79 Wis. 414, 24 Am. St. Rep. 722, 48 N. W. 712; Dixon v. Winch, [1900] 1 Ch. Div. 736, 69 Law J. Ch. 465, 82 Law T. (N. S.) 437, 48 Wkly. Rep. 612.

dinary agents and attorneys, but all persons who act for or represent others in business relations and transactions. Thus it applies to directors, managers, presidents, cashiers, and other officers, while engaged in the business affairs of their corporations;[1 a] to trustees acting on behalf of their

[1] Ex parte Larking, L. R. 4 Ch. Div. 566; Smith v. Water Comm'rs, 38 Conn. 208; Tagg v. Tenn. Nat. Bank, 9 Heisk. 479; Fulton Bank v. Canal Co., 4 Paige, 127; Bank of United States v. Davis, 2 Hill, 451; New Hope Bridge Co. v. Phœnix Bank, 3 N. Y. 156; Washington Bank v. Lewis, 22 Pick. 24; Branch Bank v. Steele, 10 Ala. 915; Holden v. New York and Erie Bank, 72 N. Y. 286; North River Bank v. Aymar, 3 Hill, 262; National Security Bank v. Cushman, 121 Mass. 490; First Nat. Bank etc. v. Town of Milford, 36 Conn. 93.

(a) **Notice to President.**— Niblack v. Cosler, (C. C. A.), 80 Fed. 596, affirming 74 Fed. 1000; Curtice v. Crawford County Bank, 118 Fed. 390; Harris v. American B. & L. Assn., 122 Ala. 545, 25 South. 200; Guarantee Co. of N. A. v. E. R. T. Co., 96 Ga. 511, 23 S. E. 503, 51 Am. St. Rep. 150; Brobston v. Penniman, 97 Ga. 527, 25 S. E. 350; Hager v. National German-American Bank, 105 Ga. 116, 31 S. E. 141; Fouché v. Merchants' Nat. Bank, 110 Ga. 827, 36 S. E. 256; Reagan v. First Nat. Bank, 157 Ind. 623, 61 N. E. 575, 62 N. E. 701; Hughes v. Settle, (Tenn. Ch. App.) 36 S. W. 577; Merchants' Nat. Bank v. McAnulty, (Tex. Civ. App.) 31 S. W. 1091; Ottaquechee Sav. Bank v. Holt, 58 Vt. 166, 1 Atl. 485; Rock Springs Nat. Bank v. Luman, 6 Wyo. 123, 42 Pac. 874.

Notice to Cashier.— Birmingham Trust & Sav. Bank v. Louisiana Nat. Bank, 99 Ala. 379, 13 South. 112, 20 L. R. A. 600; Citizens' Sav. Bank v. Walden, 21 Ky. Law Rep. 739, 52 S. W. 953; Farmers' Bank v. Saling, 33 Or. 394, 54 Pac. 190; Stebbins v. Lardner, 2 S. Dak. 127, 48 N. W. 847; Black Hills Nat. Bank v. Kellogg, 4 S. Dak. 312, 56 N. W. 1071; Winslow v. Harriman, (Tenn. Ch. App.) 42 S. W. 698; Merchants' & Planters' Bank v. Penland, 101 Tenn. 445, 47 S. W. 693; First Nat. Bank v. Ledbetter, (Tex. Civ. App.) 34 S. W. 1042; Brothers v. Bank of Kaukauna, 84 Wis. 381, 54 N. W. 786, 36 Am. St. Rep. 932.

Notice to Secretary or General Manager.— Citizens' Trust & Surety Co. v. Zane, 113 Fed. 596, affirmed, 117 Fed. 814; Love v. Anchor Raisin Vineyard Co., (Cal.) 45 Pac. 1044; Interstate B. & L. Assn. v. Ayers, 177 Ill. 9, 52 N. E. 342; Anderson v. Kinley, 90 Iowa, 554, 58 N. W. 909; In re Sweet, 20 R. I. 557, 40 Atl. 502.

Notice to Teller.— Zeis v. Potter, 105 Fed. 671, 44 C. C. A. 665; City Nat. Bank v. Martin, 70 Tex. 643, 8 Am. St. Rep. 632, 8 S. W. 507.

Notice to Directors.— Boyd v. Chesapeake & O. Canal Co., 17 Md. 195, 79 Am. Dec. 646 (notice given to two directors for purpose of having them give it to the board, though in fact not communicated); Bank of Pittsburgh v. Whitehead, 10 Watts, 397, 36 Am. Dec. 186 (information given to board at regular meeting, although discount committee absent); Wolfe v. Citizens' Bank, (Tenn. Ch. App.) 42 S. W. 39.

The Individual Stockholders are not agents of the corporation for pur-

beneficiaries;[2 b] to an agent acting on behalf of a married woman;[3] to one of two or more joint agents;[4 d] and to all actual agents, whether the agency be express or implied.[5 e]

[2] Willes v. Greenhill, 4 De Gex, F. & J. 147, 150; Myers v. Ross, 3 Head, 59.

[3] As where the agent is her husband: Willes v. Greenhill, 4 De Gex, F. & J. 147, 150; Clark v. Fuller, 39 Conn. 238; Duke v. Balme, 16 Minn. 306; see Pringle v. Dunn, 37 Wis. 449; 19 Am. Rep. 772.[c]

[4] Willes v. Greenhill, 4 De Gex, F. & J. 147, 150; as where the notice is to one of several directors of a bank: Bank of United States v. Davis, 2 Hill, 451, 464.

[5] Watson v. Wells, 5 Conn. 468; Farrington v. Woodward, 82 Pa. St. 259. The mere fact, however, that a purchase is made by two persons jointly does not constitute them agents for each other, so that notice to one is therefore a notice to the other: Snyder v. Sponable, 1 Hill, 567; 7 Hill, 427; Flagg v. Mann, 2 Sum. 486, 534.

poses of notice: Mercantile Nat. Bank v. Parsons, 54 Minn. 56, 55 N. W. 825, 40 Am. St. Rep. 299; but notice to all the stockholders is binding on the corporation: Simmons Creek Coal Co. v. Doran, 142 U. S. 417, 12 Sup. Ct. 239; Ranson v. Brinkerhoff, (N. J.) 38 Atl. 919; Franklin Min. Co. v. O'Brien, 22 Colo. 129, 43 Pac. 1016, 55 Am. St. Rep. 118.

For rules specially applicable to corporation agents and officers, see *post*, § 670 and notes, § 672, note, § 675, editor's note.

(b) Batavia v. Wallace, 102 Fed. 240, 42 C. C. A. 310, and cases cited; Chapman v. Chapman, 91 Va. 397, 21 S. E. 813, 50 Am. St. Rep. 846, citing this section of the text; Merchants' Bank v. Ballou, 98 Va. 112, 81 Am. St. Rep. 715, 32 S. E. 481.

(c) Chew v. Henrietta M. & S. Co., 2 Fed. 5; Satterfield v. Malone, 35 Fed. 445, 1 L. R. A. 35; Robinson v. Pebworth, 71 Ala. 240; Goodbar v. Daniel, 88 Ala. 583, 7 South. 252, 16 Am. St. Rep. 76; Miller v. Whelan, 158 Ill. 544, 42 N. E. 59; Forsythe v. Brandenburg, 154 Ind. 588, 57 N. E. 247; McMaken v. Niles, (Iowa) 60 N. W. 199; Tilleny v. Wolverton, 50 Minn. 419, 52 N. W. 909; C. Aultman & Co. v. Utsey, 34 S. C. 559, 13 S. E. 848; Mansfield v. Garrison, (Tex. Civ. App.) 48 S. W. 554. But it must appear that the husband was the wife's agent: M. A. Cooper & Co. v. Sawyer, (Tex. Civ. App.) 73 S. W. 992.

(d) Chapman v. Chapman, 91 Va. 397, 21 S. E. 813, 50 Am. St. Rep. 846, citing this section of the text (joint trustees); Wittenbrock v. Parker, 102 Cal. 93, 36 Pac. 374, 41 Am. St. Rep. 172, 24 L. R. A. 197 (firm of attorneys), and cases cited.

(e) Subagents.— Whether a subagent is authorized to receive notice is determined by the same considerations which decide whether he is the agent of the principal or merely of the agent: Waldman v. North British, etc., Ins. Co., 91 Ala. 170, 8 South. 666, 24 Am. St. Rep. 883; Bates v. American Mortgage Co., 37 S. C. 88, 16 S. E. 883, 21 L. R. A. 340, and note; Goode v. Georgia Home Ins. Co., 92 Va. 392, 23 S. E. 744, 53 Am. St. Rep. 817, 30 L. R. A. 842. In the following cases, notice to clerks of insurance agents was imputed to the companies: Carpenter

The general rule also applies where the same agent or attorney in reality acts on behalf of both parties to the transaction; for both the grantor and the grantee, the vendor

v. German-Am. Ins. Co., 135 N. Y. 298, 31 N. E. 1015; Bergeron v. Pamlico Ins. & B. Co., 111 N. C. 45, 15 S. E. 883; Phœnix Ins. Co. v. Ward, 7 Tex. Civ. App. 13, 26 S. W. 763. But a principal is not charged with the knowledge of an intermediate, independent contractor: Hoover v. Wise, 91 U. S. 308.

Insurance Agents.—Many questions have arisen as to the authority of soliciting agents and other special agents of insurance companies to bind their principals by information received in the discharge of their duties; especially as to whether the knowledge obtained by such an agent as to the falsity of representations made by the insured is imputed to the insurer so as to effect a waiver of conditions in the policy. See Phœnix Ins. Co. v. Copeland, 90 Ala. 386, 8 South. 48; American Cent. Ins. Co. v. Donlon, (Colo. App.) 66 Pac. 249; McGurk v. Metropolitan Life Ins. Co., 56 Conn. 528, 32 L. R. A. 530, 16 Atl. 263; Ward v. Metropolitan Life Ins. Co., 66 Conn. 227, 33 Atl. 902, 50 Am. St. Rep. 80; Commercial Ins. Co. v. Spankneble, 52 Ill. 53, 4 Am. Rep. 582; Hartford, etc., Ins. Co. v. Walsh, 54 Ill. 164, 5 Am. Rep. 115; Lumberman's Mut. Ins. Co. v. Bell, 166 Ill. 400, 45 N. E. 130, 57 Am. St. Rep. 140; American Mut. Life Ins. Co. v. Bertram, (Ind.) 70 N. E. 258; Miller v. Mut. Ben. Life Assn., 31 Iowa, 216, 7 Am. Rep. 122; Frane v. Burlington Ins. Co., 87 Iowa, 288, 54 N. W. 237; Goodwin v. Provident Sav. Life Assn., 97 Iowa, 226, 59 Am. St. Rep. 411, 66 N. W. 157, 32 L. R. A. 473; Capitol Ins. Co. v. Bank of Pleasanton, 50 Kan. 449, 31 Pac. 1069 (knowledge of general agent); Germania Ins. Co. v. Ashby, 23 Ky. Law Rep. 1564, 65 S. W. 611; Teutonia Ins. Co. v. Howell, 21 Ky. Law Rep. 1245, 54 S. W. 852; Union Nat. Bank v. Manhattan Life Ins. Co., 52 La. Ann. 36, 26 South. 800; Bigelow v. Granite State Fire Ins. Co., 94 Me. 39, 46 Atl. 808; Schaeffer v. Farmers', etc., Ins. Co., 80 Md. 563, 45 Am. St. Rep. 361 (notice to general agent); Gristock v. Royal Ins. Co., 84 Mich. 161, 47 N. W. 549, 87 Mich. 428, 49 N. W. 634; Ahlberg v. German Ins. Co., 94 Mich. 259, 53 N. W. 1102; Union Cent. Life Ins. Co. v. Smith, 105 Mich. 353, 63 N. W. 438 (notice to state agent); Power v. Monitor Ins. Co., 112 Mich. 364, 80 N. W. 111; Wilson v. Minnesota, etc., Ins. Assn., 36 Minn. 112, 30 N. W. 401, 1 Am. St. Rep. 659; Home Ins. Co. v. Gibson, 72 Miss. 58, 17 South. 13; Millis v. Scottish Union & National Ins. Co., 95 Mo. App. 211, 68 S. W. 1066; De Soto v. American Guaranty Fund Mut. Fire Ins. Co., (Mo. App.) 74 S. W. 1; Eagle Fire Ins. Co. v. Globe L. & T. Co., 44 Neb. 380, 62 N. W. 895; Rochester Loan, etc., Co. v. Liberty Ins. Co., 44 Neb. 537, 48 Am. St. Rep. 745, 62 N. W. 877; Hartford Fire Ins. Co. v. Landfare, 63 Neb. 559, 88 N. W. 779; Campbell v. Merchants' & Farmers' Mut. Fire Ins. Co., 37 N. H. 35, 72 Am. Dec. 324; Spalding v. New Hampshire Fire Ins. Co., 71 N. H. 441, 52 Atl. 858; Robbins v. Springfield F. & M. Ins. Co., 149 N. Y. 477, 44 N. E. 159; McGuire v. Hartford Fire Ins. Co., 40 N. Y. Supp. 300; Forward v. Continental Ins. Co., 142 N. Y. 382,

and the vendee, the mortgagor and the mortgagee.[e] This special application of the rule is carefully guarded by the courts, so that it shall not work injustice, and is not, there-

[e] In fact, the most striking illustrations of the rule have arisen under these circumstances: Le Neve v. Le Neve, Amb. 436; 2 Lead. Cas. Eq., 4th Am. ed., 109; Kennedy v. Green, 3 Mylne & K. 699; Dryden v. Frost, 3 Mylne & C. 670, 673; Sheldon v. Cox, 2 Eden, 224; Tweedale v. Tweedale, 23 Beav. 341; Fuller v. Bennett, 2 Hare, 394, 402; Holden v. New York etc. Bank, 72 N. Y. 286; First Nat. Bank etc. v. Town of Milford, 36 Conn. 93; Losey v. Simpson, 11 N. J. Eq. 246.[f] Also where the grantor or vendor himself acts on behalf or as attorney for the grantee or vendee: Robinson v. Briggs, 1 Smale & G. 188; Spencer v. Topham, 2 Jur., N. S., 865; Majoribanks v. Hovenden, Dru. 11; 6 I. R. Eq. 238; Atkyns v. Delmege, 12 I. R. Eq. 1; Twycross v. Moore, 13 I. R. Eq. 250; Tucker v. Henzill, 4 Ir. Ch. 513; In re Rorke, 13 Ir. Ch. 273; 14 Ir. Ch. 442.

37 N. E. 615, 25 L. R. A. 637, affirming 66 Hun, 546, 21 N. Y. Suppl. 664; Follette v. Mutual Accident Assn., 110 N. C. 377, 14 S. E. 923, 28 Am. St. Rep. 693, 15 L. R. A. 668, and cases cited in the note; People's Ins. Co. v. Spencer, 53 Pa. St. (3 P. F. Smith) 353, 91 Am. Dec. 217; Humphreys v. National Ben. Association, 139 Pa. St. 264, 11 L. R. A. 564, 20 Atl. 1047; Bard v. Penn, etc., Fire Ins. Co., 153 Pa. St. 257, 34 Am. St. Rep. 704, 25 Atl. 1124; Reed v. Equitable F. & M. Ins. Co., 17 R. I. 785, 24 Atl. 833, 18 L. R. A. 496, reviewing many cases (notice to mere soliciting agent not notice to the company); Norris v. Hartford Fire Ins. Co., 57 S. C. 358, 35 S. E. 572; Enos v. St. Paul, etc., Ins. Co., 4 S. Dak. 639, 46 Am. St. Rep. 796, 57 N. W. 919; Continental Fire Assn. v. Norris, 30 Tex. Civ. App. 299, 70 S. W. 769; West v. Norwich Union Fire Ins. Co., 10 Utah, 442, 37 Pac. 685; Tarbell v. Vermont Mut. Fire Ins. Co., 63 Vt. 53, 22 Atl. 533; Manhattan Fire Ins. Co. v. Weill, 28 Gratt. 389, 26 Am. Rep. 364 (knowledge of general agent); Dick v. Equitable Fire & Marine Ins. Co., 92 Wis. 46, 65 N. W. 742; Kahn v. Traders' Ins. Co., 4 Wyo. 419, 34 Pac. 1059, 62 Am. St. Rep. 47.

Municipal Officers.— Notice of defects in a street: Bradford v. Mayor of Anniston, 92 Ala. 349, 8 South. 683, 25 Am. St. Rep. 60 (to a street overseer); Logansport v. Justice, 74 Ind. 378, 39 Am. Rep. 79 (to a councilman); Dundas v. City of Lansing, 75 Mich. 499, 13 Am. St. Rep. 457, 42 N. W. 1011; Frazier v. Butler Borough, 172 Pa. St. 407, 23 Atl. 691, 51 Am. St. Rep. 739 (officer's knowledge not obtained in his official capacity, not imputed to the municipality). Notice to one of the financial agents of a municipality of a matter affecting its liability: Burditt v. Porter, 63 Vt. 296, 21 Atl. 955, 25 Am. St. Rep. 763.

[f] Where the principal sought to be affected by the notice has consented to his agent's acting for the party adversely interested: Pine Mt. Iron & Coal Co. v. Bailey, 94 Fed. 258, 36 C. C. A. 229. Compare *post*, §§ 674, 675, and notes. And see Witter v. McCarthy Co., (Cal.) 43 Pac. 969; Berry v. Rood, 168 Mo. 316, 67 S. W. 644.

fore, enforced unless the same agent is in fact acting for both parties.[7]

§ 668. Limitations — Within the Scope of the Agent's Authority.— There are, on the other hand, certain important limitations upon the operation of the general rule. The employment of an agent or attorney to do a merely ministerial act for his principal does not constitute him such an agent that the rule as to constructive notice will apply.[1][a] Also, in pursuance of the fundamental doctrine of agency concerning the powers of agents, the notice given to or information acquired by the agent, in order to be operative upon the principal, must be within the scope of the agent's

[7] Thus the mere fact that only one attorney is employed or engaged in a transaction, a sale or purchase, or a mortgaging, does not necessarily make him the attorney for both parties, so that one party shall thereby be charged with constructive notice of facts known by the other: Espin v. Pemberton, 3 De Gex & J. 547, 554, 555; Wythes v. Labouchere, 3 De Gex & J. 593; Perry v. Holl, 2 De Gex, F. & J. 38, 53, per Campbell, L. C.: "It does not follow that if there is not an attorney on each side, the attorney who does act is the attorney of both."[g] Also the mere fact that two corporations have the same attorney, or the same directors, does not render each chargeable with notice of whatever is known or done by the other: Banco de Lima v. Anglo-Peruvian Bank, L. R. 8 Ch. Div. 160, 175; In re Marseilles etc. Co., L. R. 7 Ch. 161; In re European Bank, L. R. 5 Ch. 358; Fulton Bank v. New York etc. Canal Co., 4 Paige, 127.[h]

[1] As where he is employed simply to procure the execution of a deed: Wyllie v. Pollen, 3 De Gex, J. & S. 596, 601. Or to record a mortgage: Anketel v. Converse, 17 Ohio St. 11; 91 Am. Dec. 115; Hoppock v. Johnson, 14 Wis. 303. But notice to an officer employed to execute an attachment is notice to the plaintiff in the suit: Tucker v. Tilton, 55 N. H. 223.

(g) That one who prepares an abstract of title on behalf of a vendor of land does not thereby become the agent of the vendee, see Davis v. Steeps, 87 Wis. 472, 58 N. W. 769, 41 Am. St. Rep. 51, 23 L. R. A. 818.

(h) The test is laid down in In re Hampshire Land Co., [1896] 2 Ch. 743, as follows: "The knowledge which has been acquired by the officer of one company will not be imputed to the other company, unless the common officer had some duty imposed on him to communicate that knowledge to the other company, and had some duty imposed upon him by the company which is alleged to be affected by the notice to receive the notice; and if the common officer has been guilty of fraud, or even irregularity, the court will not draw the inference that he has fulfilled these duties." See, also, In re David Payne & Co., Ltd., [1904] 2 Ch. 608; People's Sav. Bank v. Hine, 131 Mich. 181, 9 Detroit Leg. N. 283, 91 N. W. 130.

(a) See, also, Columbia Paper Stock Co. v. Fidelity & Casualty Co., (Mo. App.) 78 S. W. 321. As

authority, to bind the principal. If an agent cannot bind his principal by acts beyond the limits of his authority, a notice beyond those limits is equally nugatory.[2 b] Finally, in order that the rule may apply, the agent must be an attorney in fact, rather than a mere attorney at law. Wherever a solicitor or attorney at law is brought within the operation of the rule, he must be employed in some other capacity than as a *mere* professional and legal adviser; he must be employed to represent his client in a transaction whereby the principal is to acquire some rights or is to be subjected to some liabilities.[3]

[2] Spadone v. Manvel, 2 Daly, 263; Weisser v. Denison, 10 N. Y. 68; 61 Am. Dec. 731; Brown v. Bankers' etc. Tel. Co., 30 Md. 39; Roach v. Karr, 18 Kan. 529; 26 Am. Rep. 788; Wilson v. Conway Fire Ins. Co., 4 R. I. 141, 152; Grant v. Cole, 8 Ala. 519.

[3] All the decisions implicitly, at least, sustain this conclusion. Wherever the agent has been a solicitor or attorney at law, it will be seen that he has been employed in some such transaction,—the negotiation of a lease and giving a mortgage, the transfer of property, and the like: See Saffron etc. Soc. v. Rayner, L. R. 14 Ch. Div. 406, 409, 415, and the quotation therefrom *ante*, under § 666.

to subagents, see *ante*, note (e) to last section; Waldman v. North British, etc., Ins. Co., 91 Ala. 170, 8 South. 666, 24 Am. St. Rep. 883.

(b) Neal v. M. E. Smith & Co., 116 Fed. 20 (travelling salesman); Indiana Bicycle Co. v. Tuttle, 74 Conn. 489, 51 Atl. 538; Marsh v. Wheeler, (Conn.) 59 Atl. 410, and cases cited; Camp v. Southern Bkg. & Tr. Co., 97 Ga. 582, 25 S. E. 362 (bank messenger); Booker v. Booker, (Ill.) 70 N. E. 709 (messenger); Harrison v. City Fire Ins. Co., 91 Mass. (9 Allen) 231, 85 Am. Dec. 751; Sandberg v. Palm, 53 Minn. 252, 54 N. W. 1109; Strauch v. May, 80 Minn. 343, 83 N. W. 156; Hickman v. Green, 123 Mo. 165, 22 S. W. 455, 27 S. W. 440, 29 L. R. A. 39 (special agent employed to effect exchange of property, but without any authority to pass upon title); Donham v. Hahn, 127 Mo. 439, 30 S. W. 134; Nehawka Bank v. Ingersoll, (Neb.) 89 N. W. 618; Hargadine, McKittrick Dry Goods Co. v. Krug, (Neb.) 96 N. W. 280; Pennoyer v. Willis, 26 Oreg. 1, 36 Pac. 568, 46 Am. St. Rep. 594; Reed v. Equitable F. & M. Ins. Co., 17 R. I. 785, 24 Atl. 833, 18 L. R. A. 496 (insurance soliciting agent); Chicago Sugar Ref. Co. v. Jackson Brewing Co., (Tenn. Ch. App.) 48 S. W. 275; Missouri, K. & T. Ry. Co. v. Belcher, 88 Tex. 549, 32 S. W. 518; Pughe v. Coleman, (Tex. Civ. App.) 44 S. W. 576; Congar v. Chicago & N. W. R. Co., 24 Wis. 157, 1 Am. Rep. 164. One who employs an attorney merely to examine an abstract of title to real property and give an opinion thereon is not affected by his knowledge of the pendency of a suit which may affect such title: Trenton v. Pothen, 46 Minn. 298, 49 N. W. 129, 24 Am. St. Rep. 225, and note. See, also, Weil v. Reiss, 167 Mo. 125, 66 S. W. 946.

§ 669. Notice to Agent, Actual or Constructive.— If the agency exists, and the foregoing requisites are complied with so as to admit the application of the general rule, then it will operate with equal force and effect, whether the notice to the agent be actual or constructive. Actual knowledge may be brought home to the agent by the most direct evidence, or he may be chargeable with constructive notice by a *lis pendens,* by a registration, by recitals in title deeds, by possession of a stranger, or by circumstances sufficient to put a prudent man upon an inquiry; in all such cases the effect upon the principal is the same.[1] The notice with which the principal is charged is, however, constructive, since it is a presumption, and generally a conclusive presumption, of the law, and takes effect even when the principal in fact received no communication of information from his agent.[2] [a]

§ 670. Essential Requisites — (1) When the Notice must be Received by the Agent — During his Actual Employment.— Having thus stated the general rule, I shall now proceed to describe with more fullness its essential elements,— the requisites which must exist in order that it may operate. In the first place, as to the time when the information constituting notice must be acquired by or given to the agent. In order that the principal may be affected with a constructive notice under this rule, the information constituting the notice must be obtained by or imparted to the agent while he is in fact acting *as agent,*— while he is actually engaged in doing his principal's business, in pursuance of his authority,

[1] See Kennedy v. Green, 3 Mylne & K. 699, 719, per Lord Brougham; Bank of United States v. Davis, 2 Hill, 451, 461.

[2] There can be no greater misconception of its legal meaning, and no more complete confusion of the distinctions between the two kinds of notice, than to call the notice imputed to a principal through his agent an "actual" notice: See Espin v. Pemberton, 3 De Gex & J. 547, 554.

(a) That the notice to the agent is conclusive on the principal and irrebuttable was directly held in Watson v. Sutro, 86 Cal. 500, 24 Pac. 172, 25 Pac. 64.

and in his character as agent.[1][a] This special requisite finds a frequent application in the relations subsisting between directors and officers and the corporations to which they belong.[2]

[1] Saffron etc. Soc. v. Rayner, L. R. 14 Ch. Div. 406; In re Peruvian R'y Co., L. R. 2 Ch. 617, 626; Dryden v. Frost, 3 Mylne & C. 670; Wilde v. Gibson, 1 H. L. Cas. 605, 624; Pepper v. George, 51 Ala. 190; Roach v. Karr, 18 Kan. 529; 26 Am. Rep. 788; Houseman v. Girard etc. Ass'n, 81 Pa. St. 256; G. W. R'y Co. v. Wheeler, 20 Mich. 419; Pringle v. Dunn, 37 Wis. 449; 19 Am. Rep. 772; Distilled Spirits, 11 Wall. 356; Bierce v. Red Bluff Hotel Co., 31 Cal. 160; May v. Borel, 12 Cal. 91; Russell v. Sweezey, 22 Mich. 235; Hodgkins v. Montgomery Co. Ins. Co., 34 Barb. 213; Weisser v. Denison, 10 N. Y. 68; 61 Am. Dec. 731; Howard Ins. Co. v. Halsey, 8 N. Y. 271; 59 Am. Dec. 478; Smith v. Denton, 42 Iowa, 48; Jones v. Bamford, 21 Iowa, 217; Clark v. Fuller, 39 Conn. 238; Spadone v. Manvel, 2 Daly, 263; N. Y. Cent. Ins. Co. v. National Protec. Ins. Co., 20 Barb. 468; 14 N. Y. 85; Fry v. Shehee, 55 Ga. 208. If, then, an agent has obtained information while acting for himself, or for a third person, or, in general, previously to the commencement of his agency, the principal is not charged with constructive notice thereof: McCormick v. Wheeler, 36 Ill. 114; 85 Am. Dec. 388.[b]

[2] It has been held in numerous American decisions that notice given to, or information acquired by, a corporation director, manager, or officer will not affect the corporation itself with a constructive notice, unless he was at the time of the giving or acquiring acting on behalf of his corporation. It is not enough that he was, at that time, clothed with the official character; he must also, in pursuance of his official functions, have been actually engaged in transacting the business of his corporation.[c] There are two exceptions

(a) This passage is quoted in Wittenbrock v. Parker, 102 Cal. 93, 36 Pac. 374, 41 Am. St. Rep. 172, 24 L. R. A. 197; cited, in Goodbar v. Daniel, 88 Ala. 583, 7 South. 254, 16 Am. St. Rep. 76. See, also, Chew v. Henrietta M. & S. Co., 2 Fed. 5; Satterfield v. Malone, 35 Fed. 445, 1 L. R. A. 35; Pearce v. Smith, 126 Ala. 116, 28 South. 37; Taylor v. Evans, 16 Tex. Civ. App. 409, 41 S. W. 877; Kauffman v. Robey, 60 Tex. 30, 48 Am. Rep. 264.

(b) For the cases where the agent acts in his own interest and against the interest of the principal, see *post*, § 675, note; Frenkel v. Hudson, 82 Ala. 158, 2 South. 758, 60 Am. Rep. 736.

(c) Notice to Corporation Agent or Officer; he must be engaged in transacting the corporation's business at the time of receiving the notice. See Union Nat. Bank v. German Ins. Co., 71 Fed. 473, 18 C. C. A. 203, 34 U. S. App. 397; Curtice v. Crawford Co. Bank, 110 Fed. 830, and cases cited; Reid v. Bank of Mobile, 70 Ala. 199; Lothian v. Wood, 55 Cal. 159 (director); Ayers v. Green Gold Min. Co., 116 Cal. 333, 48 Pac. 221 (director); Murphy v. Gumaer, 12 Colo. App. 472, 55 Pac. 951 (director); People's Bank v. Exchange Bank, 116 Ga. 820, 43 S. E. 269, 94 Am. St. Rep. 144; Burton v. Perry, 146 Ill. 71, 34 N. E. 60; Home Sav. & State Bank v. Peoria Agricultural

§ 671. (2) In the Same Transaction.— In the second place, in order that a principal may thus be charged with constructive notice, not only must the person first receiving it be in fact an agent, and be actually engaged in the business of

or limitations. If the information received by him is of such a nature or is acquired under such circumstances that it is a part of his express official duty to communicate what he knows or has learned to the managing body or board, then the corporation will be affected with a constructive notice. Also, if the transaction in which the information was obtained was so recent, or the information itself was so positive, direct, and strong, that it must be regarded as certainly remaining present in the mind or memory of the official, then the case may fall under the operation of a rule stated in a subsequent paragraph (*post*, § 672), and a constructive notice to the corporation may follow: Fulton Bank v. N. Y. & Sharon C. Co., 4 Paige, 127; Seneca Co. Bank v. Neass, 5 Denio, 329, 337; Miller v. Ill. Cent. R. R., 24 Barb. 312; North River Bank v. Aymar, 3 Hill, 262; Farmers' Bank v. Payne, 25 Conn. 444; U. S. Ins. Co. v. Shriver, 3 Md. Ch. 381; Gen. Ins. Co. v. U. S. Ins. Co., 10 Md. 517; 69 Am. Dec. 174; Winchester v. B. & S. R. R., 4 Md. 231; Brown v. Bankers' etc. Tel. Co., 30 Md. 39; G. W. R'y Co. v. Wheeler, 20 Mich. 419; President etc. v. Cornen, 37 N. Y. 320; Bank of U. S. v. Davis, 2 Hill, 451; National Bank v. Norton, 1 Hill, 572; Atlantic etc. Bank v. Savery, 82 N. Y. 291, 307; La Farge Fire Ins. Co. v. Bell, 22 Barb. 54, 61.

& Trotting Soc., 206 Ill. 9, 99 Am. St. Rep. 132, 69 N. E. 17; Craig School Tp. v. Scott, 124 Ind. 72, 24 N. E. 585 (knowledge of member of masonic lodge is not knowledge of lodge); Fairfield Sav. Bank v. Chase, 72 Me. 226, 39 Am. Rep. 319; Baltimore & O. R. Co. v. Canton Co., 70 Md. 405, 17 Atl. 394; Dickinson v. Central Nat. Bank, 129 Mass. 279, 37 Am. Rep. 351; Kearney Bank v. Froman, 129 Mo. 427, 31 S. W. 769, 50 Am. St. Rep. 456; Canda Mfg. Co. v. Inhabitants of Woodbridge Tp., 58 N. J. Law (29 Vroom) 134, 32 Atl. 66 (superintendent of corporation acquired knowledge as school trustee); Merchants' Nat. Bank v. Clark, 139 N. Y. 314, 34 N. E. 910, 36 Am. St. Rep. 710; Frazier v. Butler Borough, 172 Pa. St. 407, 23 Atl. 691, 51 Am. St. Rep. 739 (municipal officer's knowledge not obtained in his official capacity); Mathis v. Pridham, 1 Tex. Civ. App. 58, 20 S. W. 1015; Washington Nat. Bank v. Pierce, 6 Wash. 491, 33 Pac. 972, 36 Am. St. Rep. 174; Continental Nat. Bank v. McGeoch, 92 Wis. 286, 66 N. W. 606. Notice acquired by the officer before his assumption of office: Brennan v. Emery-Bird-Thayer Dry Goods Co., 99 Fed. 971; Dorr v. Life Ins. Clearing Co., 71 Minn. 38, 73 N. W. 635, 70 Am. St. Rep. 309; Taylor v. Callaway, 7 Tex. Civ. App. 461, 27 S. W. 934 (acquired before corporation was organized).

Many cases make the distinction that private information is not notice to the corporation when the officer who has it takes no part in the transaction which is sought to be affected with the constructive notice: Hatch v. Ferguson, 66 Fed. 668, 14 C. C. A. 41, 29 U. S. App. 540, and cases cited; Casco Nat. Bank v.

his representative employment, but the notice must be given to, or the information acquired by, the agent or attorney in the course of the *same transaction* which is sought to be affected by the constructive notice; that is, in the same transaction from which the principal's rights and liabilities arise, which, it is claimed, depend upon or are modified by the con-

Clark, 139 N. Y. 307, 34 N. E. 908, 36 Am. St. Rep. 705; Bank v. Sneed, 97 Tenn. 120, 56 Am. St. Rep. 788, 36 S. W. 716, 34 L. R. A. 274; National Bank of Commerce v. Feeney, (S. Dak.) 70 N. W. 874; Smith v. Carmack, (Tenn. Ch. App.) 64 S. W. 372; Mathis v. Pridham, 1 Tex. Civ. App. 58, 20 S. W. 1015; Tate v. Security Trust Co., 63 N. J. Eq. 559, 52 Atl. 313; First Nat. Bank v. Babbidge, 160 Mass. 563, 36 N. E. 462; but that if the officer, having pertinent information, personally participates on behalf of his corporation in such subsequent transaction, the corporation may be charged with his knowledge, under the principle of § 672, *post:* Louisville Tr. Co. v. Louisville, N. A. & C. R. Co., 75 Fed. 433, 22 C. C. A. 378; Willard v. Denise, 50 N. J. Eq. 482, 26 Atl. 29, 35 Am. St. Rep. 788. The above distinction is clearly illustrated and explained in the case of Casco National Bank v. Clark, 139 N. Y. 307, 34 N. E. 908, 36 Am. St. Rep. 705. In that case a corporation and a bank had a common director, W. A note was executed which appeared to be the note of certain officers of the corporation, but was in fact intended to be the note of the corporation, and which was discounted by the bank. It was held that W's knowledge of the true character of the note was not imputable to the bank, since he in no sense represented or acted for the bank in the transaction. "He was but one of the plaintiff's directors, who could only act as a board: National Bank v. Norton, 1 Hill, 572. If he knew the fact that these were not individual but corporate notes, we cannot presume that he communicated that knowledge to the board. An officer's knowledge, derived as an individual, and not while acting officially for the bank, cannot operate to the prejudice of the latter: Bank of United States v. Davis, 2 Hill, 451. The knowledge with which the bank as his principal would be deemed chargeable, so as to affect it, would be where, as one of the board of directors and participating in the discount of the paper, he had acted affirmatively, or fraudulently, with respect to it; as in the case of Bank v. Davis, 2 Hill, 451, by a fraudulent perversion of the bills from the object for which drawn; or as in Holden v. New York & Erie Bank, 72 N. Y. 286, where the president of the bank, who represented it in all the transactions, was engaged in a fraudulent scheme of conversion. It was said in the latter case that the knowledge of the president, as an individual or as an executor, was not imputable to the bank merely because he was the president, but because, when it acted through him as president, in any transaction where that knowledge was material and applicable, it acted through an agent."

For the cases where the officer acts in the transaction in his own interest and adversely to that of the corporation, see *post*, § 675 and notes.

structive notice imputed to him. This is, in general, a well-settled requisite; and the grounds for it, depending upon motives of expediency, were thus stated by Lord Hardwicke in an early case. A different rule, he said, "would make purchasers' and mortgagees' titles depend altogether on the memory of their counselors and agents, and oblige them to apply to persons of less eminence as counsel, as not being so likely to have notice of former transactions."[1a]

[1] Banco de Lima v. Anglo-Peruvian Bank, L. R. 8 Ch. Div. 160, 175; Wyllie v. Pollen, 3 De Gex, J. & S. 596, 601; Lloyd v. Attwood, 3 De Gex & J. 614, 657; Finch v. Shaw, 19 Beav. 500; 5 H. L. Cas. 905; Tylee v. Webb, 6 Beav. 552; 14 Beav. 14; Fuller v. Bennett, 2 Hare, 394; Warrick v. Warrick, 3 Atk. 294; Worsley v. Earl of Scarborough, 3 Atk. 392; Hine v. Dodd, 2 Atk. 275; Lowther v. Carlton, 2 Atk. 242; Ashley v. Baillie, 2 Ves. Sr. 368; Wilde v. Gibson, 1 H. L. Cas. 605, 624; Houseman v. Girard etc. Ass'n, 81 Pa. St. 256, 261; Holden v. New York and Erie Bank, 72 N. Y. 286; Howard Ins. Co. v. Halsey, 8 N. Y. 271; 59 Am. Dec. 478; Weisser v. Denison, 10 N. Y. 68; 61 Am. Dec. 731; Bierce v. Red Bluff Hotel Co., 31 Cal. 160; North River Bank v. Aymar, 3 Hill, 262; Russell v. Sweezey, 22 Mich. 235; Smith v. Denton, 42 Iowa, 48; Blumenthal v. Brainerd, 38 Vt. 402, 410; 91 Am. Dec. 349; Roach v. Karr, 18 Kan. 529; 26 Am. Rep. 788; Allen v. Poole, 54 Miss. 323; Pringle v. Dunn, 37 Wis. 449; 19 Am. Rep. 772; McCormick v. Wheeler, 36 Ill. 114; 85 Am. Dec. 388; Bracken v. Miller, 4 Watts & S. 102; Hood v. Fahnestock, 8 Watts, 489; Lawrence v. Tucker, 7 Greenl. 195; but see, *per contra*, Hart v. Farmers' etc. Bank, 33 Vt. 252; Abell v. Howe, 43 Vt. 403. The same requisite applies, as has been shown in a previous paragraph, when the notice is sought to be charged upon a party personally, and not through an agent: See Hamilton v. Royse, 2 Schoales & L. 315, 327, per Lord Redesdale.

(a) The text is quoted in Day v. Exchange Bank, (Ky.) 78 S. W. 132. See, also, Chew v. Henrietta M. & S. Co., 2 Fed. 5; Satterfield v. Malone, 35 Fed. 445, 1 L. R. A. 35; Cassimus v. Scottish Union & Nat'l Ins. Co., 135 Ala. 256, 33 South. 163; Goodbar v. Daniel, 88 Ala. 583, 7 South. 254, 16 Am. St. Rep. 76, citing this section of the text; McCormick v. Joseph, 83 Ala. 401, 3 South. 796; Chapman v. Hughes, (Cal.) 58 Pac. 298, 60 Pac. 974; St. Paul Fire & M. Ins. Co. v. Parsons, 47 Minn. 352, 50 N. W. 240; Spielman v. Kliest, 36 N. J. Eq. 199; Slattery v. Schwannecke, 118 N. Y. 548, 23 N. E. 922; Constant v. University of Rochester, 111 N. Y. 604, 19 N. E. 631, 7 Am. St. Rep. 769, 2 L. R. A. 734 (a leading case); Denton v. Ontario Co. Nat. Bank, 150 N. Y. 126, 44 N. E. 781; Steinmeyer v. Steinmeyer, 55 S. C. 9, 33 S. E. 15; Wittenbrock v. Parker, 102 Cal. 93, 102, 36 Pac. 374, 41 Am. St. Rep. 172, 24 L. R. A. 197 (knowledge acquired by one of a firm of attorneys acting for client A does not bind client B, for whom another member of the firm acted in a subsequent transaction, without having shared the knowledge acquired by his partner); Kirklin v. Atlas S. & L. Assn., (Tenn. Ch. App.) 60 S. W. 149;

§ 672. **Limitation — Prior Transaction.**— The foregoing requisite, general as it is in its application, is subject to an important and well-settled limitation, equally depending upon motives of expediency. Where the transaction in question closely follows and is intimately connected with a prior transaction in which the agent was also engaged, and in which he acquired material information, or where it is clear from the evidence that the information obtained by the agent in a former transaction was so precise and definite that it is or must be present to his mind and memory while engaged in the second transaction, then the foregoing requisite becomes inapplicable; the notice given to or information acquired by the agent in the former transaction operates as constructive notice to the principal in the second transaction, although that principal was a complete stranger to and wholly unconnected with the prior proceeding or business.[1] [a] The explanation of this special rule is

1 Several of the ablest English judges have, in recent cases, expressed a decided opinion against the rule itself, and while considering themselves

Neilson v. Weber, 107 Tenn. 161, 64 S. W. 161; Irvine v. Grady, 85 Tex. 120, 19 S. W. 1028; Taylor v. Taylor, 88 Tex. 47, 29 S. W. 1057; Queen Ins. Co. v. May, (Tex. Civ. App.) 35 S. W. 829; Cooper v. Ford, 29 Tex. Civ. App. 253, 69 S. W. 487; Kauffman v. Robey, 60 Tex. 30, 48 Am. Rep. 264; Lane v. De Bode, 29 Tex. Civ. App. 602, 69 S. W. 437; Johnson v. Valido Marble Co., 64 Vt. 337, 25 Atl. 441; Pacific Mfg. Co. v. Brown, 8 Wash. 347, 36 Pac. 273. A person taking a mortgage is not charged with notice of prior unrecorded mortgage on the same property which, as attorney, he had drawn up nine years before in the regular course of his business, and there is no presumption that he had the prior mortgage in mind: Goodwin v. Dean, 50 Conn. 517.

The English Conveyancing Act, 1882, "introduced very considerable modifications" in the law of notice to agent: Taylor v. London and County Banking Co., [1901] 2 Ch. 231, 259. By sec. 3, subs. 1, . . . "a purchaser shall not be prejudicially affected by notice of any instrument, fact, or thing, unless . . . . (II) In the same transaction in respect to which a question of notice to the purchaser arises, it has come to the knowledge of his counsel, as such, or of his solicitor, or other agent, as such, or would have come to the knowledge of his solicitor, or other agent, as such, if such inquiries and inspections had been made as ought reasonably to have been made by the solicitor or other agent."

(a) The text is cited in Goodbar v. Daniel, 88 Ala. 583, 7 South. 254, 16 Am. St. Rep. 76; Snyder v. Partridge, 138 Ill. 173, 29 N. E. 851, 32

plainly to be found in the notion that the information obtained by the agent in his former employment was of such a nature, so definite and certain, that it amounted to actual *knowledge;* and as knowledge it is retained by him and carried with him into the subsequent business which he trans-

bound by it, so far as it is settled, have wished that it should be abrogated by the legislature: Fuller v. Bennett, 2 Hare, 394; Atterbury v. Wallis, 8 De Gex, M. & G. 454; Hargreaves v. Rothwell, 1 Keen, 154, 159; Mountford v. Scott, Turn. & R. 274; Nixon v. Hamilton, 2 Dru. & War. 364; Winter v. Lord Anson, 3 Russ. 488, 493; Perkins v. Bradley, 1 Hare, 219; Lenehan v. McCabe, 2 Ir. Eq. 342; Majoribanks v. Hovenden, 6 Ir. Eq. 238; The Distilled Spirits, 11 Wall. 356; Patten v. Ins. Co., 40 N. H. 375; Hovey v. Blanchard, 13 N. H. 145; Dunlap v. Wilson, 32 Ill. 517; Williams v. Tatnall, 29 Ill. 553; Pritchett v. Sessions, 10 Rich. L. 293; Wiley v. Knight, 27 Ala. 336; Abell v. Howe, 43 Vt. 403; Hart v. Farmers' & M. Bank, 33 Vt. 252; Murray v. Ballou, 1 Johns. Ch. 566, 574; Ames v. N. Y. Union Ins. Co., 14 N. Y. 253; Holden v. N. Y. & Erie Bank, 72 N. Y. 286, 292; Tagg v. Tenn. Nat. Bank, 9 Heisk. 479. In Fuller v. Bennett, 2 Hare, 394, Wigram, V. C., gives a very full and instructive discussion of this special rule, explaining its grounds, and exhibiting its necessary limitations. In the case of Distilled Spirits, 11 Wall. 356, the rule is approved and adopted by the supreme court of the United States, and it is stated by Bradley, J., in the following summary: "In England, the doctrine seems now to be established, that if the agent, at the time of effecting a purchase, has *knowledge* of any prior lien, trust, or fraud affecting the property, no matter when he acquired such knowledge, his principal is affected thereby. If he acquire the knowledge when he effects the purchase, no question can arise as to his having it at the time; if he acquired previous to the purchase, the presumption that he still retains it, and has it present to his mind, will depend on the lapse of time and other circumstances. Knowledge communicated to the principal himself he is bound to recollect; but he is not bound by knowledge communicated to his agent, unless it is present to the agent's mind at the time of effecting the purchase. Clear and satisfactory proof that it was so present seems to be the only restriction required by the English rule as now understood. With the qualification that the agent is at liberty to communicate his knowledge to his principal, it appears to us to be a sound view of the subject. The general rule that the principal is bound by the agent's knowledge is based on the principle of law that it is the agent's duty to communicate to his principal the knowledge which he has respecting the subject-matter of negotiation, and the presumption that he will perform that duty. When it is not the agent's duty to communicate such knowledge, but it would be unlawful for him to do so,— as, for example, when it has been acquired confidentially, as attorney for a former client, in a prior transac-

Am. St. Rep. 130. See, also, Brown v. Cranberry Iron & Coal M. Co., 72 Fed. 96, 18 C. C. A. 444, 25 U. S. App. 679; Campbell v. First Nat. Bank, 22 Colo. 177, 43 Pac. 1007; Christie v. Sherwood, 113 Ga. 526,

acts on behalf of his new principal. While this particular rule is settled by a strong array of authorities, the courts show a plain determination not to extend it, but to keep it

tion,— the reason of the rule ceases; and in such a case an agent would not be expected to do that which would involve the betrayal of professional confidence, and his principal ought not to be bound by the agent's secret and confidential information." A very important modification or addition to the rule, which has a special application to agents of corporations, was laid down by Folger, J., in Holden v. New York and Erie Bank, 72 N. Y. 286, 292. The view which he takes cannot be better explained than by quoting his own language: "Notice must have come to the agent, it is said, in the course of the very transaction, or so near before it that the agent must be presumed to recollect it. This limitation, however, applies more particularly to the case of an agent whose employment is short-lived, so that the principal shall not be affected by knowledge that came to the agent before his employment began, nor after it was terminated. But where the agency is continuous, and concerned with a business made up of a long series of transactions of a like nature, of the same general character, it will be held that knowledge acquired as agent in that business, in any one or more of the transactions making up from time to time the whole business of the principal, is notice to the agent and to the principal, which will affect the latter in any other of those transactions in which that agent is engaged, in which that knowledge is material. If the principal in this case, the New York and Erie Bank, had been insolvent, say on the first day of January in a given year, and that fact had then been known to its president, Ganson, and the fact and knowledge of it were material in a transaction of the bank, taking place through him on the first day of the succeeding April, the knowledge acquired by him on the first-named day was knowledge with which the bank was chargeable on the last-named day; and so it would have been with knowledge of any fact not so intimately connected with the condition of the bank,— the principal,— but relating to the character and position of dealers with it: Porter v. Bank of Rutland, 19 Vt. 410. We doubt not that the knowledge of its president, Ganson, was chargeable to the bank, so far as that knowledge was material in the transaction now under consideration. It mattered not when, during the course of his prior official management of the affairs of the bank, he acquired the knowledge; it was knowledge acquired in its business, and applicable to any subsequent transaction in which it was material. . . . . In Bank of United States v. Davis, 2 Hill, 451, the director of the plaintiff carried into the meeting of the board of directors knowledge which he had before acquired as an individual, yet the bank was charged with that knowledge. So in Fulton Bank v. New York and Sharon C. Co., 4 Paige, 127, though it was held that the plaintiff was not chargeable with notice of facts which came to the knowledge of its president while not acting as its agent, yet it was also said that if afterwards it became his duty to act upon that

45 Pac. 820; McClelland v. Saul, 113 Iowa, 208, 84 N. W. 1034, 86 Am. St. Rep. 370 (knowledge acquired a reasonable time before the agency began); Westerman v. Evans, 1 Kan. App. 1, 41 Pac. 675; Fairfield Sav.

confined within narrow and necessary limits.[b] The two essential requisites of the general rule, together with the foregoing limitation, are the results or phases of one legal conception. In order that the information obtained by an agent may be a constructive notice to his principal in any given transaction, it must be present to the agent's mind and memory while he is engaged in the transaction which is sought to be affected. This is universally true. If the agent acquired the information while acting for his principal, and *while engaged in that very same transaction,* then it is conclusively presumed that he retains the information present to his mind and in his memory; a failure of memory on his

knowledge in the business of the bank, his principal would be chargeable with notice of the facts of which he had acquired the knowledge while acting in another capacity than as agent of the bank." The decision in Tagg v. Tenn. Nat. Bank, 9 Heisk. 479, is to the same effect.

Bank v. Chase, 72 Me. 226, 39 Am. Rep. 319; Schwind v. Boyce, 94 Md. 510, 51 Atl. 45; Wilson v. Minnesota, etc., Ins. Assn., 36 Minn. 112, 30 N. W. 401, 1 Am. St. Rep. 659; Lebanon Sav. Bank v. Hollenbeck, 29 Minn. 322, 13 N. W. 145; Equitable Sureties Co. v. Sheppard, 78 Miss. 217, 28 South. 842 (citing this section of the text. Courts will presume forgetfulness unless occurrence was so recent as to make it incredible); Spielman v. Kliest, 36 N. J. Eq. 199; Slattery v. Schwannecke, 118 N. Y. 548, 23 N. E. 922 (*dictum*); Cragie v. Hadley, 99 N. Y. 131, 52 Am. Rep. 9 (knowledge of bank president); Constant v. University of Rochester, 111 N. Y. 604, 19 N. E. 631, 7 Am. St. Rep. 769 (a leading case); Red River Val. Land & Inv. Co. v. Smith, 7 N. Dak. 236, 74 N. W. 194; Gregg v. Baldwin, 84 N. W. 373, 9 N. Dak. 515; Pennoyer v. Willis, 26 Oreg. 1, 36 Pac. 568, 46 Am. St. Rep. 594; Taylor v. Evans, (Tex. Civ. App.) 29 S. W. 172; Foote v. Utah Commercial & Sav. Bank, 17 Utah 85, 54 Pac. 104; Deering v. Holcomb, 26 Wash. 588, 67 Pac. 240 (citing this section of the text); McDonald v. Fire Assn. of Philadelphia, 93 Wis. 348, 67 N. W. 719; Brothers v. Bank of Kaukauna, 84 Wis. 381, 54 N. W. 786, 36 Am. St. Rep. 932 (knowledge which the agent had acquired so recently that it is incredible that he should have forgotten it); in this case the cashier of a bank had been present at the execution of a mortgage and promissory note by one whose visible condition at the time was such as to put a reasonably observant person upon inquiry as to his capacity to contract, and immediately after the execution of the instruments the bank acquired possession of them as collateral security for the debt of a third party: *held,* that the bank was not a *bona fide* purchaser of those instruments.

(b) Quoted in Wittenbrock v. Parker, 102 Cal. 93, 36 Pac. 374, 41 Am. St. Rep. 172, 24 L. R. A. 197.

part cannot be shown, and the principal is charged with the constructive notice.[c] If the agent acquired the information in a former and independent transaction, then it is *prima facie* presumed that he does not retain it present to his mind and memory while engaged in the subsequent transaction in behalf of a principal whom it is sought to charge with notice;[d] but this presumption may be overcome by evidence. If, therefore, it be clearly shown by the evidence that the agent did in fact retain the previously acquired information present to his mind and memory while engaged in the subsequent transaction on behalf of his principal, then all the essential elements of the general rule are existing, and the principal is thereby charged with constructive notice. This is, as it seems to me, the true *rationale* of the doctrine in all its phases and applications, and is fairly deducible from the decided cases.

§ 673. (3) The Information Material, and Such as the Agent is Bound to Communicate.— A third requisite is, that the information acquired by the agent must be material to the transaction in which the principal's rights are to be affected by a notice, and it must be something which it is the duty of the agent, by virtue of his fiduciary and representative relation, to communicate to his principal.[1] It is not es-

[1] Wyllie v. Pollen, 3 De Gex, J. & S. 596, 601; Rolland v. Hart, L. R. 6 Ch. 678, 681, 682; The Distilled Spirits, 11 Wall. 356, per Bradley, J.; Roach v. Karr, 18 Kan. 529; 26 Am. Rep. 788; Pringle v. Dunn, 37 Wis. 449; 19 Am. Rep. 772; Jones v. Bamford, 21 Iowa, 217; May v. Borel, 12 Cal. 91; Fry v. Shehee, 55 Ga. 208. In Wyllie v. Pollen, 3 De Gex, J. & S. 596, Lord Westbury said: "The agent's knowledge must have been of something material to the particular transaction, and something which it was

(c) See Watson v. Sutro, 86 Cal. 500, 24 Pac. 172, 25 Pac. 64.

(d) The text is cited to this effect in Equitable Sureties Co. v. Sheppard, 78 Miss. 217, 28 South. 842. See, especially, Constant v. University of Rochester, 111 N. Y. 604, 19 N. E. 631, 7 Am. St. Rep. 769, 2 L. R. A. 734, holding very emphatically that the burden of proof rests on the party alleging notice to show "clearly and beyond question" that the information was present in the agent's mind while engaged in the subsequent transaction: Wittenbrock v. Parker, 102 Cal. 93, 36 Pac. 374, 41 Am. St. Rep. 172, 29 L. R. A. 197.

sential, however, that the agent should in fact have communicated the information to his principal; on the contrary, the general rule of constructive notice between agent and principal depends upon a legal presumption — absolutely conclusive except in two special instances — that the information received by the agent was communicated to his principal. The powerful motives of policy inhere in this very presumption.[2] [b] Even when an agent's failure to communi-

the agent's duty to communicate to his principal; the whole doctrine of constructive notice resting on the ground of the existence of such a duty on the part of the agent." In Rolland v. Hart, L. R. 6 Ch. 678, Lord Hatherley tersely sums up both branches of the doctrine stated in the text: "It has been held over and over again that notice to a solicitor of a transaction, and about a matter as to which it is part of his duty to inform himself, is notice to his client. . . . . It cannot be left to the possibility or impossibility of the man who seeks to affect you with notice being able to prove that your solicitor did his duty in communicating to you that which, according to the terms of your employment of him, was the very thing which you employed him to ascertain." The duty of the agent to communicate the information to his principal is a most essential element of the doctrine. If the information of the agent was acquired in a previous employment as attorney for another person, and was private and confidential in its nature, a moral and legal obligation would rest upon him not to disclose it; he would be under no duty to communicate the knowledge to a subsequent client, and consequently such client could not be charged with constructive notice. See the remarks of Bradley, J., in The Distilled Spirits, 11 Wall. 356, quoted in the note under the last preceding paragraph.[a]

2 Bradley v. Riches, L. R. 9 Ch. Div. 189, 196; Rolland v. Hart, L. R. 6 Ch. 678, 681, 682; Boursot v. Savage, L. R. 2 Eq. 134, 142; Hewitt v. Loosemore, 9 Hare, 449, 455; Williamson v. Brown, 15 N. Y. 354; Suit v. Woodhall, 113 Mass. 391; Owens v. Roberts, 36 Wis. 258. In the recent case of Bradley v. Riches, L. R. 9 Ch. Div. 189, the rule is stated in the following clear and decided language: "The solicitor must be assumed to have communicated the facts [i. e., facts of which he had received information] to his client, and the knowledge of the agent is, to use the language of Lord Chelmsford in Espin v. Pemberton, 3 De Gex & J. 547, the imputed knowledge

(a) Where communication of the information to the principal would be a breach of confidence: see Downer v. Porter, (Ky.) 76 S. W. 135; Akers v. Rowan, 33 S. C. 451, 12 S. E. 165, 10 L. R. A. 705; Melms v. Pabst Brewing Co., 93 Wis. 153, 66 N. W. 518, 57 Am. St. Rep. 899, and cases cited (vendee employed vendor's attorney; not charged with knowledge, previously acquired by the attorney in the vendor's employment, of a defect in the latter's title).

(b) Wittenbrock v. Parker, 102 Cal. 93, 101, 36 Pac. 374, 41 Am. St. Rep. 172. 24 L. R. A. 197.

cate is fraudulent, provided the fraud consists merely in such concealment and failure, the conclusive presumption still arises, as will be more fully shown in the following paragraphs.

§ 674. Exceptions — Presumption, when not Conclusive.— There are, however, two special exceptions to the foregoing doctrine, two special conditions in which the presumption may be rebutted, in which it may be shown that the information was not communicated by the agent to his principal, and in which, as a consequence, the principal is not charged with a constructive notice. Both of these exceptions rest upon a foundation of fraud. In the first place, when an attorney or agent acting for both the parties to a transaction, A and B,— for both the vendor and vendee, mortgagor and mortgagee,— has or receives information of any material fact, such as the existence of a document, and *with the consent of one party, A,* conceals his knowledge from the other party, B, then B will not be charged with constructive notice of such fact. The conduct of A in consenting to the agent's concealment is clearly a fraud upon B; he is estopped from afterwards insisting that B received notice, and thereby taking advantage of his own wrong.[1]

§ 675. Agent's Fraud.— The second exception is much more important and of far wider application. It is now settled by a series of decisions possessing the highest authority, that when an agent or attorney has, in the course of his employment, been guilty of an actual fraud contrived and carried out for his own benefit, by which he intended to defraud and did defraud his own principal or client, as well as perhaps the other party, and the very perpetration

of the client. It appears to me to be clear that that presumption or imputation is a thing which the client cannot be allowed to rebut. If it could be rebutted, it was amply rebutted in Le Neve v. Le Neve, Amb. 436; 2 Lead. Cas. Eq., 4th Am. ed., 109. If it could be rebutted, the language of Lord Hatherley in Rolland v. Hart, L. R. 6 Ch. 678, could not be upheld." (See this language quoted in last preceding note.)

[1] Sharpe v. Foy, L. R. 4 Ch. 35, 40, 41; Hewitt v. Loosemore, 9 Hare, 449, 455, per Turner, V. C.

of such fraud involved the necessity of his concealing the facts from his own client, then, under such circumstances, the principal is not charged with constructive notice of facts known by the attorney and thus fraudulently concealed. In other words, if in the course of the same transaction in which he is employed the agent commits an independent fraud for his own benefit, and designedly against his principal, and it is essential to the very existence or possibility of such fraud that he should conceal the real facts from his principal, then the ordinary presumption of a communication from the agent to his principal fails; on the contrary, a presumption arises that no communication was made, and consequently the principal is not affected with constructive notice.[1a] The courts have carefully confined the operation

[1] Cave v. Cave, L. R. 15 Ch. Div. 639, 643; In re European Bank, L. R. 5 Ch. 358, 361, 362; Rolland v. Hart, L. R. 6 Ch. 678, 682; Waldy v. Gray, L. R. 20 Eq. 238, 251; Thompson v. Cartwright, 2 De Gex, J. & S. 10; 33 Beav. 178; Frail v. Ellis, 16 Beav. 350; Hiorns v. Holtom, 16 Beav. 259; Greenslade v. Dare, 20 Beav. 284, 291; Neesom v. Clarkson, 2 Hare, 163; Hewitt v. Loosemore, 9 Hare, 449, 455; Ogilvie v. Jeaffreson, 2 Giff. 353; Robinson v. Briggs, 1 Smale & G. 188; Spencer v. Topham, 2 Jur., N. S., 865; Jones v. Smith, 1 Phil. Ch. 244, 256; Kennedy v. Green, 3 Mylne & K. 699; Fulton Bank v. N. Y. & Sharon C. Co., 4 Paige, 127; Barnes v. Trenton Gas Co., 27 N. J. Eq. 33; McCormick v. Wheeler, 36 Ill. 114; 85 Am. Dec. 388; Winchester v. Susquehanna R. R., 4 Md. 231; Hope Fire Ins. Co. v. Cambreling, 1 Hun, 493. In several of these cases the attorney was employed for both parties to the transaction, but this fact does not seem to be essential. Kennedy v. Green, 3 Mylne & K. 699, is the leading case in which this doctrine was first regularly formulated, by Lord Brougham. In Rolland v. Hart, L. R. 6 Ch. 678, Lord Hatherley said: "It must be made out that distinct fraud was intended in the very transaction, so as to make it necessary for the solicitor to conceal the facts from his client, in order to defraud him." In the very recent case of Cave v. Cave, L. R. 15 Ch. Div. 639, the court, having all the decisions before it, thus sums up the doctrine: "There is undoubtedly an exception to the construction or imputation of notice from the agent to the principal, that exception arising in the case of such conduct by the agent as raises a conclusive presumption that he would not communicate the fact

(a) The text is quoted in American Surety Co. v. Pauly, 170 U. S. 133, 18 Sup. Ct. 552, affirming 72 Fed. 470, 38 U. S. App. 254, 18 C. C. A. 644; in Henry v. Allen, 151 N. Y. 1, 45 N. E. 335, 36 L. R. A. 658, citing many cases; in Benedict v. Arnoux, 154 N. Y. 715, 49 N. E. 326; and cited in Germania Safety Vault & Tr. Co. v. Driskell, 23 Ky. Law Rep. 2050, 66 S. W. 610. See, also, Gunster v. Scranton Illum., H.

of this exception to the condition described where a presumption necessarily arises that the agent did not disclose the real facts to his principal, because he was committing

in controversy. This exception has been put in two ways. In the very well known case of Rolland v. Hart, L. R. 6 Ch. 678, Lord Hatherley put it substantially this way: that you must look at the circumstances of the case, and inquire whether the court can see that the solicitor intended a fraud, which would require the suppression of the knowledge of the encumbrance from the person upon whom he was committing the fraud. In Thompson v. Cartwright, 33 Beav. 178, the late master of rolls put it rather differently, and it would appear that, in his view, you must inquire whether there are such circumstances in the case, independently of the fact under inquiry, as to raise an inevitable conclusion that the notice had not been communicated. In the one view notice is not imputed, because the circumstances are such as not to raise the conclusion of law, which does ordinarily arise from the mere existence of notice to the agent; in the other view — that of Lord Hatherley — the act done by the agent is such as cannot be said to be done by him in his character of agent, but is done by him in the character of a party to an independent fraud on his principal, and that is not to be imputed to the principal as an act done by his agent."

Whether this exception can apply to directors, presidents, and other such managing officers of a corporation, through whom alone the corporation *can* act, may, I think, be doubted: See Holden v. N. Y. & Erie Bank, 72 N. Y. 286, and First Nat. Bank etc. v. Town of New Milford, 36 Conn. 93; but see Barnes v. Trenton Gas Co., 27 N. J. Eq. 33.

& P. Co., 181 Pa. St. 327, 37 Atl. 550, 59 Am. St. Rep. 650, a valuable case, reviewing a great number of authorities: Thompson-Houston Elect. Co. v. Capitol Elect. Co., 65 Fed. 341, 12 C. C. A. 643; Hart v. Beer, 74 Fed. 592; Findley v. Cowles, 93 Iowa, 389, 61 N. W. 998; Wyeth v. Renz-Bowles Co., 23 Ky. Law Rep. 2338, 66 S. W. 825; Davis v. Boone Co. Deposit Bank, (Ky.) 80 S. W. 161; Innerarity v. Merchants' Nat. Bank, 139 Mass. 332, 1 N. E. 282, 52 Am. Rep. 710 (a leading and frequently cited case); Allen v. South Boston R. R. Co., 150 Mass. 200, 22 N. E. 917, 15 Am. St. Rep. 185, 5 L. R. A. 716; Produce Exch. Tr. Co. v. Bieberbach, 176 Mass. 577, 58 N. E. 162; Shepard & Morse Lumber Co. v. Eldridge, 171 Mass. 516, 68 Am. St. Rep. 446, 51 N. E. 9; Ft. Dearborn Nat. Bank v. Seymour, 71 Minn. 81, 73 N. W. 724; Benton v. Minneapolis Tailoring & Mfg. Co., 73 Minn. 498, 76 N. W. 265; Smith v. Boyd, 162 Mo. 146, 62 S. W. 439; Southern Comm. Sav. Bank v. Slattery's Adm'r, 166 Mo. 620, 66 S. W. 1066; Houghton v. Todd, 58 Neb. 360, 78 N. W. 634; Graham v. Orange Co. Nat. Bank, 59 N. J. L. 225, 35 Atl. 1053; Sproul v. Standard Plate Glass Co., 201 Pa. St. 103, 50 Atl. 1003; United Security Life Ins. & Tr. Co. v. Central Nat. Bank, 185 Pa. St. 586, 40 Atl. 97, 42 Wkly. Notes Cas. 145; Knobeloch v. Germania Sav. Bank, 50 S. C. 259, 27 S. E. 962; People's Bldg., L. & S. Assn. v. Dailey, (Tex. Civ. App.) 42 S. W. 364; Scripture v. Scottish-Am. Mortg. Co., (Tex. Civ. App.) 49 S. W. 644; Campbell v. Crowley, (Tex. Civ.

such an independent fraud that concealment was essential to its perpetration; it has never been extended beyond these circumstances. It follows, therefore, that every fraud of an agent in the course of his employment, and in the very

App.) 56 S. W. 373; Cooper v. Ford, 29 Tex. Civ. App. 253, 69 S. W. 487; Jungk v. Reed, 12 Utah, 196, 42 Pac. 292; First Nat. Bank v. Briggs' Assignee, 70 Vt. 594, 41 Atl. 580; Cole v. Getzinger, 96 Wis. 559, 71 N. W. 75; Speiser v. Phœnix Mut. Life Ins. Co., (Wis.) 97 N. W. 207. Certain expressions in First National Bank v. Allen, 100 Ala. 476, 14 South. 335, 46 Am. St. Rep. 80, 27 L. R. A. 426, appear to ignore the rule. It was there held that a bank depositor who intrusts the duty of examining vouchers to a clerk who has forged his employer's name on checks is charged with the clerk's knowledge of the forgery. See, also, Dana v. National Bank of the Republic, 132 Mass. 156. *Contra*, that the depositor in such case is not charged with notice, see cases collected in note, 27 L. R. A. 429, 430; Shipman v. Bank of the State, 126 N. Y. 318, 27 N. E. 371, 12 L. R. A. 791; Weisser v. Denison, 10 N. Y. 68, 61 Am. Dec. 731; Welsh v. German-American Bank, 73 N. Y. 424, 29 Am. Rep. 175; Hardy v. Chesapeake Bank, 51 Md. 562, 34 Am. Rep. 325; Kenneth Inv. Co. v. National Bank of the Republic, (Mo.) 70 S. W. 173.

Cases where the agent's fraud was committed on behalf of a third party: Western Mortg. & Inv. Co. v. Ganzer, 63 Fed. 647, 11 C. C. A. 371, 23 U. S. App. 608, and cases cited: Hudson v. Randolph, 66 Fed. 216, 13 C. C. A. 402, 23 U. S. App. 681; Waite v. City of Santa Cruz, 89 Fed. 619 (purchaser's agent receives a share of the seller's profits; his knowledge of defects in the thing sold not imputed to the purchaser); Hadden v. Dooley, 92 Fed. 274, 34 C. C. A. 338, reversing 84 Fed. 80; School Dist. of City of Sedalia v. De Weese, 100 Fed. 705; Scotch Lumber Co. v. Sage, 132 Ala. 598, 32 South. 607, 90 Am. St. Rep. 932 (purchaser's agent secretly acting for seller); Hickman v. Green, 123 Mo. 165, 22 S. W. 455, 27 S. W. 440, 29 L. R. A. 39, and cases cited.

Agent Acting in His Own Interest, in General.— The same presumption that the agent's information is not communicated to his principal has been held in very many cases to arise, independently of any question of fraud, whenever the agent is dealing with the principal in his own interest, and adversely to the interest of the principal. The application of this special rule to officers and agents of corporations is very frequent. See First Nat. Bank v. Tompkins, 57 Fed. 20, 6 C. C. A. 237 (bank acquiring title from its president); Hatch v. Ferguson, 66 Fed. 668, 14 C. C. A. 41, 29 U. S. App. 540; Louisville Tr. Co. v. Louisville, N. A. & C. R. Co., 75 Fed. 433, 22 C. C. A. 378; Niblack v. Cosler, 80 Fed. 596, (C. C. A.), affirming 74 Fed. 1000 (officer not shown to have been acting adversely); Whittle v. Vanderbilt M. & M. Co., 83 Fed. 48, and cases cited; Holm v. Atlas Nat. Bank, 84 Fed. 119, 28 C. C. A. 297; Pine Mt. Iron & Coal Co. v. Bailey, 94 Fed. 258, 36 C. C. A. 229, and cases cited; Levy & Cohn Mule Co. v. Kauffman, 114 Fed. 170, 52 C. C. A. 126, and cases cited; Bank of Overton v. Thompson, 118 Fed. 798, reviewing

same transaction, does not fall within this exception; and, most emphatically, it does not apply when the agent's fraud consists merely in his concealment of material facts within his own knowledge from his principal.[2]

2 It is sometimes very difficult to determine whether a case does or does not fall under this exception. Many of the decisions confessedly rest upon very narrow distinctions: Rolland v. Hart, L. R. 6 Ch. 678, 682; Boursot v. Savage, L. R. 2 Eq. 134, 142; Atterbury v. Wallis, 8 De Gex, M. & G. 454, 466; Davis v. Bank of United States, 2 Hill, 451; Holden v. New York and Erie Bank, 72 N. Y. 286; Bank of New Milford v. Town of New Milford, 36 Conn. 93; Tagg v. Tenn. Nat. Bank, 9 Heisk. 479. In Boursot v. Savage, L. R. 2 Eq. 134, the attorney committed a fraudulent breach of a trust existing in reference to the property which was the subject of negotiation. Kindersley, V. C., said (p. 142): "It is insisted that the doctrine of constructive notice cannot apply, because the agent, Holmes, was committing a fraud, and the client is not to be affected with constructive notice of a fraud committed by his solicitor. But if the client would be affected with constructive notice of a trust. the existence of which is known to his solicitor, in the case where there is fraud, the fact that the solicitor is committing a fraud in relation to that trust cannot afford any reason why the client should not be affected with constructive notice of the existence of the trust. It is the existence of the trust, and not the fraud, of which he is held to have constructive notice; and the constructive notice of the existence of the trust must be imputed to him, whether there is a fraud relating to it or not." In Rolland v. Hart, L. R. 6 Ch. 678, Lord Hath-

many cases; Central Coal & Coke Co. v. Geo. S. Good & Co., 120 Fed. 793, and cases cited; Frenkel v. Hudson, 82 Ala. 158, 2 South. 758, 60 Am. Rep. 736; English-Am. L. & T. Co. v. Hiers, 112 Ga. 823, 38 S. E. 103 (director sold note to corporation); Seaverus v. Presbyterian Hospital, 173 Ill. 414, 50 N. E. 1079, 64 Am. St. Rep. 125; Higgins v. Lansingh, 154 Ill. 301, 40 N. E. 362 (president sold property to corporation); Hart Pioneer Nurseries v. Coryell, 8 Kan. App. 496, 55 Pac. 514; First Nat. Bank v. Skinner, 10 Kan. App. 517, 62 Pac. 705; Commercial Bank v. Cunningham, 24 Pick. 270, 35 Am. Dec. 322; State Sav. Bank v. Montgomery, 126 Mich. 327, 85 N. W. 879; Dorr v. Life Ins. Clearing Co., 71 Minn. 38, 73 N. W. 635, 70 Am. St. Rep. 309; Bang v. Brett, 62 Minn. 4, 63 N. W. 1067; Merchants' Nat. Bank v. Lovitt, 114 Mo. 519, 21 S. W. 825, 35 Am. St. Rep. 770, and note; Koehler v. Dodge, 31 Nebr. 328, 47 N. W. 913, 28 Am. St. Rep. 518; State Bank v. Mathews, 45 Nebr. 659, 63 N. W. 930, 50 Am. St. Rep. 565; First Nat. Bank v. Christopher, 40 N. J. L. 435, 29 Am. Rep. 262 (a leading case; bank director obtaining from the bank discount of a note for a firm of which he was a member); Westfield Bank v. Cornen, 37 N. Y. 320, 93 Am. Dec. 573; Commercial Bank v. Burgwyn, 110 N. C. 267, 17 L. R. A. 326, 14 S. E. 623; Victor G. & S. Min. Co. v. National Bank of the Republic, 15 Utah, 391, 49 Pac. 826; Martin v. South Salem Land Co., 94 Va. 28, 26 S. E. 591; In re Plankington Bank, 87 Wis. 378, 58 N. W. 784.

§ 676. True Rationale of the Rule — Based Wholly upon Policy and Expediency.— The rule of constructive notice through agent to principal, like the doctrine of constructive notice in general, must find its ultimate foundation and only support in motives of policy and expediency. It will not

erley, in meeting the defense based upon the case of Kennedy v. Green, 3 Mylne & K. 699, said (p. 682): "I think with Turner, L. J., that the question how far you are justified in assuming that the agent does not communicate to his client information which he has received, and ought to have communicated, may be affected by very delicate shades of difference. It might be said that the very fact of the solicitor not having communicated an important circumstance is of itself evidence of the fraud. But Turner, L. J., in the case of Atterbury v. Wallis, 8 De Gex, M. & G. 454, exactly meets that difficulty, and says that such a rule cannot prevail. . . . . Robinson [the attorney] was not raising money for himself, but for Hall; and though he grievously neglected his duty, he does not appear to have been concerned in any fraud *which would render concealment necessary*, so as to bring the case within Kennedy v. Green, 3 Mylne & K. 699." In the well-considered case of Atterbury v. Wallis, 8 De Gex, M. & G. 454, Turner, L. J., said (p. 466): "The case of Kennedy v. Green, 3 Mylne & K. 699, was much relied upon by the defendant; but I thought, in Hewitt v. Loosemore, 9 Hare, 449, and I continue to think, that that case does not govern cases like the present. In that case there was fraud, independently of the question whether the act which had been done was made known or not. In such cases as the present the question of fraud wholly depends upon whether the act which has been done has been made known or not." The decision in Holden v. New York and Erie Bank, 72 N. Y. 286, was the same, in principle, as Boursot v. Savage, L. R. 2 Eq. 134. The same person was trustee under a will for certain minors, and president and chief managing officer of the bank. He had seventeen thousand dollars of trust money in his hands, which were deposited in the bank to his credit as such trustee. He was at the same time personally indebted to the bank to a very large amount, and his private account was heavily overdrawn. The bank was utterly insolvent, and this fact was known to him, although not yet published to the world. In this condition he committed a fraudulent breach of his trust by transferring the said trust moneys to the bank in part payment of his private indebtedness. This was done in reality for the benefit of the bank, and the fraud was against the beneficiaries entitled under the trust. The court of appeals held that the bank had constructive notice of all these facts which were known to its president, viz., that the money transferred was subject to the trust, and that the transfer was a fraud upon the *cestuis que trustent*, and a violation of the trustees' fiduciary duties. The case, therefore, came under the general rule, and not under the exception. First Nat. Bank of Milford v. Town of Milford, 36 Conn. 93, is similar in its essential features.[b] It has also been said that

(b) Similar, also, is the often cited case of Atlantic Cotton Mills v. Indian Orchard Mills, 147 Mass. 268, 17 N. E. 496, 9 Am. St. Rep. 698. One Gray was the treasurer of both the plaintiff and defendant com-

aid us in the least to inquire whether it should be derived from the notion that the agent is identical with his principal, — is the principal's *alter ego*,— or from the notion that the principal cannot be allowed to acquire and retain a benefit through means of an act or proceeding which his agent knew to be wrong. The true *rationale* is, as I have already shown, that the agent's knowledge of material facts,— not necessarily of the ultimate facts,— or what the law assumes to be his knowledge, must always, from considerations of expediency, be regarded and treated as the principal's knowledge; otherwise the business affairs of society could not be safely transacted. Whenever the knowledge of the agent is actual,— that is, whenever he has obtained actual information of certain facts, and has therefore received actual notice,— this imputation of his knowledge to the principal is evident and reasonable. Whenever the agent's knowledge of certain facts exists only in contemplation of law,— that is, when he has received a constructive notice,— the imputation thereof to the principal is no less reasonable and clear.

information given to or known by an attorney is not notice to his client, when the attorney himself is the borrower. This would seem to fall under the same reason, viz., that it is presumed the information would not be communicated: See Hope Fire Ins. Co. v. Cambreling, 1 Hun, 493; Winchester v. Susquehanna R. R., 4 Md. 231; McCormick v. Wheeler, 36 Ill. 114; 85 Am. Dec. 388.

panies, and for some time had been embezzling largely from the plaintiff. To cover his defalcations at an expected periodical examination, he had placed with its funds fraudulent checks of the defendant company, which he had drawn payable to the order of plaintiff company, to the amount of more than $200,000, and these were in possession of plaintiff company when the defalcations were discovered. Plaintiff sought to recover on the checks, as having received them innocently in payment of Gray's indebtedness to it through his defalcations. The court, in holding that the plaintiff was charged with notice of the fraudulent character of the checks, lay stress on the fact that the agent's fraud was committed for the plaintiff's benefit, and state that the question is one of a principal's availing himself of the result of his agent's fraud without responsibility for the fraud. See the comment on this case in Bank of Overton v. Thompson, 118 Fed. 798, 802, 803, (C. C. A.); and in Gunster v. Scranton Illum., H. & P. Co., 181 Pa. St. 327, 37 Atl. 550, 59 Am. St. Rep. 650.

If, under any circumstances, a party, while dealing for himself, must be treated, in contemplation of law, as one who has acquired certain information, and must be charged with constructive notice thereby, the same result must follow when, under like circumstances, the party is dealing by means of an agent. If that assumed information called constructive notice should affect a party acting for himself, it should equally affect him acting through an attorney. As the doctrine is thus based entirely on motives of policy, it should never in its application transcend the scope and limits of those motives. Whenever its operation in a given state of facts would produce manifest injustice, the courts should, if not absolutely compelled by express authority, withhold such operation. A tendency to restrict the doctrine — to confine it within the limits already established — is clearly exhibited by many of the recent decisions. Some of the ablest judges now on the English bench have even expressed a strong dissent from the doctrine itself, in some of its phases and applications, especially where a principal is charged with notice of information acquired by his agent in a former transaction, and which such agent is assumed to have remembered. The English cases in which this branch of the rule commonly arises are more frequent, involve a different condition of circumstances, and are consequently much more harsh in their effects, than the analogous class of cases which come before the American courts.

SECTION VI.

CONCERNING PRIORITIES.

ANALYSIS.

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§§ 731, 732. V. Effect of fraud or negligence upon priorities.
§§ 733, 734. Assignments of mortgages, rights of priority depending upon them.

§ 677. Questions Stated — Divisions.[a]— Having thus ascertained, in the preceding section, what notice is, we are naturally led to inquire, in the next place, what are its effects? In discussing the affirmative aspect of this question,— what effects are produced by the presence of notice? — it is almost impossible to avoid considering also the negative aspect,— what effects are produced by the absence of notice? In other words, a full treatment of the question, What are the effects of notice? involves the entire subject of priorities, including the particular doctrine of purchase in good faith for a valuable consideration and without notice. The present section will therefore be devoted to a discussion of the rules concerning *priorities*, both as they are the immediate effects of notice, and as they exist in the absence of notice. Since the doctrine of *bona fide* purchase for a valuable consideration and without notice is so important, and gives rise to so many particular rules, its full treatment is reserved for the next succeeding section. The whole subject of priorities in all its phases is the development of two simple and fundamental equitable principles. I have thought it expedient, therefore, to present the doctrine, in

(a) § 677 is cited in Gilchrist v. Helena Co., 58 Fed. 708.

the present section, in its entirety, in all its applications to various departments of the equity jurisprudence, and not to treat it in a partial and broken manner, under the separate heads of assignments, estates, mortgages, liens, and the like. The doctrine itself is one of great practical importance, and is distinctively equitable; it has no connection with or existence in the common law, except as certain classes of statutes have partially introduced it into that legal system. The subject will be considered in the following order: 1. A statement and exposition of the general principles upon which the doctrine of priorities rests, and from which it has been developed; 2. The application of these principles to the important classes of cases which are governed by the doctrine, namely, assignments of things in action, equitable estates, mortgages, equitable liens, charges and encumbrances, and "equities"; and 3. Purchase in good faith for a valuable consideration and without notice.

§ 678. First. The Fundamental Principles — Equitable Maxims. —As was stated in a former chapter, the doctrine of priorities in equity is entirely a development of two maxims: Where there are equal equities, the first in order of time shall prevail, and Where there is equal equity, the law must prevail.[1] It was there shown, in the language of an eminent judge, that the first of these maxims means: "As between persons having only equitable interests, if their interests are *in all other respects equal,* priority in time gives the better equity, or *qui prior est tempore, potior est jure.*"[2] The meaning of the second maxim is: "If two persons have equal equitable claims upon or interests in the same subject-matter, or in other words, if each is equally entitled to the protection and aid of a court of equity, *with respect of his equitable interest,* and one of them, in addition to his equity, also obtains the legal estate in the subject-matter, then he who thus has the legal estate will prevail. This precedence of the legal estate might be worked out by the court of

[1] *Ante,* §§ 413–417.

[2] *Ante,* § 414; Rice v. Rice, 2 Drew. 73; see the paragraph referred to for the entire quotation.

equity simply refusing to interfere at all, and thereby leaving the parties to conduct their controversy in a court of law, or in a purely legal action, where, of course, the legal estate alone would be recognized."[3] It follows from these definitions that the entire discussion upon which we are entering involves the three following inquiries: 1. To what estates and interests does the equitable doctrine of priorities not apply, so that they are left completely controlled by the order of time? 2. Under what circumstances are equities "equal," so that they are left controlled by the order of time? and under what circumstances is one of two or more equities *superior* to the others, so that the order of time may be broken in upon, and the equitable doctrine of priorities may control? 3. Under what circumstances, two or more equities being otherwise "equal," *can* the holder of one of them obtain, and *does* he obtain, the legal title, so that the order of time may be disregarded, and the equitable doctrine of priorities may prevail? The full answers to these three questions, in their combination and mutual effects, plainly constitute the entire discussion of the subject.

§ 679. **I. Estates and Interests to Which the Equitable Doctrine Applies. 1. Not to Legal Estates.**— Among purely legal titles to the same subject-matter, successive legal conveyances of and legal estates in the same tract of land, the equitable doctrine of priorities growing out of the presence or absence of notice, or of a valuable consideration, or of any other incident, has absolutely no application nor effect; such legal titles, estates, and interests are, in the absence of any statutory modification, completely controlled, with respect to their priority, by the order of time.[1][a] Even the

[3] *Ante*, § 417; Thorndike v. Hunt, 3 De Gex & J. 563, 570, 571; Caldwell v. Ball, 1 Term Rep. 205, 214; Fitzsimmons v. Ogden, 7 Cranch, 2, 18; Newton v. McLean, 41 Barb. 285.

[1] Gaines v. New Orleans, 6 Wall. 642, 716, per Davis, J.; Ruckman v. Decker, 23 N. J. Eq. 283; Van Amringe v. Morton, 4 Whart. 382; 34 Am. Dec. 517;

(a) The text is quoted in Mac Gregor v. Thompson, 7 Tex. Civ. App. 32, 26 S. W. 649; cited, in Cole v. Mette, 65 Ark. 503, 67 Am. St. Rep. 945; Gordon v. Rixey, 76 Va. 694.

mere want of a valuable consideration in the earlier conveyance would not, at the common law, affect the priority of legal right given by the priority of time.[2]

Wade v. Withington, 1 Allen, 561; Waring v. Smyth, 2 Barb. Ch. 119, 133; 47 Am. Dec. 299; Arrison v. Harmstead, 2 Pa. St. 191, 197; Jones v. Jones, 8 Sim. 633. The truth of this proposition is clearly seen from a consideration of the legal conception of estates at law and of conveyances and charges operating at law; and it will plainly appear that between two claimants of legal estates in the same land, the second one in order of time cannot, in the absence of the statutes concerning registration, avail himself even of the position of *bona fide* purchaser for a valuable consideration and without notice. If A, being owner of a piece of land in fee, conveys it in fee to B, and afterwards executes a deed in fee of the same land to C, at law C can acquire nothing. In contemplation of law, the entire estate passed by the deed to B, and there was no interest left which could be transferred to C, and it could make no possible difference with this result whether C was wholly ignorant of the prior conveyance or was informed of it. Again, if A has no estate at all, or only a defective one, he cannot by a deed convey any more or better estate than he holds himself to B, and it can make no difference whether the defect is open or hidden, or whether B buys with knowledge or in ignorance of it: Arrison v. Harmstead, 2 Pa. St. 191; Ruckman v. Decker, 23 N. J. Eq. 283. These propositions are constantly illustrated in ejectment suits, where the parties are claiming under conflicting legal titles, and both of them are purchasers for value and without notice. In Arrison v. Harmstead, 2 Pa. St. 191, Rogers, J., said: "Where the vendor has nothing to convey, nothing can be acquired by the vendee. One who bought from the grantee in a *voidable* deed *might* be in a better position than a vendor. But the principle did not apply to a sale by a vendor who had no title, or, what came to the same thing, who had avoided the title by his own wrong. A deed acquired surreptitiously without delivery, or altered after delivery, was invalid even in the hands of a *bona fide* purchaser." Again, in an action of ejectment between one who claims under deed or other paper title, and one who claims by adverse possession, the latter's notice of the outstanding paper title would not affect his right injuriously; the titles being legal, the controversy would be decided upon the completeness of the adverse possession, or the validity of the paper title.[b]

[2] If A, owning the land, should convey it as a mere gift to B, by means of a conveyance sufficient in kind and form to transfer the legal estate, and so that no trust should result to himself, and should afterwards execute a deed in fee of the same land to C, who should pay a valuable consideration therefor, C would obtain no interest whatever at the common law. The prior conveyance to B would exhaust and transfer the entire fee, as fully as though a money price had been paid, and no interest would be left upon which C's deed could operate. The fact that C paid value, and was ignorant of the former convey-

[b] That the registration laws do not apply to protect a recorded title against a title by adverse possession, see MacGregor v. Thompson, 7 Tex. Civ. App. 32, 26 S. W. 649, quoting § 679 of the text.

§ 680. Modifications by Statutes concerning Fraudulent Conveyances and Recording.—This rule, otherwise universal, that among successive legal estates or interests in the same subject-matter the order of time controls, has been broken in upon by two classes of statutes, which are, within the scope of their operation, very important. The first of these classes includes that of 27 Eliz., c. 4, by which grants of lands made for the purpose of defrauding subsequent purchasers are declared to be void as against such subsequent purchasers for a valuable consideration, and their representatives; and the statute of 13 Eliz., c. 5, by which conveyances of lands or chattels made for the purpose of delaying or defrauding creditors are declared to be void as against such creditors and their representatives; provided that the act shall not extend to any conveyance made in good faith and for a valuable consideration to a person not having notice of the fraud.[1] The second class embraces the recording acts of the various states, by which it is generally provided that every conveyance of land which is not recorded shall be deemed void as against a subsequent conveyance of the same land, made for a valuable consideration, which shall have been first put on record;[2] and also the similar

ance, could not destroy the legal effect of the prior deed, and create an estate which would pass to C by *his* conveyance. It is entirely the result of statute that C's conveyance *may* under such circumstances obtain the precedence at law.

1 Similar statutes have been enacted in the American states. For the force and effect of these statutes, both English and American, see Twyne's Case, 3 Coke, 80; 1 Smith's Lead. Cas., 7th Am. ed., 33; Sexton v. Wheaton, 8 Wheat. 229; 1 Am. Lead. Cas., 4th Am. ed., 17; Doe v. Manning, 9 East, 59; Pulvertoft v. Pulvertoft, 18 Ves. 84.[a] To these may be added the bankruptcy and insolvency acts in some of the states, which declare certain conveyances and transfers of the bankrupt or insolvent to be void as against his assignee.

2 See *ante*, § 646, and note. It is evident that all questions concerning legal conveyances arising under the recording acts — questions depending upon the fact of recording or not recording, upon the record as notice, and upon the effect of an actual or constructive notice of a prior unrecorded deed given to a subsequent grantee — belong to the law, and do not constitute any part of equity jurisprudence. The estates are legal; the conflicting titles based upon

(a) See also *post*. §§ 968–974.

statutes which postpone the lien of a prior undocketed judgment to that of a subsequent one which has been duly docketed.[c]

§ 681. 2. To Equitable Estates and Interests Alone.— The equitable doctrine concerning priorities resulting from the presence or absence of notice, or of a valuable consideration or other incident, by which a precedence may be given contrary to the mere order of time, applies to conflicting legal and equitable estates or interests in the same subject-matter, and to successive equitable estates, equitable interests such as liens and charges, and mere "equities," meaning thereby purely remedial rights, such as that of cancellation, reformation, and the like; and it applies to no other kind of estates, interests, or rights.[1 a]

§ 682. II. Equitable Doctrine of Priority.— Having thus stated the kind of interests to which alone the equitable doctrine applies, we shall next consider the nature, scope, and operation of the doctrine itself. In all of its phases, in all the instances where it may be invoked, the equitable doctrine concerning priorities is embodied in three most general and fundamental rules: 1. Among successive equi-

recorded and unrecorded deeds, or involving the presence of notice in place of a record, are constantly settled by means of the legal action of ejectment.[b] The effect of the recording acts upon mortgages, on the other hand, belongs to equity jurisprudence, since, in any theory of the mortgage, it creates an equitable estate or interest.

1 Basset v. Nosworthy, Cas. t. Finch, 102; 2 Lead. Cas. Eq. 1, 31, 46; Le Neve v. Le Neve, Amb. 436; 2 Lead. Cas. Eq. 109, 117; Rice v. Rice, 2 Drew. 73; Thorndike v. Hunt, 3 De Gex & J. 563; Cory v. Eyre, 1 De Gex, J. & S. 149, 167; Newton v. Newton, L. R. 6 Eq. 135.

(b) It should be observed, however, that while the recording acts, so far as they deal with legal conveyances, have not enlarged the equitable *jurisdiction*, they have greatly enlarged the field for the application, by courts of law, of the doctrine of *bona fide* purchase. "In the practical operation of this legislation the right created by a prior unrecorded instrument is generally regarded as tantamount to an equitable interest," and the rule which restricts the operation of the doctrine to competing estates or interests of which one at least is equitable, is thus evaded. See *post*, § 758.

(c) See *ante*, §§ 642, 643.

(a) Cited in Cole v. Mette, 65 Ark. 503, 47 S. W. 407, 67 Am. St. Rep. 945; Wales v. Sammis, 120 Iowa, 293, 94 N. W. 840.

table estates or interests, where there exists no special claim, advantage, or superiority in any one over the others, the order of time controls. Under these circumstances, the maxim, Among equal equities the first in order of time prevails, furnishes the rule of decision.[1] [a] 2. Between a legal and equitable title to the same subject-matter, the legal title in general prevails, in pursuance of the maxim, Where there is equal equity the law must prevail.[2] [b] 3. The legal title being outstanding, and not involved in the controversy, where there are successive *unequal* equities in the same subject-matter, as where there is a complete or perfect equitable estate and an incomplete or imperfect one, or a mere "equity," or where, among equitable interests of a like intrinsic nature, one is affected by some incident or quality which renders it inferior to another, then the precedence resulting from order of time is defeated, and the superior equitable estate or interest prevails over the others, as is manifestly implied in the maxim, Where there are *equal* equities the first in order of time must prevail.[3]

§ 683. III. Superior and Equal Equities.— In determining the scope and operation of the foregoing rules, the discussion must largely consist in ascertaining when equities are *equal,* and when one is superior to another. It is impossible to define "equal equities" affirmatively by any exact

[1] Rice v. Rice, 2 Drew. 73; Phillips v. Phillips, 4 De Gex, F. & J. 208, 215, per Lord Westbury; Cory v. Eyre, 1 De Gex, J. & S. 149, 167; Newton v. Newton, L. R. 6 Eq. 135, 140; 4 Ch. 143, 146; Shirras v. Caig, 7 Cranch, 34, 48; Boone v. Chiles, 10 Pet. 177; Watson v. Le Row, 6 Barb. 481, 485; Berry v. Mutual Ins. Co., 2 Johns. Ch. 603, 608; Lynch v. Utica Ins. Co., 18 Wend. 236, 253; Grosvenor v. Allen, 9 Paige, 74, 76; Downer v. Bank, 39 Vt. 25; Bellas v. McCarty, 10 Watts, 13; Kramer v. Arthurs, 7 Pa. St. 165; Sumner v. Waugh, 56 Ill. 531; Pensonneau v. Bleakley, 14 Ill. 15.

[2] Thorndike v. Hunt, 3 De Gex & J. 563, 570, 571; Fitzsimmons v. Ogden, 7 Cranch, 2, 18; Newton v. McLean, 41 Barb. 285; and see *ante,* § 417, cases cited in note.

[3] Basset v. Nosworthy, 2 Lead. Cas. Eq. 1; Le Neve v. Le Neve, 2 Lead. Cas. Eq. 109, 117, 144.

(a) See, also, *post,* § 718.

(b) See, also, Forman v. Brewer, 62 N. J. Eq. 748, 48 Atl. 1012, 90 Am. St. Rep. 475; Hunter v. Lawrence, 11 Gratt. 111, 62 Am. Dec. 640.

formula. It is certainly not enough that two successive equitable interests in the same thing should be of *precisely the same nature,* for even then one might be accompanied by some collateral incident which gave it a precedence over the other without reference to their order of time. When we say that A has a better equity than B, this means that according to those principles of right and justice which a court of equity recognizes and acts upon, it will prefer A to B, and will interfere to enforce the rights of A as against B; and therefore it is impossible that two persons should have equal equities, except in a case in which a court of equity would altogether refuse to lend its assistance to either party as against the other.[1] Two persons have equal equitable interests in the same subject-matter, when each is equally entitled, with respect of his equitable interest, to the protection and aid of a court of equity. When the court is dealing with such successive equitable interests in the same subject-matter, and they are all thus equal, the priority in time determines the priority in right; and the fact that the holder of the subsequent interest, under these circumstances, acquired it without notice of the prior one does not, in general, give him any right to be preferred.[2]

1 See Rice v. Rice, 2 Drew. 73.

2 See *ante,* § 414, note 1, quotation from the opinion of Lord Westbury in Phillips v. Phillips, 4 De Gex, F. & J. 208, 215, which states this rule with great force and clearness. In Cory v. Eyre, 1 De Gex, J. & S. 149, 167, Turner, L. J., said: "Questions of priority between equitable encumbrancers are, in general, governed by the rule, *Qui prior est tempore, potior est jure;* and in determining cases depending on the rule, we must, of course, look at the principle on which the rule is founded. It is founded. as I conceive, on this principle, that the creation or declaration of a trust vests an estate and interest in the subject-matter of the trust in the person in whose favor the trust is created or declared. Where, therefore, it is sought to postpone an equitable title created by declaration of trust, there is an estate or interest to be displaced. No doubt there may be cases so strong as to justify this being done, but there can be as little doubt that a strong case must be required to justify it. A vested estate or interest ought not to be disturbed on any light grounds." In Newton v. Newton, L. R. 6 Eq. 135, 140, Lord Romilly said: "These are simply equitable interests, and in such cases the prior interest must prevail over the subsequent. The fact that the owner of the subsequent equitable interest had no notice of the prior interest when he advanced his

The foregoing description of equal equities is not of much practical value, since it states the effects rather than the nature of equality. We shall, in fact, determine when equities are equal by ascertaining when they are unequal, by learning what qualities or incidents render one equity superior to another equity in the same subject-matter.

money and took his security does not affect the question. He could not take from the person who gave the charge on his interest more than his interest, and he could not give a charge on the interest of another person." This judgment was reversed, on the evidence only, by the court of appeal, but the law as thus laid down by the master of rolls was expressly affirmed: See Cory v. Eyre, L. R. 4 Ch. 143, 146. In Jones v. Jones, 8 Sim. 633, which has been frequently cited with approval, A mortgaged an estate, first to B (who by the English law of course acquired the legal title and received possession of the title deeds), secondly to C, and thirdly to D. C had no notice of the first mortgage. D had notice of the first, but not of the second; and he caused notice of his mortgage to be given to B, who had the legal estate and possession of the title deeds. Held, that he did not thereby acquire priority over C. Shadwell, V. C., stated the rule as follows: "At law, the rule clearly is, that different conveyances of the same tenement take effect according to their priority in time. The effect of different conveyances is the same as if different successive estates were granted by the same conveyance, first in possession and then in remainder. Equity follows the law; and where the legal estate is outstanding, conveyances of the equitable interest are construed and treated, in a court of equity, in the same manner as conveyances of the legal estate are construed and treated at law. In Beckett v. Cordley, 1 Brown Ch. 353 (which Lord Eldon notices in Martinez v. Cooper, 2 Russ. 214), Lord Thurlow twice decided that, where the legal estate was outstanding in a first mortgagee, of two subsequent equitable encumbrancers, he who is prior in time must be prior in equity. His words are: 'The second equitable encumbrancer had the security he trusted to. He knew he had not the legal estate. He trusted to the honor of the borrower!'" These decisions, and the reasoning upon which they are based, show that one who purchases an equitable estate, or acquires an equitable interest, obtains only the right of his own vendor; the facts of his paying value and of not having notice do not of themselves entitle him to take precedence over a prior vendee or encumbrancer; some quality imparting to his estate or interest an intrinsic superiority would be necessary to give him a preference: See Boone v. Chiles, 10 Pet. 177; Shirras v. Caig, 7 Cranch, 34, 48; Watson v. Le Row, 6 Barb. 481, 485; Bellas v. McCarty, 10 Watts, 13; Kramer v. Arthurs, 7 Pa. St. 165; Sumner v. Waugh, 56 Ill. 531; Pensonneau v. Bleakley, 14 Ill. 15.[a] The recording acts may modify the operation of the

(a) **Purchaser of Equitable Estate or Interest not Protected as a Bona Fide Purchaser.**— Thus, the assignee of a contract for the purchase of lands, the legal title of which is outstanding, takes it subject to equities: Taylor v. Weston, 77 Cal. 534, 20 Pac. 62 (certificate of purchase of

§ 684. Superior Equities Defined.— It may be stated that, so far as their intrinsic nature is concerned, a court of equity recognizes no inequality, based upon their form and mode of creation, among all perfected equitable interests based upon a valuable consideration and arising in any manner by which, in contemplation of equity, an interest in the very thing itself — the land, the chattels, or the fund — is created. If there is a valuable consideration, and an equitable interest in the very subject-matter itself *has been perfected,* it does not seem to affect their equalities, whether such interest arose from a declaration of trust, from an assignment, from a contract express or implied, or from acts such as the deposit of title deeds. A valuable consideration is, however, a most important element. The whole history and scope of equity jurisprudence show that a valuable consideration is always regarded as a most essential requisite to the existence of complete equitable es-

equitable rule in this country, because they give to a recorded mortgage or other equitable encumbrance the very quality which imparts to it an intrinsic superiority, under the statute, over one which is not recorded.

public lands); Jasper County v. Tavis, 76 Mo. 13 (same); York v. McNutt, 16 Tex. 13, 67 Am. Dec. 607 (assignment of bond for title, the consideration of which was illegal); Morehead v. Horner, 30 W. Va. 548, 4 S. E. 448. See, also, Overall v. Taylor, (Ala.) 11 South. 738; Polk v. Gallant, 2 Dev. & B. Eq. (N. C.) 395, 34 Am. Dec. 410; Craig v. Leiper, 2 Yerg. (Tenn.) 193, 24 Am. Dec. 479; National Oil & Pipe Line Co. v. Teel, 95 Tex. 586, 68 S. W. 979, (Tex. Civ. App.) 67 S. W. 545; Shoufe v. Griffiths, 4 Wash. 161, 30 Pac. 93, 31 Am. St. Rep. 910; Wilson v. Morrell, 5 Wash. 654, 32 Pac. 733; Lowther Oil Co. v. Miller-Sibley Oil Co., 53 W. Va. 501, 97 Am. St. Rep. 1027, 44 S. E. 433. As to whether this principle applies to the purchaser at execution sale, or his assignee, who has received the sheriff's certificate of purchase but has not completed the purchase by obtaining the deed, the cases are in conflict; some holding that his interest under the certificate is an equitable one, and not entitled to protection: Reynolds v. Harris, 14 Cal. 667, 76 Am. Dec. 459; Singley v. Warren, 18 Wash. 434, 444, 51 Pac. 1066, 63 Am. St. Rep. 896; Bruschke v. Wright, 166 Ill. 183, 57 Am. St. Rep. 125, 46 N. E. 813; others, that it is not merely an equitable, but an "inchoate legal" title, to which the principle of *bona fide* purchase should apply: Halley v. Oldham, 5 B. Mon. (Ky.) 233, 41 Am. Dec. 262; Duff v. Randall, 116 Cal. 226, 48 Pac. 66, 58 Am. St. Rep. 158. See, also, Maroney v. Boyle, 141 N. Y. 462, 36 N. E. 511, 38 Am. St. Rep. 821.

tates and interests of all kinds. Assuming this conclusion as generally, if not even universally, true, the various causes which will render one equity superior to another may be formulated in three general rules. It will be seen that the first of these rules relates to the intrinsic nature of the two interests which are compared;[a] the second relates, not to their nature, but to a quality inseparably connected with them, and constituting the occasion for their existence; the third relates neither to their nature nor qualities, but to a mere external or collateral incident affecting them at their origin. These three rules are as follows:—

§ 685. 1. **Nature of the Equities.**— The equitable interest created by a trust, or by a contract *in rem*, made upon a valuable consideration, is superior to the equity arising from a mere voluntary transfer, a mere gift, or from a mere judgment lien. In contemplation of equity, the interest created by a trust, or by a valid executory contract of sale, or by a valid contract giving rise to a lien, or by an act in connection with such a contract constituting a lien, — as, for example, a deposit of title deeds,— is a real, beneficial interest *in the specific thing itself*,— an interest which is property, or analogous to property;[1] and although such interest is not recognized by the law, it is treated by courts of equity as actually subsisting, and as binding upon the conscience of the original party who held the thing and who created the interest.[2] On the other hand, while the interest acquired by a transfer without consideration, by a voluntary gift, *may* be protected if it does not interfere with third persons, yet the voluntary transferee or donee

1 This is the fundamental distinction between the legal and the equitable view of executory contracts concerning some specific subject-matter: See *ante*, §§ 146–149, 161.

2 See the quotation from Cory v. Eyre, 1 De Gex, J. & S. 149, 167, *ante*, under § 683.

(a) This paragraph is cited in Martin v. Bowen, 51 N. J. Eq. 452, 26 Atl. 823, concerning the inferiority of judgment liens: see *post*, §§ 685, 721.

can only receive whatever interest the donor was actually entitled in conscience and good faith to bestow; he never obtains, even as against the donor, and much less as against third persons dealing with the donor in respect to the same thing, any paramount right of his own. The consideration on the one side, and the absence of it on the other, lie at the very bottom of the equitable theory concerning actual rights.[3] [a] The lien of a judgment is analogous to the claim of a donee; it is general, not specific. The beneficiary under a trust, the vendee under an agreement, the holder of a lien created by a contract *in rem*, deals concerning a specific thing; he parts with the consideration upon the security of that specific thing; he obtains an equitable interest in that specific thing. The judgment creditor has not dealt with that specific thing; he has not parted with value in contemplation of it; his lien is general, and not confined to it. It is just, therefore, that, so far as their intrinsic natures are concerned, his claim should be considered as inferior to the interest arising from a trust or from a contract *in rem*. His lien only extends to what his debtor really has, — that is, to the thing subject to all the equities in it existing at the date of the judgment.[4] [b]

[3] Green v. Givan, 33 N. Y. 343.

[4] It is settled in England, in accordance with this rule, that the interest of a *cestui que trust*, of the vendee under an executory contract, and of an equitable mortgagee by contract or by deposit of title deeds, is superior to that of a subsequent judgment against the trustee, vendor, or mortgagor, even though the legal estate may have been acquired under the judgment by means of an *elegit:* Newlands v. Paynter, 4 Mylne & C. 408; Lodge v. Lyseley, 4 Sim. 70; Langton v. Horton, 1 Hare, 549, 560; Whitworth v. Gaugain, 3 Hare, 416; 1 Phill. Ch. 728. This particular rule has been modified or altered by statute in several of the states. See *post*, §§ 721–724, where this subject is more fully examined.

(a) See, also, *post*, § 691.

(b) This paragraph of the text is quoted *in toto* in Harney v. First Nat. Bank, 52 N. J. Eq. 697, 29 Atl. 221; cited, in McAdow v. Wachob, (Fla.) 33 South. 702; both cases concerning the inferiority of judgment liens; Gates Iron Works v. Cohen, 7 Colo. App. 341, 43 Pac. 667.

§ 686. 2. Effects of Fraud.[a]— The equity acquired by a party who has been misled is superior to the interest in the same subject-matter of the one who willfully procured or suffered him to be thus misled. The following example illustrates the operation of this rule, and the principle underlying it may be generalized and applied to all analogous cases. A, being about to part with value to B upon the security of B's estate, informs C of his intention, and asks C whether he has any encumbrance on the estate; C denies that he has any, and A, relying upon this denial, parts with money or other value to B; in fact, C had at the time a mortgage or other encumbrance upon the estate; this mortgage or lien, although prior in time, would, by reason of C's fraud, be postponed to the subsequent interest acquired by A. The basis of this rule is the conduct which equity regards as constituting fraud, either an actual intention to mislead, or that gross negligence which produces all the effects and merits all the blame of intentional deception.[1 b] It is not, however, necessary that the party

[1] The rule is thus stated in 1 Fonblanque's Equity, 64: "If a man, by the suppression of the truth which he was bound to communicate, or by the suggestion of a falsehood, be the cause of prejudice to another who had a right to a full and correct representation of the fact, it is certainly agreeable to the dictates of good conscience that his claim should be postponed to that of the person whose confidence was induced by his representation": Berrisford v. Milward, 2 Atk. 49; Beckett v. Cordley, 1 Brown Ch. 353, 357; Pearson v. Morgan, 2 Brown Ch. 384, 388; Mocatta v. Murgatroyd, 1 P. Wms. 393, 394; Evans v. Bicknell, 6 Ves. 174, 182, 183; Plumb v. Fluitt, 2 Anstr. 432; Lee v. Munroe, 7 Cranch, 366; Wendell v. Van Rensselaer, 1 Johns. Ch. 344, 354; Storrs v. Barker, 6 Johns. Ch. 166, 168; 10 Am. Dec. 316; Otis v. Sill, 8 Barb. 102; Lesley v. Johnson, 41 Barb. 359; Crocker v. Crocker, 31 N. Y. 500; Lee v. Kirkpatrick, 14 N. J. Eq. 264; McKelvey v. Truby, 4 Watts & S. 323; Folk v. Beidelman, 6 Watts, 339; Schmitheimer v. Eiseman, 7 Bush, 298; Chapman v. Hamilton, 19 Ala. 121.

(a) See, also, *post*, §§ 731, 732.

(b) The text is cited in Hooper v. Central Trust Co., 81 Md. 559, 32 Atl. 505, 29 L. R. A. 262, where, by means of fraudulent representations, the holder of one lien had been induced to postpone it to another, and the priority of the former was established on account of the fraud. See, also, Miller v. Merine, 43 Fed. 261; Wilson v. Hicks, 40 Ohio St. 419; Brown v. Kuhn, 40 Ohio St. 468; Heidenheimer v. Stewart, 65 Tex. 321.

having an interest or title, under such circumstances, when applied to, should use positive misrepresentations or expressly deny the existence of his right; it is sufficient if he refrain from disclosing his claim, and suffer a third person to deal with the property as his own, or to acquire an interest in or lien upon it; he will not be permitted to set up or enforce his interest in preference to that obtained by the person whom he has suffered to be misled by his silence.[2]

§ 687. And of Negligence.[a]— The rule extends to gross negligence, which is tantamount in its effects to fraud. An equity otherwise equal, or even prior in point of time, may, through the gross laches of its holder, be postponed to a subsequent interest which another person was enabled to acquire by means of such negligence.[1 b] To admit the operation of this rule in either of its phases, and to displace

[2] Nicholson v. Hooper, 4 Mylne & C. 179; Wendell v. Van Rensselaer, 1 Johns. Ch. 344, 354; Storrs v. Barker, 6 Johns. Ch. 166, 168, 169–172; 10 Am. Dec. 316; Bright v. Boyd, 1 Story, 478. The same rule applies when, under like circumstances, a party having a prior claim knowingly permits another person to expend money on an estate or to make improvements upon it, without disclosing his own interest: Pilling v. Armitage, 12 Ves. 78, 84, 85; Cawdor v. Lewis, 1 Younge & C. 427; Williams v. Earl of Jersey, Craig & P. 91; Chautauque Co. Bank v. White, 6 Barb. 589; Bright v. Boyd, 1 Story, 478; Carr v. Wallace, 7 Watts, 394, 400.

[1] For example, A, a mortgagee of a leasehold estate, having the lease in his possession, loaned it to the mortgagor for the purpose of enabling him to obtain a further loan upon its security, but told the mortgagor to inform the person of whom he should borrow the money that he, A, had a prior lien. The mortgagor borrowed a sum from his bankers and deposited the lease with them as security, without informing them of A's mortgage. It was held that as A's gross negligence had enabled the mortgagor to perpetrate the fraud, his mortgage must be postponed to the lien of the bankers:[c] Briggs v. Jones, L. R. 10 Eq. 92; Perry Herrick v. Attwood, 2 De Gex & J. 21; Lloyd v. Attwood, 3 De Gex & J. 614; Waldron v. Sloper, 1 Drew. 193. See Fisher v. Knox, 13 Pa. St. 622; 53 Am. Dec. 503; Campbell's Appeal, 29 Pa. St. 401; Garland v. Harrison, 17 Mo. 282.

(a) See, also, *post*, §§ 731, 732. This paragraph of the text is cited in Dunman v. Coleman, 59 Tex. 199, 67 Tex. 390, 3 S. W. 319.

(b) See Frost v. Wolf, 77 Tex. 455, 14 S. W. 440, 19 Am. St. Rep. 761, where the holder of an earlier equitable title was postponed by reason of his failure to assert it for many years.

(c) So, where prior equitable mortgagees (debenture holders) had left

the otherwise natural order of priority, there must be intentional deceit,— that is, intentional misrepresentation or suppression of the truth,— or else gross negligence. In the one case, the party possessing the claim which it is sought to postpone must both know of his own right and also of the other person's intention to acquire, or of his acts in acquiring, an interest in the same subject-matter. In the other case there must be gross laches, for mere carelessness or ordinary negligence will not suffice according to the weight of modern authority.[2 d]

§ 688. 3. Effects of Notice — Illustrations.— The third, and in its practical effects by far the most important, rule is, that a party taking with notice of an equity takes subject

[2] Hewitt v. Loosemore, 9 Hare, 449, 458; Colyer v. Finch, 5 H. L. Cas. 905; and see cases on the subject of constructive notice from a neglect to make sufficient inquiry, *ante*, §§ 606, 612.

the title deeds with the company so as to enable it to deal with its property as if it had not been encumbered, they could not set up their prior charge against a subsequent equitable mortgage to a bank, which had not been guilty of negligence: In re Castell & Brown, [1898] 1 Ch. 315, 67 Law J. Ch. 169, 78 Law T. (N. S.) 109, 46 Wkly. Rep. 248; followed in In re Valletort Sanitary Steam Laundry Co., [1903] 2 Ch. 654. See also the analogous case of Heyder v. Excelsior B. & L. Assn., 42 N. J. Eq. 403, 8 Atl. 310, 59 Am. Rep. 49, where a mortgage was cancelled of record by reason of the mortgagee's negligence in permitting it to remain in the custody and control of the mortgagor.

In support of the general principle of the text, see also this important series of English cases: Clarke v. Palmer, L. R. 21 Ch. Div. 124; Northern Counties, etc., Co. v. Whipp, L. R. 26 Ch. Div. 482 (a very leading case); Lloyd's Bank Co. v. Jones, L. R. 29 Ch. Div. 221, 227; Manners v. Mew, L. R. 29 Ch. Div. 725; National Provincial Bank v. Jackson, L. R. 33 Ch. Div. 1; Farrand v. Yorkshire Banking Co., L. R. 40 Ch. Div. 182; In re Ingham, [1893] 1 Ch. 352; Brocklesby v. Temperance Permanent Building Society, [1895] A. C. 173, affirming [1893] 3 Ch. 130; Taylor v. London and County Banking Co., [1901] 2 Ch. 231, 260ff.

(d) In Farrand v. Yorkshire Banking Co., L. R. 40 Ch. Div. 182, the rule was settled that in order to postpone an equitable mortgagee to another equitable mortgagee, whose security is of a later date, it is not necessary to show that the first mortgagee has been guilty of negligence amounting to fraud. In this case the first mortgagee neglected for many years to call for the title deeds, so that the mortgagor was able to make a second mortgage by deposit of the deeds.

to that equity. The full meaning of this most just rule is, that the purchaser of an estate or interest, legal or equitable, even for a valuable consideration, with notice of any existing equitable estate, interest, claim, or right, in or to the same subject-matter, held by a third person, is liable in equity to the same extent and in the same manner as the person from whom he made the purchase; his conscience is equally bound with that of his vendor, and he acquires only what his vendor can honestly transfer.[1] [a] The applications of this rule are as numerous as are the various kinds of equitable interests. The following are some of the most important: A purchaser with notice of a trust, either express or implied, becomes himself a trustee for the beneficiary with respect of the property, and is bound in the same manner as the original trustee from whom he purchased.[2] [b] A purchaser or mortgagee with notice of the

1 Le Neve v. Le Neve, Amb. 436 (see extract from opinion of Lord Hardwicke, *ante*, § 591). For American cases, see preceding section on notice.

2 Burgess v. Wheate, 1 Eden, 177, 195; Bovey v. Smith, 1 Vern. 144; Saunders v. Dehew, 2 Vern. 271; Wigg v. Wigg, 1 Atk. 382; Mead v. Lord Orrery,

(a) This paragraph of the text is quoted in Dunman v. Coleman, 59 Tex. 199, 67 Tex. 390, 3 S. W. 319; cited in Tate v. Pensacola Gulf, L. & D. Co., 37 Fla. 439, 20 South. 542, 53 Am. St. Rep. 251; Indiana, I. & I. R. Co. v. Swannell, 157 Ill. 616, 41 N. E. 989, 30 L. R. A. 290; Malone's Committee v. Lebus, (Ky.) 77 S. W. 180; Peay v. Seigler, 48 S. C. 496, 59 Am. St. Rep. 731, 26 S. E. 885. See, also, McCone v. Courser, 64 N. H. 506, 15 Atl. 129.

The patentee of government land with notice of the equitable right of a prior locator in whose application for the land it was by mistake misdescribed, takes the legal title in trust for the equitable owner: Widdicombe v. Childers, 84 Mo. 382; Sensenderfer v. Kemp, 83 Mo. 581.

For relief against purchasers with notice of *mistake*, see Simpson v. Montgomery, 25 Ark. 365, 99 Am. Dec. 228; Snyder v. Partridge, 138 Ill. 173, 29 N. E. 851, 32 Am. St. Rep. 130; Smith v. Sweigerer, 129 Ind. 363, 28 N. E. 696 (mistake of omission in description of land reformed against purchaser with notice); Ferguson v. Glassford, 68 Mich. 36, 35 N. W. 820 (purchaser with notice of mistake in discharge of mortgage).

Purchaser with notice of deed of trust cancelled without authority: Connecticut Gen. Life Ins. Co. v. Eldridge, 102 U. S. 545.

(b) The text is cited in Indiana, I. & I. R. Co. v. Swannell, 157 Ill. 616, 41 N. E. 989, 30 L. R. A. 290;

equitable lien of a vendor for unpaid purchase price takes the land subject to that lien.[3 c] A purchaser or mortgagee of the legal estate, with notice of an equitable lien created by a deposit of title deeds, or by a prior defective mortgage, or by any other means from which an equitable lien can arise, is bound by the lien.[4 d] A purchaser with notice of a prior contract to sell or to lease takes subject to such contract, and is bound in the same manner as his vendor to carry it into execution.[5 e] These examples are of ordinary occurrence.

3 Atk. 235, 238; Mansell v. Mansell, 2 P. Wms. 672, 681; Mackreth v. Symmons, 15 Ves. 329, 350; Phayre v. Peree, 3 Dow, 116, 129; Adair v. Shaw, 1 Schoales & L. 248, 262; Dunbar v. Tredennick, 2 Ball & B. 304, 319; Pindall v. Trevor, 30 Ark. 249.

3 Mackreth v. Symmons, 15 Ves. 329, 350; Grant v. Mills, 2 Ves. & B. 306.

4 Birch v. Ellames, 2 Anstr. 427; Jennings v. Moore, 2 Vern. 609.

5 Merry v. Abney, 1 Cas. Ch. 38; Ferrars v. Cherry, 2 Vern. 383; Daniels v. Davison, 16 Ves. 249; Crofton v. Ormsby, 2 Schoales & L. 583; Kennedy v. Daly, 1 Schoales & L. 355; Field v. Boland, 1 Dru. & Walsh, 37; Potter v. Sanders, 6 Hare, 1; Greaves v. Tofield, L. R. 14 Ch. Div. 563, 577, per Bramwell, L. J.

First Nat. Bank v. Leech, 207 Ill. 215, 69 N. E. 890.

See, also, *post*, § 1048; Randolph v. East Birmingham L. Co., 104 Ala. 355, 16 South. 126, 53 Am. St. Rep. 64; Drake v. Thyng, 37 Ark. 228 (constructive trust from sale of partnership property by partner without authority); Cavagnaro v. Don, 63 Cal. 227; Gilbert v. Sleeper, 71 Cal. 290, 12 Pac. 172; Carmichael v. Foster, 69 Ga. 372; Shuey v. Latta, 90 Ind. 136; Sleeper v. Iselin, 62 Iowa 583, 17 N. W. 922; Priest v. Chouteau, 85 Mo. 398, 55 Am. Rep. 373 (one taking mortgage of partnership property, with notice, to secure individual debt of partner); Tankard v. Tankard, 84 N. C. 286; Wetmore v. Porter, 92 N. Y. 77 (purchaser from trustee, with notice, takes subject to right not only of *cestui que trust*, but of trustee, to recover the trust property); Dodge v. Stevens, 94 N. Y. 209 (mortgagee with notice); Hobson v. Whitlaw, 80 Va. 784. In general, as to the rights of purchasers from a trustee with power of sale, see note to Day v. Brenton, 102 Iowa, 482, 71 N. W. 538, 63 Am. St. Rep. 460.

(c) See, also, *post*, § 1253; Poe v. Paxton, 26 W. Va. 607.

(d) See, also, Malone's Committee v. Lebus, 25 Ky. Law Rep. 1146, 77 S. W. 180 (equitable lien reserved in a recorded deed); Dunman v. Coleman, 59 Tex. 199, 67 Tex. 390, 3 S. W. 319.

(e) See, also, Union Pac. R'y v. McAlpine, 129 U. S. 309, 314, 9 Sup. Ct. 286; Gore v. Condon, 82 Md. 649, 33 Atl. 261; Thompson v. Henry, 85 Mo. 451; Whitehorn v. Cranz, 20 Nebr. 392, 30 N. W. 406; Veitte v. McMurtry, 26 Nebr. 341, 42 N. W. 6;

§ 689. **Notice of a Prior Covenant.**— On the same principle, if the owner of land enters into a covenant concerning the land, concerning its use, subjecting it to easements or personal servitudes, and the like, and the land is afterwards conveyed or sold to one who has notice of the covenant, the grantee or purchaser will take the premises bound by the covenant, and will be compelled in equity either to specifically execute it, or will be restrained from violating it; and it makes no difference whatever, with respect to this liability in equity, whether the covenant is or is not one which in law "runs with the land."[1][a] Notice, although a

[1] Whatman v. Gibson, 9 Sim. 196; Schreiber v. Creed, 10 Sim. 9; Tulk v. Moxhay, 11 Beav. 571; 2 Phill. Ch. 774, 777, per Lord Cottenham, holding that a covenant between a vendor and purchaser that the latter and his assigns shall use or abstain from using the land in a particular way will be enforced in equity against purchasers with notice, without regard to the question whether it runs with the land; also explaining and correcting language used in Keppell v. Bailey, 2 Mylne & K. 517; Duke of Bedford v. Trustees etc., 2 Mylne & K. 552; Coles v. Sims, 5 De Gex, M. & G. 1, 8 (covenant prohibiting building except in a specified manner); Moxhay v. Inderwick, 1 De Gex & S. 708; Western v. McDermot, L. R. 1 Eq. 499; 2 Ch. 72 (covenant by owners of adjoining houses to use their gardens in a certain manner); Clements v. Welles, L. R. 1 Eq. 200 (covenant by a lessee not to carry on a particular trade is binding on his under-lessee and on assignee of the under-lessee); Morland v. Cook, L. R. 6 Eq. 252 (purchaser bound by constructive notice of a covenant to keep up a sea-wall made between vendor and adjoining owners of lands on the sea-shore); Davies v. Sear, L. R. 7 Eq. 427 (purchaser bound by constructive notice of a right of way by implication); Feilden v. Slater, L. R. 7 Eq. 523 (a conveyance contained a covenant by the grantee not to use the premises "as an inn, public house, or for the sale of spirituous liquors"; a lessee from the grantee was held bound by such covenant); Wilson v. Hart, 2 Hem. & M. 551; 11 Jur., N. S., 735; L. R. 1 Ch. 463 (a grantee covenanted that "no building erected or

Borough of Woodbridge v. Borough of Carlstadt, 60 N. J. Eq. 1, 46 Atl. 540; Hunter v. McDevitt, (N. Dak.) 97 N. W. 869. See, also, Pomeroy's "Equitable Remedies," chap. "Specific Performance."

(a) The text is quoted in Willoughby v. Lawrence, 116 Ill. 11, 4 N. E. 356, 56 Am. Rep. 758; cited, in Sharp v. Cheatham, 88 Mo. 498, 57 Am. Rep. 433. See, also, Gilmer v. Mobile, etc., R'y Co., 79 Ala. 569, 58 Am. Rep. 623; Halle v. Newbold, 69 Md. 265, 14 Atl. 662; Newbold v. Peabody Heights Co., 70 Md. 493, 17 Atl. 372, 3 L. R. A. 579; Shields v. Titus, 46 Ohio St. 528, 22 N. E. 717. For further treatment of this subject, see §§ 1295, 1342, and Pomeroy's Equitable Remedies, "Injunction against Breach of Contract."

collateral incident, is thus perhaps the most powerful element in creating a superiority, and in disturbing an order of priority which would otherwise have existed. It may destroy the precedence which a legal estate ordinarily has over an equitable one; it may operate as well between legal and equitable estates in the same thing as between successive estates or interests which are purely equitable.

§ 690. 1. **What is Notice.**— In the further discussion of this rule in its general form, three questions are to be con-

to be erected on the" premises should be used as a beer-shop, etc., the covenantor's *assigns not being named;* this covenant held binding on an assignee of the grantee); Keates v. Lyon, L. R. 4 Ch. 218, 224 (expressly recognizes all these decisions, but holds that the assignee was not bound, because the covenant was personal, not running with the land, *and he had no notice of it,* either actual or constructive); Cooke v. Chilcott, L. R. 3 Ch. Div. 694 (a grantee of land, on which was a spring, covenanted to erect a pump and reservoir on said land, and to supply water to houses to be erected on the grantor's adjoining land; held, that whether this covenant ran with the land or not, a purchaser from the grantee with notice of it was bound by it, and his violation would be restrained by a mandatory injunction); Richards v. Revitt, L. R. 7 Ch. Div. 224 (covenant not to carry on certain trades); Luker v. Dennis, L. R. 7 Ch. Div. 227 (covenant by the lessee of a public house that he would buy all the beer consumed in that house, and also in another house rented from a different person, from the lessor, who was a brewer; held binding in equity upon the assignee of the second-named public house, who had notice of the covenant); Keppell v. Bailey, 2 Mylne & K. 517 (declared to have been repeatedly overruled); Parker v. Nightingale, 6 Allen, 341, 344; 83 Am. Dec. 632; Whitney v. Union Railway, 11 Gray, 359, 364; 71 Am. Dec. 715, per Bigelow, J.: "The precise form or nature of the covenant or agreement is quite immaterial. It is not essential that it should run with the land. A personal covenant or agreement will be held valid and binding in equity on a purchaser taking the estate with notice. It is not binding on him merely because he stands *as an assignee* of the party who made the agreement, but because he has taken the estate with notice of a valid agreement concerning it, which he cannot equitably refuse to perform": Barrow v. Richard, 8 Paige, 351; 35 Am. Dec. 713; Hills v. Miller, 3 Paige, 254; 24 Am. Dec. 218; Trustees etc. v. Cowen, 4 Paige, 510; 27 Am. Dec. 80; Wolfe v. Frost, 4 Sand. Ch. 72; Brouwer v. Jones, 23 Barb. 153; Tallmadge v. East River Bank, 26 N. Y. 105; Gibert v. Peteler, 38 N. Y. 165; 97 Am. Dec. 785; 38 Barb. 488; Phœnix Ins. Co. v. Continental Ins. Co., 14 Abb. Pr., N. S., 266; Trustees etc. v. Lynch, 70 N. Y. 440, 449–452; 26 Am. Rep. 615 (in this case the question is elaborately discussed, and many of the authorities are examined by Allen, J.); Lattimer v. Livermore, 72 N. Y. 174; Greene v. Creighton, 7 R. I. 1; Kirkpatrick v. Peshine, 24 N. J. Eq. 206; Winfield v. Henning, 21 N. J. Eq. 188; St. Andrew's Church's Appeal, 67 Pa. St. 512; Norfleet v. Cromwell, 70 N. C. 634; 16 Am. Rep. 787.

sidered: What is notice? at what time must it be received? and of what must it notify the party receiving it? The first of these questions, What is notice? has been fully examined in the preceding section. It is important to remember that actual notice, and constructive notice in any one of its varieties, produce exactly the same effects upon the equitable rights and liabilities of the party charged thereby; the general rule under consideration equally includes both kinds within its operation.[1]

§ 691. 2. Time of the Notice.— At what time must notice be given to a party so that his right may be subordinate to the equity of which he is actually or constructively informed? In answering this question, the two following rules, already stated, must constantly be borne in mind: that among purely equitable interests which are equal, the order of time controls, so that the absence of notice cannot give a subsequent equity any precedence over a prior one of equal standing; and that a trust or equity created by a contract *in rem* is superior to the interest acquired under a voluntary conveyance or transfer. It is plain, then, that the facts of the subsequent estate, being legal rather than equitable, and of a valuable consideration having been actually paid, must play a most important part in determining the proper time of giving the notice. In the first place, therefore, the decisions, both English and American, are all agreed that the notice received before the party has actually paid the money or parted with the other valuable consideration is a valid and binding notice, and subjects his interest to the prior equity of which he is thereby notified; and this is true even though he has already taken a conveyance of the legal title and has given security for the purchase price even by an instrument under seal.[1] The reason

§ 690, [1] See *ante*, sec. v., §§ 591–676.

§ 691, [1] More v. Mahow, 1 Cas. Ch. 34; Jones v. Stanley, 2 Eq. Cas. Abr. 685, pl. 9; Story v. Lord Windsor, 2 Atk. 630; Tourville v. Naish, 3 P. Wms. 306; Collinson v. Lister, 7 De Gex, M. & G. 634; 20 Beav. 356; Wigg v. Wigg, 1 Atk. 382, 384; Tildesley v. Lodge, 3 Smale & G. 543; Rayne v. Baker,

is, that the conveyance of the legal estate is, under such circumstances, a voluntary one, because the agreement to pay the price, and the security given therefor, are in reality mere nullities.[a] Although, originally, the party might have had no defense at law against a recovery of the amount agreed to be paid, he always had ample relief in a court of equity, which would decree the surrender and cancellation of the security, and perpetually enjoin any action at law for the price. In most of the American states the defense of a total failure of the consideration, under such circumstances, would now be available at law.[2] The rule as settled in England goes farther than this. It makes the notice binding upon the party if he receives it prior to his obtaining the title by conveyance, although he may have parted with a valuable consideration before such notice. In other words, in order to be free from the effects of the notice, the party must have both paid the consideration and obtained the estate, before it was communicated.[3] In the United States a different, and as it seems to me more just, rule has generally been established, that where the estate subsequently purchased is the *legal* estate, a notice, in order to be binding, must be received before the purchaser pays the price or parts with the other valuable consideration. In other words, if he actually pays the valuable consideration without any notice, a notice afterwards given does not

1 Giff. 241; Flagg v. Mann, 2 Sum. 486; Murray v. Ballou, 1 Johns. Ch. 566; Penfield v. Dunbar, 64 Barb. 239; Farmers' Loan Co. v. Maltby, 8 Paige, 361; Haughwout v. Murphy, 21 N. J. Eq. 118; Union Canal Co. v. Young, 1 Whart. 410, 432; 30 Am. Dec. 212; Patten v. Moore, 32 N. H. 382; Palmer v. Williams, 24 Mich. 328, 333; Blanchard v. Tyler, 12 Mich. 339; 86 Am. Dec. 57; Wilson v. Hunter, 30 Ind. 466; Keys v. Test, 33 Ill. 316; Brown v. Welch, 18 Ill. 343; 68 Am. Dec. 549; Bennett v. Titherington, 6 Bush, 192; Wells v. Morrow, 38 Ala. 125. See *post*, §§ 750, 755.

2 Ibid.

3 Wigg v. Wigg, 1 Atk. 382, 384; Sharpe v. Foy, L. R. 4 Ch. 35, 40; Tildesley v. Lodge, 3 Smale & G. 543; Rayne v. Baker, 1 Giff. 241; see *post*, § 755.

(a) This passage of the text is quoted in Hayden v. Charter Oak Driving Park, 63 Conn. 142, 27 Atl. 232. The text is cited in Halloran v. Holmes (N. Dak.), 101 N. W. 310.

preclude him from completing the transaction, obtaining a conveyance of the legal title, and thereby securing the precedence due to a *bona fide* purchaser for a valuable consideration and without notice.[4] It should be carefully observed, however, that, notwithstanding this latter rule, upon the well-settled doctrines of equity, independently of modifying statutes, if the subsequent purchase is of an *equitable* interest merely, without the legal title, a payment of valuable consideration without notice cannot of itself give the purchaser the precedence over a prior equity of an equal standing; the parting of value without notice does not alone constitute a superiority among successive equities so as to disturb the priority determined by order of time.[b]

§ 692. 3. Of What the Notice must Consist.—It is not true that a notice of any and every species of right or claim will thus affect and subordinate the estate of the party receiving it. The notice required by the general rule under consideration must be of an actual equity, of something which equity regards as an interest in the subject-matter itself, although such may not be its nature in contemplation of the law.[1] [a] Furthermore, this interest must be of such a character, that if it were clothed, in the hands of its holder, with a legal title, it would be indefeasible. The fact that an interest is equitable shall not render it liable to be defeated by a party with notice of it, provided it would be indefeasible if legal. On the other hand, notice of a legal interest which is defeasible, or of an equitable interest which, if legal, would be defeasible, does not bind the party receiving it, nor sub-

[4] See *post*, §§ 750, 755, and cases cited.

[1] For equity in many cases recognizes a real interest in the specific subject-matter,— land or chattels,— where the law only admits a mere *personal* right or liability. This difference of conceptions is vital throughout the whole domain of equity jurisprudence.

(b) See *ante*, § 683, notes, and cases cited.

(a) Notice of a contract void under the statute of frauds (Van Cloostere v. Logan, 149 Ill. 588, 36 N. E. 946), or void as against public policy (Everett v. Todd, 19 Colo. 322, 35 Pac. 544) does not bind the purchaser.

ordinate the estate in his hands.[2] The general rule as to the effect of notice must therefore include all trust estates express or implied, the equitable estate of the vendee in a contract for the sale of land, the equitable estate arising from the doctrine of conversion, equitable mortgages, liens, and charges, covenants creating equitable easements and servitudes,[b] and the like. Notice, however, of a prior conveyance made with intent to defraud subsequent purchasers, and declared void by the statute, will not affect the rights of a subsequent purchaser for value,[3] nor of a prior contract which the purchaser had *ab initio* a right to nullify.[4] [c] Prior unrecorded conveyances and mortgages may appear to be exceptions to this rule, but are not in reality.[5] Having thus explained the fundamental principles upon which the equitable doctrine of priorities is based, I shall now describe some of the most important classes of cases in which these principles are applied.

§ 693. Second. Applications of These Principles — Assignments of Things in Action.— Where the creditor party in a thing in action assigns the debt to successive assignees, where a fund being held under a trust the *cestui que trust* assigns his interest therein to successive assignees, and where a person entitled thereto makes successive equitable

2 See Adams's Equity, 152 (323).

3 Pulvertoft v. Pulvertoft, 18 Ves. 84; Buckle v. Mitchell, 18 Ves. 100.

4 Lufkin v. Nunn, 11 Ves. 170.

5 They are apparent exceptions, because the prior unrecorded conveyances and mortgages are declared by the statute to be void as against subsequent purchasers whose deeds or mortgages are recorded, and the estates created by them appear therefore to be defeasible. They are not real exceptions, because by the judicial interpretation, which has even been incorporated into most of the modern American statutes, the chief object of the registry is to give a constructive notice, and a notice of any other kind merely supplies the place of that prescribed by the statute: See *ante*, §§ 659, 660, 665.

(b) The text is cited in Gilmer v. Mobile, etc., Ry. Co., 79 Ala. 569, 58 Am. Rep. 623; Willoughby v. Lawrence, 116 Ill. 11, 4 N. E. 356, 56 Am. Rep. 758; both instances of covenants creating equitable easements. See *ante*, § 689.

(c) This paragraph of the text is cited in Graybill v. Brugh, 89 Va. 895, 37 Am. St. Rep. 894, 17 S. E. 558 (notice of a mere naked option not binding).

assignments of a fund to different parties, the interests acquired by the assignees in each instance are equitable.[1] It might therefore appear, at first blush, that, as the legal estate is outstanding, and as the interests of all the successive assignees are similar in their essential nature, the general rule, where there are equal equities the first in order of time must prevail, should govern them, without regard to any notice which might or might not have been given to subsequent assignees; in other words, that, under these circumstances, the maxim, *Qui prior est tempore, potior est jure,* should control. There are, however, certain important elements which plainly distinguish these assignments from other kinds of successive equities, and remove them from the operation of the general rule. When an equitable interest in land is created, the holder thereof can often protect himself by a possession of the title deeds in England, or by a registration in this country. When chattels are sold and transferred, the title of the purchaser is secured against all the world by a delivery. No such safeguards inhere in the assignments above mentioned.[2] The legal title or right

1 This is unquestionably so in every case of an assignment by a *cestui que trust,* and of an equitable assignment of a fund. It was also true of all assignments of ordinary *choses in action,* debts, etc., until recent statutes in England and in this country have had the effect to clothe the assignee of debts, money demands, and other ordinary things in action with a legal right: See vol. 1, § 168. This legislation, however, has not affected the doctrines discussed in the text. These doctrines were settled while the interests were purely equitable, and have not been abrogated by the new jurisdiction at law.

2 The peculiar nature of such assignments, which distinguishes them from other equitable interests, was admirably described by Sir Thomas Plumer, M. R., in the leading case of Dearle v. Hall, 3 Russ. 1, 12: "Where a contract respecting property in the hands of other persons who have a legal right to the possession is made behind the back of those in whom the legal interest is thus vested, it is necessary, if the security is intended to attach on the thing itself, to lay hold of that thing in the manner in which its nature permits it to be laid hold of,— that is, by giving notice of the contract to those in whom the legal interest is. By such notice the legal holders are converted into trustees for the new purchaser, and are charged with responsibility towards him; and the *cestui que trust* is deprived of the power of carrying the same security repeatedly into the market, and of inducing third persons to advance money upon it, under the erroneous belief that it continues to belong to him absolutely, free from encumbrance, and that the trustees are still trustees for him, and for no one else. That precaution is always taken

analogous to possession remains vested in the debtor, trustee, or holder of the fund. The assignor — the creditor or the *cestui que trust* — continues to be clothed with all the apparent right and power to deal with the claim, and to dispose of it to third persons, which he held prior to the assignment. Courts of the highest ability have therefore regarded such assignments as occupying a very special position, and have applied to them a special rule in determining their order of priority.[b]

§ 694. I. Notice by the Assignee.— The reasons which prevail between the assignee and the debtor or the holder of the fund on the one hand, or subsequent assignees on the other, do not prevail between him and the assignor. It is

by diligent purchasers and encumbrancers; if it is not taken, there is neglect. The consequence of such neglect is, that the trustee of the fund remains ignorant of any alteration having taken place in the equitable rights affecting it; he considers himself to be a trustee for the same individual as before, and no other person is known to him as the *cestui que trust*. The original *cestui que trust*, though he has in fact parted with his interest, appears to the world to be the complete equitable owner, and remains in the order, management, and disposition of the property as absolutely as ever, so that he has it in his power to obtain, by means of it, a false and delusive credit. He may come into the market to dispose of that which he has previously sold; and how can those who may chance to deal with him protect themselves from his fraud? Whatever diligence may be used by a subsequent encumbrancer or purchaser, — whatever inquiries he may make in order to investigate the title, and to ascertain the exact state of the original right of the vendor, and his continuing right,— the trustees, who are the persons to whom application for information would naturally be made, will truly and unhesitatingly represent to all who put questions to them that the fund remains the sole absolute property of the proposed vendor.[a] These inconveniences and mischiefs are the natural consequences of omitting to give notice to trustees. To give notice is a matter of no difficulty; and whenever persons, treating for a chose in action, do not give notice to the trustee or executor, who is the legal holder of the fund, they do not perfect their title; they do not do all that is necessary in order to make the thing belong to them in preference to all other persons; and they become responsible, in some respects, for the easily foreseen consequences of their negligence."

(a) It has been decided, however, that a trustee is under no obligation to answer the inquiries of a stranger who is about to deal with the *cestui que trust:* Low v. Bouverie, [1891] 3 Ch. 82.

(b) This paragraph of the text is cited in Methven v. Staten Island L., H. & P. Co., 66 Fed. 113, 13 C. C. A. 362, 35 U. S. App. 67.

therefore settled that, to render the assignment valid and perfect *as against the assignor himself*,— that is, to give the assignee a complete claim upon the fund and right of action as against the assignor,— no notice of the assignment need be given to the debtor, trustee, or other holder of the fund.[1] The same is true, according to many decisions, with respect to those who "stand in the shoes of" the assignor, namely, his judgment creditors, and mere volunteers under him.[2] [a]

[1] Rodick v. Gandell, 1 De Gex, M. & G. 763, 780, per Lord Truro; In re Way's Trusts, 2 De Gex, J. & S. 365; Donaldson v. Donaldson, Kay, 711.

[2] Beavan v. Lord Oxford, 6 De Gex, M. & G. 492; Eyre v. McDowell, 9 H. L. Cas. 619, 642, 652; Kinderley v. Jervis, 22 Beav. 1; Scott v. Lord Hastings, 4 Kay & J. 633; Pickering v. Ilfracombe R'y, L. R. 3 Com. P. 235; Crow v. Robinson, L. R. 3 Com. P. 264.

(a) **Assignee Protected against Subsequent Judgment and Garnishment Creditors of Assignor.**— The rule of the text is supported by the great preponderance of authority in this country both as to subsequent judgment creditors and subsequent garnishing creditors of the assignor. See the following recent cases, among a multitude of others: Farmers' & Merchants' Bank v. Farwell, 58 Fed. 633, 7 C. C. A. 391, 19 U. S. App. 256; Young v. Upson, 115 Fed. 192; Kapes v. McPherson, (N. J. Eq.) 32 Atl. 710 (judgment creditor); D. M. Koehler & Son Co. v. Flebbe, 47 N. Y. Supp. 369, 21 App. Div. 210. Assignee protected against subsequent attaching or garnishing creditors of assignor: Third Nat. Bank v. Atlantic City, 126 Fed. 413; Jones v. Lowery Bkg. Co., 104 Ala. 252, 16 South. 11; Morgan v. Lowe, 5 Cal. 325, 63 Am. Dec. 132; Brown v. Ayres, 33 Cal. 525, 91 Am. Dec. 655; Savage v. Gregg, 150 Ill. 161, 37 N. E. 312 (the assignee's right protected by a court of law); Knight v. Griffey, 161 Ill. 85, 43 N. E. 727, affirming 57 Ill. App. 583; Schoolfield v. Hirsh, 71 Miss. 55, 14 South. 528, 42 Am. St. Rep. 450; Macrae v. Goodbar, 80 Miss. 315, 31 South. 812 (assignment of title-bond); Pollard v. Pollard, 68 N. H. 356, 39 Atl. 329; Marsh v. Garney, 69 N. H. 236, 45 Atl. 745; Board of Education v. Duparquet, 50 N. J. Eq. 234, 24 Atl. 922 (notice to debtor is of value merely to prevent the debtor from dealing with the assignor as still the owner); Williams v. Ingersoll, 89 N. Y. 508; Noble v. Thompson Oil Co., 79 Pa. St. (29 P. F. Smith) 354, 21 Am. Rep. 66; Abbott v. Davidson, 18 R. I. 91, 25 Atl. 839; Bellingham Bay Boom Co. v. Brisbois, 14 Wash. 173, 44 Pac. 153; but it seems that the garnished debtor must receive notice of the assignment in time for him to state it in his answer as garnishee, otherwise the assignee will not be protected: Walters v. Washington Ins. Co., 1 Iowa, 404, 63 Am. Dec. 451; Knight v. Griffey, 161 Ill. 85, 43 N. E. 727, affirming 57 Ill. App. 583; Rodes v. Haynes, 95 Tenn. 673, 33 S. W. 564; Abbott v. Davidson, 18 R. I. 91, 25 Atl. 839; Bellingham Bay Boom Co. v. Brisbois, 14

§ 695. English Rule — Priority Determined by Notice to the Debtor Party.— The rule is firmly established in England that, as against subsequent assignees for a valuable consideration, a notice to the debtor, trustee, or holder of the fund is necessary, in order to perfect the assignment and render it valid and effectual.[1] Among successive assignees

[1] This rule and the reasons for it were most forcibly stated by Sir Thomas Plumer, M. R., in the leading case of Dearle v. Hall, 3 Russ. 1, from which a quotation has already been made. He said (pp. 20–23): "The ground of this claim is priority of time. They rely upon the known maxim, which in many cases regulates equities, *Qui prior est tempore, potior est jure.* If by the first contract all the thing is given, there remains nothing to be the subject of the second contract, and priority must decide. But it cannot be contended that priority in time must decide, where the legal estate is outstanding. For the maxim, as an equitable rule, admits of exception, and gives way when the question does not lie between bare and equal equities. If there appears to be, in respect of any circumstance independent of priority of time, a better title in the subsequent purchaser to call for the legal estate, than in the purchaser who precedes him in date, the case ceases to be a balance of equal equities, and the preference which priority of date might otherwise have given is done away with and counteracted. The question here is, not which assignment is first in date, but whether there is not, on the part of Hall, a better title to call for the legal estate than Dearle or Sheering can set up. Or rather, the question is, Shall these plaintiffs now have equitable relief, to the injury of Hall?" He shows that the failure of D. or S. to give notice was negligence; from this negligence all the doubt and difficulty have arisen; and it is not equitable that they should take advantage of their own negligence,— should obtain a benefit as the result of their neglect. He then adds (p. 22): "They say that they were not bound to give notice to the trustees; for that notice does not form part of the necessary conveyance of an equitable interest. I admit that if you mean to rely on contract with the individual, you do not need to give notice; from the moment of the contract he with whom you are dealing is personally bound. But if you mean to go further, and to make your right attach upon the thing which is the subject of the contract, it is necessary to give notice; and unless notice is

Wash. 173, 44 Pac. 153. In a few states, notice is essential, by statute, to render the assignment valid against creditors attaching the debt by "trustee" process: Burditt v. Porter, 63 Vt. 296, 25 Am. St. Rep. 763, 21 Atl. 955, R. L. Vt., § 1134; Fuller v. Parmenter, 72 Vt. 362, 47 Atl. 1079.

In a number of states, the assignment of *future wages* must be recorded: see, for example, Pullen v. Monk, 82 Me. 412, 19 Atl. 909; Me. Rev. St., c. 111, § 6; Peabody v. City of Lewiston, 83 Me. 286, 22 Atl. 171 (recorded assignment of wages has priority over unrecorded assignment); Abbott v. Davidson, 18 R. I. 91, 25 Atl. 839.

As to priorities between assignees of *shares of stock* and creditors of the assignor, see *post*, § 700.

of the same thing in action who have paid a valuable consideration, the mere order of time does not necessarily determine the priority; the assignee in good faith and for value who first gives a notice obtains a precedence over the

given, you do not do that which is essential in all cases of transfer of personal property. The law of England has always been, that personal property passes by delivery of possession; and it is possession which determines the apparent ownership. If you, having the right of possession, do not exercise that right, but leave another in actual possession, you enable that person to gain a false and delusive credit, and put it in his power to obtain money from innocent parties on the hypothesis of his being the owner of that which in fact belongs to you. Possession must follow right; and if you, who have the right, do not take possession, you do not follow up the title, and are responsible for the consequences. It is true that a chose in action does not admit of tangible, actual possession. But in Ryall v. Rowles, 1 Ves. Sr. 348, 1 Atk. 165, the judges held that in the case of a chose in action you must do everything towards having possession which the subject admits; you must do that which is tantamount to obtaining possession, by placing every person who has an equitable or legal interest in the matter under an obligation to treat it as your property. For this purpose you must give notice to the legal holder of the fund; in the case of a debt, for instance, notice to the debtor is, for many purposes, tantamount to possession. If you omit to give that notice, you are guilty of the same degree and species of neglect as he who leaves a personal chattel to which he has acquired a title in the actual possession and under the absolute control of another person." This course of reasoning is, as it seems to me, completely unanswerable; the special rule concerning notice results from it as an irresistible conclusion. No other rule within the entire range of equity jurisprudence rests upon a more solid foundation of argument, or is more intrinsically just and reasonable.[a]

(a) In the recent case of In re Phillips' Estate, 205 Pa. St. 515, 55 Atl. 213, 97 Am. St. Rep. 746, the supreme court of Pennsylvania, in adopting the rule of Dearle v. Hall, cited the above paragraph of the text and used the following emphatic language (per Brown, J.): "Business transactions constantly require the assignments of choses in action. In many instances personal credit cannot be maintained in any other way, and for assignees who purchase in good faith there ought to be protection. None is found in the recording act, but a measure of it ought not on that account to be withheld, if it can be extended by courts of equity on equitable principles. . . . Protection can hardly be expected from an assignor who will sell twice what he knows he has a right to sell but once, for, if conscienceless enough to make a second sale, he will conceal the first in his scheme to cheat one or the other of his assignees. Protection can come only from him who owes the money, and who, by notice to him, may be able to give protection. He is a mere stakeholder, and it is immaterial to him whom he pays. There is no reason why he should not be frank with a prospective purchaser of the whole or

others, even though they may be earlier in time. The equities of the successive assignments being otherwise equal, the priority among them is determined by the order of the notices, rather than by the order of their dates. Giving notice is regarded as equivalent, or at least analogous, to the act of taking possession.[b] The rule thus formulated is applied to assignments of ordinary things in action by the creditor party, including shares of stock in a company, insurance policies, and the like, to assignments of a fund held under a trust by the *cestui que trust,* and to equitable assignments of a fund by the person entitled thereto, and the notice should be given, in the first class to the debtor, in the second to the trustee, and in the third to the holder of the fund.[2 c] It should be carefully observed, however,

2 Dearle v. Hall, 3 Russ. 1; Loveridge v. Cooper, 3 Russ. 31; affirmed on appeal, by Lord Lyndhurst, 3 Russ. 48-60; Ryall v. Rowles, 1 Ves. Sr. 348; 1 Atk. 165; 2 Lead. Cas. Eq., 4th Am. ed., 1533, 1579; Foster v. Blackstone, 1 Mylne & K. 297; 9 Bligh, N. S., 332, 376; Meux v. Bell, 1 Hare, 73, 84, 85; Saffron etc. Soc. v. Rayner, L. R. 14 Ch. Div. 406 (what is a sufficient notice to trustees); In re Freshfield's Trusts, L. R. 11 Ch. Div. 198, 200, 202, per Jessel, M. R. (rule applied when the second assignee of a trust fund, who gave the first notice to the trustee, took his assignment from the executors of the *cestui que trust,* the first assignee having taken directly from the *cestui que trust* himself);[d] Ex parte Garrard, L. R. 5 Ch. Div. 61; L. R. 4 Ch. Div. 101 (the trustee himself the assignee); Addison v. Cox, L. R. 8 Ch. 76, 79, per Lord Selborne (a creditor assigned the money due to two different persons successively; these two assignees gave *simultaneous* notices

a portion of what he owes, or that, upon inquiry from such a one, he should conceal notice of any other prior purchase or assignment, if notice of it was given him. If it be understood that each assignee of a fund, or a portion of it, can protect himself against subsequent assignees only by giving immediate notice to the debtor, such notice will be given, and, when given, the instances will be very rare when subsequent assignees are imposed upon."

(b) This statement of the text is quoted in Third Nat. Bank of Philadelphia v. Atlantic City, 126 Fed. 413.

(c) See, also, the following English cases, illustrating various phases of the rule: Johnstone v. Cox, L. R. 16 Ch. Div. 571; Mutual Life Ins. Co. v. Langley, L. R. 26 Ch. Div. 686; In re Wyatt, [1892] 1 Ch. 188, affirmed in Ward v. Dunscombe, [1893] App. Cas. 369; Wigram v. Buckley, [1894] 3 Ch. 483; Stephens v. Green, [1895] 2 Ch. 148; In re Wasdale, [1899] 1 Ch. 163; Montefiore v. Guedalla, [1903] 2 Ch. 26.

(d) To the same effect with In re Freshfield's Trusts, see Montefiore v. Guedalla, [1903] 2 Ch. 26.

that to enable a subsequent assignee to obtain a priority in this manner, by giving the first notice to the debtor or legal holder, he must be an assignee in good faith and for a valuable consideration. If he parted with no consideration, he is a mere volunteer, and stands in the same position as his assignor. If he had notice of the earlier assignment, then he took subject thereto.[1] The rule thus established by the uniform course of decision in England has been adopted in

to the debtor; held, that the first assignee had priority over the second); Lloyd v. Banks, L. R. 3 Ch. 488, 490, per Lord Cairns, reversing Lloyd v. Banks, L. R. 4 Eq. 222 (actual knowledge by the trustee of a first assignment by the *cestui que trust* operates as a notice, and gives the first assignee a priority over a second assignee, who afterwards served a formal notice);[e] see, *per contra*, Edwards v. Martin, L. R. 1 Eq. 121, and In re Brown's Trusts, L. R. 5 Eq. 88, which must be regarded as overruled, so far as they differ from Lloyd v. Banks, L. R. 3 Ch. 488; Bridge v. Beadon, L. R. 3 Eq. 664, 667; In re Atkinson, 2 De Gex, M. & G. 140; In re Barr's Trusts, 4 Kay & J. 219; Thompson v. Speirs, 13 Sim. 469; Martin v. Sedgwick, 9 Beav. 333. The time of giving the notice may be material.[f] If it is given to a trustee before the fund comes into his possession, or before the trust relation exists, it will be wholly nugatory, while a subsequent notice given after the trust relation commences, or after the fund comes into the trustee's hands, will be operative:[g] Somerset v. Cox, 33 Beav. 634; Webster v. Webster, 31 Beav. 393; Addison v. Cox, L. R. 8 Ch. 76; Buller v. Plunkett, 1 Johns. & H. 441. If simultaneous notices are given by two assignees, the one who is earlier in date will have precedence:[h] Calisher v. Forbes, L. R. 7 Ch. 109; Addison v. Cox, L. R. 8 Ch. 76, 79. Wherever an assignee earlier in time has done all in his power towards taking possession or perfecting his title, he will retain his priority: Feltham v. Clark, 1 De Gex & S. 307; Langton v. Horton, 1 Hare, 549.

(e) See, also, In re Wyatt, [1892] 1 Ch. 188, affirmed in Ward v. Dunscombe, [1893] App. Cas. 369.

(f) **Time of Giving the Notice.**— That notice of an intended assignment, given by the assignor before the assignment is made, is ineffectual for the assignee's protection, see Third Nat. Bank v. Atlantic City, 126 Fed. 413.

(g) See, also, Johnstone v. Cox, L. R. 16 Ch. Div. 571. This group of cases is carefully reviewed in the recent case of In re Dallas, [1904] 2 Ch. 385, holding the fact to be immaterial that when the fund came into existence there was no person having legal dominion of the fund to whom effective notice could be given; thus, where there were several assignments of an expectancy, priority among them was determined by the order of giving notices to the administrator of the testator, although none was appointed until a considerable time after the fund came into existence by the testator's death.

(h) See, also, Johnstone v. Cox, L. R. 16 Ch. Div. 571.

(i) The text is quoted and followed in The Elmbank, 72 Fed. 610.

a portion of the American states.[3 j] It has been rejected by the courts of other states, which hold that among successive assignments of things in action the order of time controls.[4 k]

§ 696. To Whom the Notice should be Given.—Notice may be given to the debtor, trustee, or holder of the fund, either

3 Spain v. Hamilton's Ex'r, 1 Wall. 604, 624; Campbell v. Day, 16 Vt. 558; Barney v. Douglas, 19 Vt. 98; Ward v. Morrison, 25 Vt. 593; Loomis v. Loomis, 26 Vt. 198, 204; Dale v. Kimpton, 46 Vt. 76; Barron v. Porter, 44 Vt. 587; Bishop v. Holcomb, 10 Conn. 444; Adams v. Leavens, 20 Conn. 72; Foster v. Mix, 20 Conn. 395; Van Buskirk v. Hartford etc. Ins. Co., 14 Conn. 141, 144; 36 Am. Dec. 473; Harrop v. Landers etc. Co., 45 Conn. 561; Judah v. Judd, 5 Day, 534; Woodbridge v. Perkins, 3 Day, 364; Dews v. Olwill, 3 Baxt. 432; Flickey v. Loney, 4 Baxt. 169; Hobson v. Stevenson, 1 Tenn. Ch. 203; Gayoso Sav. Inst. v. Fellows, 6 Cold. 467; Clodfelter v. Cox, 1 Sneed, 330; McWilliams v. Webb, 32 Iowa, 577; Murdoch v. Finney, 21 Mo. 138.

4 Thayer v. Daniels, 113 Mass. 129; Bohlen v. Cleveland, 5 Mason, 174; Warren v. Copelin, 4 Met. 594; Dix v. Cobb, 4 Mass. 508, 511; Wood v. Partridge, 11 Mass. 488, 491; Littlefield v. Smith, 17 Me. 327; Stevens v. Stevens, 1 Ashm. 190; United States v. Vaughan, 3 Binn. 394; Muir v. Schenck, 3 Hill, 228; Beckwith v. Union Bank, 9 N. Y. 211; Kennedy v. Parke, 17 N. J. Eq. 415.

(j) It is the rule of the Federal courts: Laclede Bank v. Schuler, 120 U. S. 511, 7 Sup. Ct. 644 (equitable assignment, and subsequent assignment for the benefit of creditors); Methven v. Staten Island L., H. & P. Co., 66 Fed. 113, 13 C. C. A. 362, 35 U. S. App. 67; The Elmbank, 72 Fed. 610 (rule only applies where subsequent assignee giving first notice is a purchaser for value); Third Nat. Bank v. Atlantic City, 126 Fed. 413. It has recently been adopted in California: Graham Paper Co. v. Pembroke, 124 Cal. 117, 56 Pac. 627, 71 Am. St. Rep. 26, 44 L. R. A. 632, citing the text; and in Pennsylvania: In re Phillips' Estate, 205 Pa. St. 515, 97 Am. St. Rep. 746, 55 Atl. 213, citing the text. And see Enochs-Harris Lumber Co. v. Newcomb, 79 Miss. 462, 30 South. 608; Nelson v. Trigg, 75 Tenn. (7 Lea) 69.

(k) Fairbanks v. Sargent, 104 N. Y. 108, 58 Am. Rep. 490; s. c., 117 N. Y. 320, 22 N. E. 1039, 6 L. R. A. 475; Fortunato v. Patten, 147 N. Y. 277, 41 N. E. 572; York v. Conde, 147 N. Y. 486, 42 N. E. 193, 61 Hun, 26, 15 N. Y. Suppl. 380; Niles v. Mathusa, 162 N. Y. 546, 57 N. E. 184; Central Trust Co. v. West Indies Imp. Co., 169 N. Y. 314, 62 N. E. 387; Farmers' Bank v. Diebold Safe & Lock Co., 66 Ohio St. 367, 90 Am. St. Rep. 586, 64 N. E. 518, 58 L. R. A. 620; Mitchell v. Hockett, 25 Cal. 538, 85 Am. Dec. 151; Gillette v. Murphy, 7 Okl. 91, 54 Pac. 413; Harris County v. Donaldson, 20 Tex. Civ. App. 9, 48 S. W. 791; Clarke v. Hogeman, 13 W. Va. 718; Columbia Finance & Trust Co. v. First Nat. Bank, 25 Ky. Law Rep. 561, 76 S. W. 156 (citing the text).

In England, also, the order of time controls among successive equitable assignments of shares of stock, to

in writing or verbally, if the latter form is explicit, definite, and certain.[1] Notice to one of two or more co-trustees or joint debtors is, in general, notice to all, but it ceases to be operative when such trustee or debtor dies, or such trustee gives up his position.[2] [a] Where shares of stock in a business

[1] In re Tichener, 35 Beav. 317; Browne v. Savage, 4 Drew. 635, 640. Notice cannot be given by a mere conversation: Saffron etc. Soc. v. Rayner, L. R. 14 Ch. Div. 406; In re Tichener, 35 Beav. 317. How far a notice to attorneys of a trustee is operative: See Saffron etc. Soc. v. Rayner, L. R. 14 Ch. Div. 406; Willes v. Greenhill, 29 Beav. 376, 387, 392; Rickards v. Gledstanes, 3 Giff. 298.

[2] Meux v. Bell, 1 Hare, 73; Ex parte Rogers, 8 De Gex, M. & G. 271; Timson v. Ramsbottom, 2 Keen, 35; Willes v. Greenhill, 29 Beav. 376, 387; Wise v. Wise, 2 Jones & L. 403. Where the trustee is himself the assignee from his *cestui que trust*, no further notice is necessary to gain priority over a subsequent assignee: Ex parte Garrard, L. R. 5 Ch. Div. 61; L. R. 4 Ch. Div. 101; Elder v. Maclean, 3 Jur., N. S., 284. If one of several co-trustees is also a beneficiary, and assigns his interest to a third person, a notice to the other trustee is requisite; but if he assigns to one of his fellow-trustees, no notice

which, by charter or statutory provision, the rule of Dearle v. Hall does not apply: Société Générale de Paris v. Walker, L. R. 11 App. Cas. 20, affirming 14 Q. B. D. 424.

A good discussion of the reasons for the rule is contained in Meier v. Hess, 23 Or. 599, 32 Pac. 755. After citing this section of the text the court said, referring to the English rule: "It is explained by the courts adopting it as but an application, to the case of an assignment of a chose in action, of the principle which renders void, as to *bona fide* purchasers, sales and transfers of chattels, unless accompanied by a delivery and continuous change of possession. It is said that the act of giving the debtor notice is, in a certain degree, taking possession of the fund, and is going as far towards an actual change of possession as is possible; and, if this notice is omitted, the assignee is guilty of the same degree and species of neglect, and must suffer the same consequences, as one who leaves a chattel, purchased by him, in the possession of his vendor. In jurisdictions where the rule prevails that the sale of personal property, capable of immediate delivery to the purchaser, is fraudulent and void as to subsequent *bona fide* purchasers unless accompanied by immediate delivery, and followed by an actual change of possession, the reasoning of the authorities cited seems unanswerable, and to rest upon a solid foundation of argument. But where, as in this state, the sale of chattels, unaccompanied by a change of possession, only creates a presumption of fraud as against a *bona fide* purchaser, which may be rebutted by showing that the sale was made in good faith, for a sufficient consideration, and without intent to defraud, the foundation for the rule fails."

(a) In Timson v. Ramsbottom, 2 Keen, 35, and In re Hall, 7 L. R. Ir. 180, the subsequent assignee took his assignment and gave notice after the death of the only trustee who had

corporation, or policy of insurance, are assigned, the notice required by the general rule should be given to a managing officer of the company.[3] If a fund is subject to successive trusts, the notice should be given to the trustee who has it under his actual control.[4] [c]

§ 697. The Rule does not Apply to Assignments of Equitable Interests in Land.—Where a debt has been assigned, and the debtor refuses or fails to pay it, no notice of such non-pay-

is necessary as long as that trustee lives:[b] Browne v. Savage, 4 Drew. 635; In re Selby, 8 De Gex, M. & G. 271; Willes v. Greenhill, 29 Beav. 376, 387, 391; Comm'rs v. Harby, 23 Beav. 508. These decisions seem to be based upon mere verbal logic.

[3] Thompson v. Speirs, 13 Sim. 469; Edwards v. Martin, L. R. 1 Eq. 121; Martin v. Sedgwick, 9 Beav. 333. Notice of the assignment of a future cargo of a ship given to the master has been held sufficient, when followed by other steps, to perfect the title of the assignee: Langton v. Horton, 1 Hare, 549; 3 Beav. 464.

[4] Bridge v. Beadon, L. R. 3 Eq. 664.

received notice of the earlier assignment; since inquiry by the second assignee would not have yielded information of the first assignment, the second assignee was held to be protected; followed in In re Phillips' Trusts, [1903] 1 Ch. 183. If, however, the first assignee gives notice to *all* the existing trustees, he has done his full duty, and the priority so acquired cannot be lost by their death or retirement, and notice of a subsequent assignment received by their successors: In re Wasdale, [1899] 1 Ch. 163. If the first assignee gives notice to one and the second assignee gives notice subsequently to both of the trustees, the priority acquired by the earlier notice is not lost by the death of the trustee who received it; for in such a case, as distinguished from Timson v. Ramsbottom, full inquiry by the second assignee would have elicited information of the first assignment: Ward v. Dunscombe, [1893] App. Cas. 369, affirming In re Wyatt, [1892] 1 Ch. 188. "Why," inquires Herschell, Lord Ch., "should an accident of this description [death of a trustee] entitle the second incumbrancer to a priority to which he had no title at the time when he made the advance, and gave notice of it to the trustees?" See the speech of Lord Macnaghten in this case for an elaborate review of the cases, and some unfavorable criticism of the rule of Dearle v. Hall.

See Bank of Spring City v. Rhea County, (Tenn. Ch. App.) 59 S. W. 442 (citing the text).

(b) Notice given to the assignor, who afterwards becomes trustee of the fund, is, it seems, not effectual: Browne v. Savage, *supra;* In re Dallas, [1904] 2 Ch. 385 (assignments of expectancy; assignor was appointed executor but never acted as such and renounced. Priority determined by order of notices given to the administrator appointed in his place.)

(c) See, however, Stephens v. Green, [1895] 2 Ch. 148, holding

ment is required to be given to the assignor, in order that he may be made liable; the rules concerning notices to indorsers of negotiable paper do not apply.[1] Finally, the special rule requiring a notice to the trustee or other holder of the legal title, in order to settle the priority among successive assignees, is confined to transfers of personal property, debts, money claims arising from contracts, funds, and the like; it does not extend to nor embrace assignments of any equitable estates or interests in land. These latter are governed by the more general rules concerning priority, already stated.[2] [a]

§ 698. II. Diligence of the Assignee.—Irrespective of any requirement to give notice in order to obtain a priority, the duty rests upon all assignees of things in action to use

[1] Glyn v. Hood, 1 De Gex, F. & J. 334.

[2] See *ante*, §§ 682, 683; Jones v. Jones, 8 Sim. 633; Wiltshire v. Rabbitts, 14 Sim. 76; Wilmot v. Pike, 5 Hare, 14; Lee v. Howlett, 2 Kay & J. 531; McCreight v. Foster, L. R. 5 Ch. 604, 610, 611. In this case the vendee in a contract for the sale of land had agreed to assign the contract to A, and A gave notice of such agreement to the vendor. It was held by Lord Hatherley that the vendor might, notwithstanding such notice, receive payment of the balance of the price and convey the land to the original vendee; the notice did not affect the rights of the original contracting parties. An agreement to assign would be treated in equity as an assignment.

that the assignee of a *cestui que trust* should give notice to the immediate trustee of his assignor, not to the trustee in the original settlement.

(a) This section is cited in Stillson v. Stevens, (Tex.) 23 S. W. 322.

See, also, In re Wyatt, [1892] 1 Ch. 188; Hopkins v. Hemsworth, [1898] 2 Ch. 347, 67 Law J. Ch. 526, 78 Law T. [N. S.] 832, 47 Wkly. Rep. 26 (the rule does not apply to successive equitable sub-mortgages by deposit of the title deeds by the legal mortgagee). "Although a mortgage debt is a chose in action, yet, where the subject of the security is land, the mortgagee is treated as having 'an interest in land,' and priorities are governed by the rules applicable to interests in land, and not by the rules which apply to interests in personalty": Taylor v. London and County Banking Co., [1901] 2 Ch. 231, 254, citing Jones v. Gibbons, 9 Ves. 407, 410, 7 R. R. 247, 250. Leaseholds are real estate for the purposes of this rule: Union Bank of London v. Kent, 39 Ch. Div. 238. That priority among successive assignments of an interest in land which has been affected by the doctrine of equitable conversion in accordance with the terms of a will is determined by the rules relating to the assignment of choses in action, see Snover v. Squire, (N. J. Eq.) 24 Atl. 365.

reasonable diligence in perfecting their titles or enforcing their rights. Even where the rule concerning notice to the debtor or trustee has not been adopted, an assignee who had otherwise the priority may lose it through his laches, as against a subsequent purchaser in good faith and for value who has been injured by the negligence.[1] [a] It may

[1] Spain v. Hamilton, 1 Wall. 604. See, as illustrations of such neglect and of its consequences, Judson v. Corcoran, 17 How. 612; Mercantile Ins. Co. v. Corcoran, 1 Gray, 75; Richards v. Griggs, 16 Mo. 416; 57 Am. Dec. 240; Fraley's Appeal, 76 Pa. St. 42; Fisher v. Knox, 13 Pa. St. 622; 53 Am. Dec. 503; Maybin v. Kirby, 4 Rich. Eq. 105. The rule that a subsequent assignee of a pure thing in action will be protected by a court of equity in any advantage which he has gained by his own diligence, or by the neglect of a prior assignee, is well illustrated by the case of Judson v. Corcoran, 17 How. 612. One W. had a claim against Mexico, which became the subject of adjustment and award by commissioners acting under a treaty. In 1845, W. assigned this claim to Judson, who kept the transfer secret, gave no notice of it to any one, and took no steps whatever until 1851, when he brought this suit. After the assignment to Judson, W. assigned the claim to Corcoran, who had no knowledge or notice whatever of the prior transfer. He at once communicated a formal notice of his assignment to the United States Secretary of State, which notice was filed with other papers in the case; he appeared and prosecuted the claim before the treaty commissioners, and obtained an award in his favor as the assignee of W. During all these proceedings Judson did not interpose any claim nor appear before the commissioners. After the award in 1851 he brought this suit against Corcoran to establish his own prior right, and to recover the amount awarded from Corcoran. The opinion of the court, per Catron, J., said: "Assuming that both sets of assignments are alike fair, and originally stood on the same *bona fide* footing, the rule of necessity is, that the assignor having parted with his interest by the first assignment, the second assignee could take nothing; and as he represents the assignor, is bound by the equities imposed on the latter; and hence has arisen the maxim in such cases, that he who is first in time is best in right. But this general rule has exceptions." He then states the facts as given above, and proceeds: "Corcoran's assignment was fair, and without knowledge of Judson's. And assuming Judson's to be fair also, and that no negligence could be imputed to him, then the case is one where an equity was successively assigned in a chose in action to two innocent persons whose equities are equal. Here Corcoran has drawn to his equity a legal title to the fund, which legal title Judson seeks to set aside. Now, nothing is better settled than that this cannot be done. The equities being equal, the law must prevail. There are other objections to the case made by Judson, growing out of the negligence on his part in not presenting his assignment and claim of property to the state department, so as to notify

(a) The text is quoted in Graham Paper Co. v. Pembroke, 124 Cal. 117, 56 Pac. 627, 71 Am. St. Rep. 26, 44 L. R. A. 632.

be said, in general, that, in order to protect himself against subsequent transfer by the assignor, where a notice is not given to the debtor or the holder of the legal interest, the assignee should obtain a delivery and possession of the written instrument, which, in ordinary language, constitutes the thing in action, which embodies and is the highest evidence of the existing demand; or when such delivery and

others of the fact. The assignment was held up, and operated as a latent and lurking transaction, calculated to circumvent subsequent assignees, and such would be its effect on Corcoran, were priority accorded to it by our decree. It is certainly true, as a general rule, as above stated, that a purchaser of a chose in action, or of an equitable title, must abide by the case of the person from whom he buys, and will only be entitled to the remedies of the seller; and yet there may be cases in which a purchaser, by sustaining the character of a *bona fide* assignee, will be in a better situation than the person was from whom he bought." He then gives as an illustration the case of a subsequent assignee who *has* given notice to the debtor, while the first assignee has omitted to do so, according to the settled English rule, citing Dearle v. Hall, 3 Russ. 1, and other decisions, and adds: "And the same principle of protecting subsequent *bona fide* purchasers of choses in action, against latent outstanding equities of which they had no notice, was maintained in this court in the case of Bayley v. Greenleaf, 7 Wheat. 46. That was an outstanding vendor's lien, set up to defeat a deed made to trustees for the benefit of the vendee's creditors. The court held it to be a secret trust; and although to be preferred to any other subsequent equity unconnected with a legal advantage, or equitable advantage which gives a superior claim to the legal title, still, it must be postponed to a subsequent equal equity connected with such advantage." The exact force of this decision should be carefully apprehended. It certainly is not an authority, as has sometimes been claimed, for the theory that assignments of things in action are never subject to outstanding equities in favor of third persons, but only to those in favor of the debtor. On the contrary, it asserts in clear and express terms the *general* doctrine that assignments of choses in action are subject to such equities, even though latent. To this general doctrine it announces certain exceptions, and carefully distinguishes the extent of these exceptions. They are as follows: 1. Where the second assignee, in good faith, and without notice of the prior outstanding equity, protects or supports his own interest by obtaining a legal title or legal position; 2. Where the second assignee, although holding only an equitable interest, took without notice of the prior outstanding *secret* equity, and through the laches of the third person in delaying, or other similar conduct, or through his own diligence, the second assignee has acquired a position of advantage, so that it would be inequitable to deprive him of such advantage. In these cases, the general doctrine that an assignment is subject to outstanding equities of third persons does not apply. These considerations would go far to reconcile the conflict of decision described in subsequent paragraphs and notes.

possession are impossible from the very nature of the subject-matter, that he should take all the steps permitted by the law which are equivalent to actual possession.[2] The questions as to priority of right may arise between the assignee and a judgment creditor of the assignor or a subsequent purchaser from the assignor. There is a clear distinction between these two claimants, since a judgment creditor only succeeds to the rights of his debtor, while a purchaser *may* acquire higher rights.[d]

2 Ryall v. Rowles, 1 Ves. Sr. 348, 352; Pinkerton v. Manchester etc. R. R., 42 N. H. 424. Thus between two successive assignees of a written thing in action, such as a policy of insurance, a bond, etc., both in good faith and otherwise equal, the one to whom possession of the instrument has been actually delivered will obtain the precedence: Ancher v. Bank of England, Doug. 637, 639; Wells v. Archer, 10 Serg. & R. 412; 13 Am. Dec. 682; Ellis v. Kreutzinger, 27 Mo. 311; 72 Am. Dec. 270.[b]

On the same principle, if between two successive assignees of an equitable interest, otherwise equal, the subsequent one acquires the legal title or legal advantage, he thereby obtains the superiority: Ogden v. Fitzsimmons, 7 Cranch, 1, 18; Judson v. Corcoran, 17 How. 612; Downer v. Bank, 39 Vt. 25, 29. This rule has been applied to subsequent transferees of shares of stock who have perfected their titles by a record in the transfer-book, and by the issue of a new certificate, as against prior assignees who have not taken these steps: Morris etc. Co. v. Fisher, 9 N. J. Eq. 667; Craig v. Vicksburg, 31 Miss. 216; and see *infra*, §§ 712, 715.[c]

(b) So, in Bridge v. Wheeler, 152 Mass. 343, 25 N. E. 612, the first assignee of a life insurance policy, who reassigned a part to the insured and delivered the policy to the insured, was postponed to a *bona fide* assignee of a paid-up policy issued by the company without notice of the first assignment. The first assignee of accounts and choses in action, having left the papers in the hands and under the control of the assignor as agent, for collection, was postponed to a second assignee who took actual possession of them, in Graham Paper Co. v. Pembroke, 124 Cal. 117, 56 Pac. 627, 71 Am. St. Rep. 26, 44 L. R. A. 632. In England, between competing equitable assignments of shares of stock, the possession of the certificates makes the equity of the possessor better: Société Générale de Paris v. Walker, L. R. 11 App. Cas. 20, affirming 14 Q. B. D. 424.

(c) In Dueber Watch-Case Mfg. Co. v. Daugherty, 62 Ohio St. 589, 57 N. E. 455, the rule was applied to the protection of the second of two parties to each of whom the legal owner of stock had agreed to assign it, where such second equitable assignee, after notice of the prior equity, procured an assignment of the stock, thus clothing himself with what, for most purposes, was the legal title: see the facts of this case, *post*, in editor's note to § 710. See, also, Fairbanks v. Sargent, 117 N. Y. 320, 32 N. E. 1039, 6 L. R. A. 475.

(d) As to judgment creditors of the assignor, see *ante*, § 694, and notes, and *post*, § 700, and notes.

§ 699. **Assignment of Shares of Stock — Between Assignee and Assignor.**— The question has very frequently arisen in this country in connection with transfers of shares of stock in business corporations. The by-laws of such companies generally, and even in some states the statutes, provide that an assignment of shares shall be consummated and perfected by the assignee's surrendering the original certificate to the proper officers of the corporation, and receiving a new one issued to himself, and by a record of the transaction entered in the company's transfer-books. It is the common practice, however, to effect an assignment by delivering the certificate to the assignee, with a power of attorney indorsed thereon executed by the assignor, authorizing the surrender to be made and all the other steps to be taken as prescribed by the by-laws. This method of transfer, according to the overwhelming weight of authority, clothes the assignee with a full legal ownership as against the assignor, and with an equitable title and ownership valid at least as against the corporation.[1 a] The only important questions, therefore,

[1] N. Y. & N. H. R. R. v. Schuyler, 34 N. Y. 30, 80, per Davis, J.; Comm. Bank v. Kortright, 22 Wend. 348; 34 Am. Dec. 317; Cushman v. Thayer Mfg. Co., 76 N. Y. 365, 371; 32 Am. Rep. 315; Dunn v. Commercial Bank, 11 Barb. 580; McCready v. Rumsey, 6 Duer, 574; People v. Elmore, 35 Cal. 653; Parrott v. Byers, 40 Cal. 614; People v. Crockett, 9 Cal. 112; Mt. Holly Co. v. Ferree, 17 N. J. Eq. 117. The rule is concisely stated by Davis, J., in the Schuyler case, *supra*, as follows: "Where the stock of a corporation is, by the terms of its charter or by-laws, transferable only on its books, the purchaser who receives a certificate with power of attorney gets the entire title, legal and equitable, as between himself and the seller, with all the rights the latter possessed; but as between himself and the corporation he acquires only an equitable title, which they are bound to recognize and permit to be ripened into a legal title, when he presents himself, before any effective transfer on the books has been made, to do the acts required by the charter or by-laws. . . . . Until those acts be done, he is not a stockholder, and has no claim to act as such; but possesses, as between himself and the corporation, by virtue of the certificate and power, the right to make himself or whomsoever he chooses a stockholder, by the prescribed transfer."

The text is quoted in Graham Paper Co. v. Pembroke, 124 Cal. 117, 56 Pac. 627, 71 Am. St. Rep. 26, 44 L. R. A. 632.

(a) See, also, Hubbard v. Manhattan Trust Co., 87 Fed. 51; Masury v. Arkansas Nat. Bank, 93 Fed. 603, 35 C. C. A. 476, reversing 87 Fed.

relate to the right and priority of such an assignee as against judgment creditors of the assignor and subsequent purchasers.

§ 700. The Same — Between Assignee and Judgment Creditors of Assignor.— It has been held by some courts that such a transfer of shares by a mere delivery of the certificate and power of attorney, without the further steps for completing the transaction on the transfer-books, *and without any notice thereof given to the company,* is presumptively fraudulent, and therefore invalid as against judgment creditors of the assignor.[1] A different rule, however, must

[1] Pinkerton v. Manchester etc. R. R., 42 N. H. 424; Shipman v. Ætna Insurance Co., 29 Conn. 245; but see Colt v. Ives, 31 Conn. 25; 81 Am. Dec. 161.[a] These cases, it will be seen, arose in states which have adopted the English rule concerning notice of an assignment. Similar decisions have been made in Massachusetts, but based entirely upon the express language of a statute: Fisher v. Essex Bank, 5 Gray, 373; Blanchard v. Dedham Gas Co., 12 Gray, 213.[b] The same rule has been laid down by the courts in California,

381; Winter v. Montgomery G. L. Co., 89 Ala. 544, 7 South. 773; Reed v. Copeland, 50 Conn. 472, 47 Am. Rep. 663 (mere delivery of certificate, with intent to pass title, sufficient to vest an equitable title as against the assignor and his representatives); Victor G. Bloede Co. v. Bloede, 84 Md. 129, 34 Atl. 1127, 57 Am. St. Rep. 373, 33 L. R. A. 107; Andrews v. Worcester, N. & R. R. Co., 159 Mass. 64, 33 N. E. 1109; Walker v. Detroit Transit Co., 47 Mich. 338, 11 N. W. 187; Nicollet Nat. Bank v. City Bank, 38 Minn. 85, 35 N. W. 577, 8 Am. St. Rep. 643; Joslyn v. St. Paul D. Co., 44 Minn. 183, 46 N. W. 337; Wilson v. St. Louis & S. F. Ry. Co., 108 Mo. 588, 18 S. W. 286, 32 Am. St. Rep. 624 (such transfer cannot be invalidated by by-law of the company); Meredith Village Sav. Bank v. Marshall, 68 N. H. 417, 44 Atl. 526; Curtis v. Crossley, 59 N. J. Eq. 358, 45 Atl. 905 (assignment by deed); Wood's Appeal, 92 Pa. St. 379, 37 Am. Rep. 694. See, also, the cases cited *post*, to §§ 700, 710, etc.

(a) In New York Commercial Co. v. Francis, 83 Fed. 769, 28 C. C. A. 199, it was held, on a review of the Connecticut cases, that the beneficial owner of stock is not precluded, by allowing it to stand on the books in the name of another, from asserting title as against the creditors of the nominal owner. *Contra,* see White v. Rankin, 90 Ala. 541, 8 South. 118.

(b) The law of Massachusetts was changed by statute in 1884; see note d, *infra.* By the statutes of a number of other states, unregistered transfers are invalid against attaching creditors: Abels v. Mobile Real Estate Co., 92 Ala. 382, 9 South. 423; White

be regarded as settled by the great majority of decisions, which hold that this mode of assignment is valid as against creditors of the assignor, and gives the assignee a precedence over their subsequent judgments, executions, and attachments.[2]

and is rested upon the statutes; these do not, however, materially differ from the provisions of statutes, charters, and by-laws in other states: Weston v. Bear River etc. Co., 5 Cal. 186; 63 Am. Dec. 117; 6 Cal. 425, 429; Naglee v. Pacific Wharf Co., 20 Cal. 530, 533; People v. Elmore, 35 Cal. 653, 655.[c]

[2] This conclusion is in complete harmony with the doctrine of those recent English cases, cited *supra*, § 694, which hold that an assignment, *although without notice to the debtor*, or trustee, has priority over judgment creditors of the assignor. The rule given in the text is sustained by the following among other decisions:[d] Mt. Holly Co. v. Ferree, 17 N. J. Eq. 117; Rogers v. Rankin, 90 Ala. 541, 8 South. 118 (attachment is superior not only to an unrecorded transfer, but to the equitable title of one in whose behalf the debtor, in his own name, made the subscription); Masury v. Arkansas Nat. Bank, 93 Fed. 603, 35 C. C. A. 476, reversing 87 Fed. 381 (transfer by way of pledge is not within the terms of a statute of Arkansas requiring the recording of stock transfers with the county clerk); Batesville, etc., Co. v. Myer, etc., Co., 68 Ark. 115, 56 S. W. 784 (same); and cases *infra* in this note; Ft. Madison Lumber Co. v. Batavian Bank, 71 Iowa 270, 32 N. W. 336, 60 Am. Rep. 789; Lyndonville Nat. Bank v. Folsom, 7 N. M. 611, 38 Pac. 253. But such transfers are generally protected against attaching creditors who have notice: Bridgewater Iron Co. v. Lissberger, 116 U. S. 8, 6 Sup. Ct. 241 (under the earlier Massachusetts statute); Selma, etc., Co. v. Harris, 132 Ala. 179, 31 South. 508; Hotchkiss & Upson Co. v. Union Nat. Bank, 68 Fed. 76 (Connecticut); *contra*, see Fahrney v. Kelley, 102 Fed. 403 (Arkansas); Perkins v. Lyons, 111 Iowa, 192, 82 N. W. 486; Ottumwa Screen Co. v. Stodghill, 103 Iowa, 437, 72 N. W. 669; Hair v. Burnell, 106 Fed. 280 (Iowa). Under the Colorado statute an attaching creditor has priority over an earlier assignment of the stock unless the assignment is registered on the books of the corporation within sixty days of its date: First Nat. Bank v. Hastings, 7 Colo. App. 129, 42 Pac. 691; but where the corporation refuses to make the transfer although demand is made in time, the assignment is prior: Weber v. Bullock, 19 Colo. 214, 35 Pac. 183; First Nat. Bank v. Dickson, (Colo.) 36 Pac. 618.

(c) In California, "in order that an assignee or pledgee of a certificate may protect his rights as against a purchaser at execution sale, he must cause a re-issue to him of a certificate, or he must serve notice on the corporation that he holds the certificate as such assignee or pledgee:" West Coast Safety Faucet Co. v. Wulff, 133 Cal. 315, 85 Am. St. Rep. 171, 65 Pac. 622.

(d) See, also, Continental Nat. Bank v. Eliot Nat. Bank, 7 Fed. 369; Allen v. Stewart, 7 Del. Ch. 287, 44 Atl. 786; Mapleton Bank v. Standrod, 8

§ 701. The Same — Between Assignee and Subsequent Purchasers.— As between such an assignee and subsequent purchasers, the question is more complicated. I think that general language has sometimes been used by judges, which indicates a confusion of mind with reference to the real situation of the parties, and the *possible* circumstances which might arise in the transaction. If the holder of shares should deliver the certificate with a power of attorney executed by himself, it would be impossible for him to clothe a subsequent assignee with the same *indicia* of ownership, so that the latter should have a title apparently equal to the former. On the other hand, if the holder of shares should assign them verbally or by a written instrument to A, but without delivering the certificate and power of attorney, and should afterwards assign them in the ordinary manner, by delivering the certificate with a power of attorney to B, the apparent title of the latter would certainly be superior

v. N. J. Ins. Co., 8 N. J. Eq. 167; Broadway Bank v. McElrath, 13 N. J. Eq. 24; Commercial Bank v. Kortright, 22 Wend. 348; 34 Am. Dec. 317; McNeil v. Tenth National Bank, 46 N. Y. 325; 7 Am. Rep. 341; Grymes v. Hone, 49 N. Y. 17, 22; 10 Am. Rep. 313; Comm. v. Watmough, 6 Whart. 117; United States v. Vaughan, 3 Binn. 394; 5 Am. Dec. 375; People v. Elmore, 35 Cal. 653; Dale v. Kimpton, 46 Vt. 76 (what is sufficient notice to the debtor to protect an assignee against attachments and executions by creditors of the assignor; casual information or knowledge may be sufficient); see also United States v. Vaughan, 3 Binn. 394; 5 Am. Dec. 375; Stevens v. Stevens, 1 Ashm. 190; Dix v. Cobb, 4 Mass. 508.

Iowa, 740, 71 Pac. 119; Rice v. Gilbert, 173 Ill. 348, 50 N. E. 1087, affirming 72 Ill. App. 649; Revised Stat. Illinois, c. 77, § 52, amend. of 1883; Kern v. Day, 45 La. Ann. 71, 12 South. 6; Noble v. Turner, 69 Md. 519, 16 Atl. 124 (assignee's priority lost by laches); Boston Music Hall Ass'n v. Cory, 129 Mass. 435; Massachusetts statute of 1884, c. 229; Andrews v. Worcester, N. & R. R. Co., 159 Mass. 64, 33 N. E. 1109; Clews v. Friedman, 182 Mass. 555, 66 N. E. 201; May v. Cleland, 117 Mich. 45, 75 N. W. 129, 44 L. R. A. 163; Nicollet Nat. Bank v. City Bank, 38 Minn. 85, 35 N. W. 577, 8 Am. St. Rep. 643; Lund v. Wheaton Roller-Mill Co., 50 Minn. 36, 52 N. W. 268, 36 Am. St. Rep. 623; Goyer Cold-Storage Co. v. Wildberger, 71 Miss. 438, 15 South. 235; Clark v. German Sav. Bank, 61 Miss. 611; McClintock v. Central Bank, 120 Mo. 127, 24 S. W. 1052; Wilson v. St. Louis & S. F. Ry. Co., 108 Mo. 588, 18 S. W. 286, 32 Am. St. Rep. 624; Doty v. First Nat. Bank, 3 N. Dak. 9, 53 N. W. 77,

to that of the former.[a] It does not seem possible, therefore, that a question of priority, on the assumption that their equitable interests are intrinsically equal, can arise between two successive assignees of the same shares from the same owner, where the assignment to one of them has been by a delivery of the certificate with a power of attorney. The questions of precedence among successive transfers executed in such a manner must arise in cases where the earlier assignment, apparently made by and in the name of the owner, is procured through fraud, breach of trust, or even forgery.[1] The discussion of this particular topic properly belongs, and will be found, in the next subdivision, which treats of the equities to which assignments of things in action are subject.[2]

§ 702. **Notice to the Debtor Necessary to Prevent Subsequent Acts by Him.**—Diligence is also necessary on the part of the assignee, in order to protect his right, by giving prompt notice of the transfer to the debtor, trustee, or other holder of the fund. Until notice, actual or constructive, is received

1 Mt. Holly Co. v. Ferree, 17 N. J. Eq. 117; Bank of Commerce's Appeal, 73 Pa. St. 59, 64; Sabin v. Bank of Woodstock, 21 Vt. 353; McNeil v. Tenth Nat. Bank, 46 N. Y. 325; 7 Am. Rep. 341.

2 See *infra*, §§ 707–715.

17 L. R. A. 259; Cornick v. Richards, 3 Lea (Tenn.), 1; Tombler v. Palestine Ice Co., 17 Tex. Civ. App. 596, 43 S. W. 896; Donnally v. Hearndon, 41 W. Va. 519, 23 S. E. 646; but it is held, in Tennessee, that the attachment is superior to a sale of the stock not consummated by an actual transfer and delivery of the stock certificate until after the attachment was levied: Young v. South Tredegar Iron Co., 85 Tenn. 189, 4 Am. St. Rep. 752; Cates v. Baxter, 97 Tenn. 443, 37 S. W. 219 (attachment made before certificate was issued). To the effect that an unregistered assignment gives the holder priority over a subsequent purchaser at execution sale against the former owner, see Geo. R. Barse Live-Stock Com. Co. v. Range Valley Cattle Co., 16 Utah, 59, 50 Pac. 630; Port Townsend Nat. Bank v. Port Townsend Gas & Fuel Co., 6 Wash. 597, 34 Pac. 155.

(a) See Dueber Watch-Case Mfg. Co. v. Daugherty, 62 Ohio St. 589, 57 N. E. 455, in editor's note to § 710, *post;* Société Générale de Paris v. Walker, L. R. 11 App. Cas. 20, affirming 14 Q. B. D. 424 (between competing equitable assignees, the equity of the possessor of the certificates is the better one). As to equitable assignments by a *trustee* of shares of stock, in England, see *post*, § 714, note.

by the debtor or trustee, payment by him to the assignor would be a valid payment of the claim, and binding upon the assignee. The same would be true of a release from the assignor to the debtor or trustee, or any other transaction between them which would operate as a legal discharge; it would also be a discharge as against the assignee, if done before notice.[1 a] It is expressly provided in many of the states that a demand in favor of the debtor, which might be a set-off against the assignor, not existing at the date of the assignment, but arising subsequently, *and before notice to the debtor,* shall be a valid set-off against the assignee.[2]

§ 703. III. Assignments of Things in Action Subject to Equities.[a]— The doctrine, stated in its most comprehensive form, is, that an assignment of every non-negotiable thing

[1] Bishop v. Garcia, 14 Abb. Pr., N. S., 69; Loomis v. Loomis, 26 Vt. 198; Campbell v. Day, 16 Vt. 558; Rider v. Johnson, 20 Pa. St. 190; Louden v. Tiffany, 5 Watts & S. 367; Stocks v. Dobson, 4 De Gex, M. & G. 11; Norrish v. Marshall, 5 Madd. 475; Van Keuren v. Corkins, 66 N. Y. 77, 79, 80; Kellogg v. Smith, 26 N. Y. 18; Reed v. Marble, 10 Paige, 409; N. Y. Life Ins. etc. Co. v. Smith, 2 Barb. Ch. 82; James v. Morey, 2 Cow. 246; 14 Am. Dec. 475; Atkinson v. Runnells, 60 Me. 440; Upton v. Moore, 44 Vt. 552; Cook v. Mut. Ins. Co., 53 Ala. 37; Brashear v. West, 7 Pet. 608; Muir v. Schenck, 3 Hill, 228; 38 Am. Dec. 633.

[2] See *infra,* § 705.

§ 702, (a) Merchants', etc., Bank v. Hewitt, 3 Iowa 93. 66 Am. Dec. 49; Chapman v. Steiner, 5 Kan. App. 326, 48 Pac. 607; Lockrow v. Cline, 4 Kan. App. 716, 46 Pac. 720; Com. v. Burnett, 19 Ky. Law Rep. 1836, 44 S. W. 966; Dodd v. Brott, 1 Minn. 270, 66 Am. Dec. 541; Nielsen v. City of Albert Lea, (Minn.) 98 N. W. 195; Faber v. Wagner, (N. Dak.) 86 N. W. 963; Gaullagher v. Caldwell, 22 Pa. St. (10 Harris) 300, 60 Am. Dec. 85; Cantrell v. Ford, (Tenn. Ch. App.) 46 S. W. 581; Clark v. Hogeman, 13 W. Va. 718. As to what is sufficient notice to the debtor, within this rule, see Rose v. Fritz, 109 Fed. 810; May v. Hill, 14 Mont. 338, 36 Pac. 877; Crouch v. Miller, 141 N. Y. 495, 36 N. E 394; Strobis v. Ferge. (Wis.) 78 N. W. 426; Bence v. Shearman, [1898] 2 Ch. 582, 67 Law J. Ch. 513, 78 Law T. (N. S.) 804. It seems that payment to a party who has never had the legal title will not protect the debtor who has not received notice of the assignment; as where the original holder of a judgment as trustee assigned the same to a *bona fide* purchaser, who becomes the legal and equitable owner, and the debtor, without notice of the assignment, made a subsequent payment, not to the original trustee, but to the original *cestui que trust:* Seymour v. Smith, 114 N. Y. 481, 21 N. E. 1042, 11 Am. St. Rep. 683.

§ 703, (a) This and the following paragraphs of the text are cited in Sutherland v. Reeve, 151 Ill. 384, 38

in action, even when made without notice of the defect to the assignee, is subject, in general, to all equities existing against the assignor. This broad doctrine has three different applications: 1. Where the equities are in favor of the debtor or trustee; 2. Where they arise between successive assignors and assignees,— that is, in favor of some prior assignor; 3. Where they arise entirely in favor of third persons,— the two latter cases including what are often called *latent* equities. As these three applications depend upon *somewhat* different grounds, and as there is not a perfect harmony of decision concerning them, it will be expedient to discuss them separately, and thus to avoid all unnecessary doubt with respect to the settled rules.

§ 704. 1. **Equities in Favor of the Debtor Party.**— The rule is settled, by an unbroken series of authorities, that the assignee of a thing in action not negotiable takes the interest assigned subject to all the defenses, legal and equitable, of the debtor who issued the obligation, or of the trustee or other party upon whom the obligation originally rested; that is, when the original debtor or trustee, in whatever form his promise or obligation is made, if it is not negotiable, is sued by the assignee, the defenses, legal and equitable, which he had at the time of the assignment, or at the time when notice of it was given, against the original creditor, avail to him against the substituted creditor.[1] [a] This rule

[1] See Pomeroy on Remedies, sec. 157; Callanan v. Edwards, 32 N. Y. 483, 486, per Wright, J.: "An assignee of a chose in action, not negotiable, takes the thing assigned subject to all the rights which the debtor had acquired in respect thereto prior to the assignment, or to the time notice was given of it, when there is an interval between the execution of the transfer and the notice." See also Ingraham v. Disborough, 47 N. Y. 421; Wanzer v. Cary, 76 N. Y. 526; Andrews v. Gillespie, 47 N. Y. 487; Bush v. Lathrop, 22 N. Y. 535, 538, per Denio, J.; Reeves v. Kimball, 40 N. Y. 299; Commercial Bank v. Colt, 15 Barb. 506; Western Bank v. Sherwood, 29 Barb. 383; Barney v. Grover, 28 Vt. 391;

N. E. 130; Western Nat. Bank v. Maverick Nat. Bank, 90 Ga. 339, 16 S. E. 942, 35 Am. St. Rep. 210.

(a) The text is quoted in Haydon v. Nicoletti, 18 Nev. 290, 3 Pac. 473; cited in Sutherland v. Reeve, 151 Ill. 384, 38 N. E. 130; Preston v. Russell, 71 Vt. 115, 44 Atl. 115; San José Ranch Co. v. San José L. & W. Co., 132 Cal. 582, 64 Pac. 1097. See

applies to all forms of contract not negotiable, and to all defenses which would have been valid between the debtor party and the original creditor. These defenses may arise

Kamena v. Huelbig, 23 N. J. Eq. 78; Bank v. Fordyce, 9 Pa. St. 275; Ragsdale v. Hagy, 9 Gratt. 409; Martin v. Richardson, 68 N. C. 255; Andrews v. McCoy, 8 Ala. 920; 42 Am. Dec. 669; Jeffries v. Evans, 6 B. Mon. 119; 43 Am. Dec. 158; Kleeman v. Frisbie, 63 Ill. 482; Boardman v. Hayne, 29 Iowa, 339; Norton v. Rose, 2 Wash. (Va.) 233; Brashear v. West, 7 Pet. 608; Wood v. Perry, 1 Barb. 114, 131; Ainslie v. Boynton, 2 Barb. 258, 263; Frants v. Brown, 17 Serg. & R. 287; Jordan v. Black, 2 Murph. 30; McKinnie v. Rutherford, 1 Dev. & B. Eq. 14; Moody v. Sitton, 2 Ired. Eq. 382; Lackay v. Curtiss, 6 Ired. Eq. 199; Turton v. Benson, 1 P. Wms. 497; 2 Vern. 764; Coles v. Jones, 2 Vern. 692; Priddy v. Rose, 3 Mer. 86; Athenæum etc. Soc. v. Pooley, 3 De Gex & J. 294; Stocks v. Dobson, 4 De Gex, M. & G. 11; Aberaman Iron Works v. Wickens, L. R. 5 Eq. 485, 516, 517; 4 Ch. 101; Graham v. Johnson, L. R. 8 Eq. 36; Ex parte Chorley, L. R. 11 Eq. 157; In re China etc. Co., L. R. 7 Eq. 240; In re Natal etc. Co., L. R. 3 Ch. 355; Ex parte New Zealand Bank, L. R. 3 Ch. 154; Houlditch v. Wallace, 5 Clark & F. 629; Rolt v. White, 31 Beav. 520; Smith v. Parkes, 16 Beav. 115; Cockell v. Taylor, 15 Beav. 103; Dibbs v. Goren, 11 Beav. 483. Upon the question whether the doctrine stated in the text applies to mortgages given to secure negotiable promissory notes — a form of security very common in some states — the authorities are in direct conflict. In one class of decisions it has been held that where a mortgage is given to secure a negotiable promissory note and before maturity of the note it and the mortgage are assigned to a *bona fide* purchaser for value, the assignment of the mortgage as well as of the note is free from all equities subsisting between the original parties in favor of the mortgagor:[b] Carpenter

also, Pollard v. Vinton, 105 U. S. 7; Friedlander v. T. & P. Ry., 130 U. S. 416, 9 Sup. Ct. 570; Withers v. Greene, 50 U. S. (9 How.) 213; Rauer v. Fay, 110 Cal. 361, 42 Pac. 902; McJilton v. Love, 13 Ill. (3 Peck) 486, 54 Am. Dec. 449; Robeson v. Roberts, 20 Ind. 155, 83 Am. Dec. 308; Robertson v. Cooper, 1 Ind. App. 78, 27 N. E. 104; Anthony v. Masters, 28 Ind. App. 239, 62 N. E. 505; Tabor v. Foy, 56 Iowa, 539, 9 N. W. 897; Johnson v. Boice, 40 La. Ann. 273, 4 South. 163, 8 Am. St. Rep. 528; Spinning v. Sullivan, 48 Mich. 5, 11 N. W. 758; Cox v. Palmer, 60 Miss. 793; Lewis v. Holdrege, 56 Neb. 379, 76 N. W. 890; Decker v. Adams, 28 N. J. Law 511, 78 Am. Dec. 65; Clement v. City of Philadelphia, 137 Pa. St. 328, 20 Atl. 1000, 21 Am. St. Rep. 876; Romig v. Erdman, 5 Whart. 112, 34 Am. Dec. 533; Westbury v. Simmons, 57 S. C. 477, 35 S. E. 764; Goldwaite v. National Bank, 67 Ala. 549; and cases cited *infra*, in notes to this paragraph. As to assignments of mortgages, see *post*, § 733, and notes.

(b) Negotiable Note Makes Negotiable Mortgage.— See, also, Beals v. Neddo, 2 Fed. 43; O'Rourke v. Wahl, 109 Fed. 276, 48 C. C. A. 360; Hawley v. Bibb, 69 Ala. 52; Spence v. Mobile, etc., Ry. Co., 79 Ala. 576 (citing the author's note); Thompson v. Maddux, 117 Ala. 468, 23 South. 157; Cowing v. Cloud, (Colo. App.) 65 Pac. 417; Baumgartner v. Peterson, 93 Iowa,

out of or be inherent in the very terms or nature of the obligation itself, as that it was conditional and the condition has not been performed by the assignor, failure or illegality

v. Longan, 16 Wall. 271, 273; Kenicott v. Supervisors, 16 Wall. 452, 469; Taylor v. Paige, 6 Allen, 86; Reeves v. Scully, Walk. Ch. 248; Croft v. Bunster, 9 Wis. 503, 509; Cornell v. Hichens, 11 Wis. 353; Fisher v. Otis, 3 Chand. 83; Martineau v. McCollum, 4 Chand. 153; Potts v. Blackwell, 4 Jones Eq. 58; Bloomer v. Henderson, 8 Mich. 395; 77 Am. Dec. 453; Cicotte v. Gagnier, 2 Mich. 381; Pierce v. Faunce, 47 Me. 507. Other cases reach exactly the opposite conclusion, and hold that the assignment of such a mortgage is governed by the general rule:[c] Kleeman v. Frisbie, 63 Ill. 482; Bryant v. Vix, 83 Ill. 572, 62 N. W. 27; Jenks v. Shaw, 99 Iowa, 604, 61 Am. St. Rep. 256, 68 N. W. 900 (but the assignment of the note is not free from equities as respects a *bona fide* purchaser of the premises from the mortgagor and mortgagee); Lewis v. Kirk, 28 Kan. 497, 42 Am. Rep. 173 (a clear statement of the rules relating to the subject of the negotiability of mortgages); Fisher v. Cowles, 41 Kan. 418, 22 Pac. 228; Harrison Nat. Bank v. Pease, 8 Kan. App. 573, 54 Pac. 1038; Duncan v. Louisville, 13 Bush (76 Ky.), 378, 26 Am. Rep. 201 (observations on the policy of the rule); Murphy v. Barnard, 162 Mass. 72, 38 N. E. 29, 44 Am. St. Rep. 340; Biggerstaff v. Marston, 161 Mass. 101, 36 N. E. 785; Barnum v. Phenix, 60 Mich. 388, 27 N. W. 577; Williams v. Keyes, 90 Mich. 290, 51 N. W. 520, 30 Am. St. Rep. 438; Wilson v. Campbell, 110 Mich. 580, 68 N. W. 278, 35 L. R. A. 544; Cox v. Cayau, 117 Mich. 599, 76 N. W. 96, 72 Am. St. Rep. 585; Crawford v. C. Aultman & Co., 139 Mo. 262, 40 S. W. 952; Borgess Investment Co. v. Vette, 142 Mo. 560, 44 S. W. 754, 64 Am. St. Rep. 567; Black v. Reno, 59 Fed. 917 (Missouri); Eggert v. Beyer, 43 Nebr. 711, 62 N. W. 57; Stark v. Olsen, 44 Nebr. 646, 63 N. W. 37; Bull v. Mitchell, 47 Nebr. 647, 66 N. W. 632; Richards v. Waller, 49 Nebr. 639, 68 N. W. 1053; Porter v. Ourada, 51 Nebr. 510, 71 N. W. 52; Herbage v. Moodie, 51 Nebr. 837, 71 N. W. 778; First Nat. Bank v. Flath, 10 N. Dak. 281, 86 N. W. 867; Bamberger v. Geiser, 24 Oreg. 203, 33 Pac. 609; Nashville Trust Co. v. Smythe, 94 Tenn. 513, 45 Am. St. Rep. 748, 29 S. W. 903 (an instructive case); Heidenheimer v. Stewart, 65 Tex. 321; Solinsky v. Bank, 82 Tex. 246, 17 S. W. 1050; Boone v. Miller, 86 Tex. 80, 81, 23 S. W. 574; Van Burkleo v. Southwestern Mfg. Co., (Tex. Civ. App.) 39 S. W. 1085; Crosby v. Roub, 16 Wis. 616, 84 Am. Dec. 720; Kelley v. Whitney, 45 Wis. 110, 30 Am. Rep. 697; Miller Brewing Co. v. Manasse, 99 Wis. 99, 67 Am. St. Rep. 854, 74 N. W. 535. Where the mortgage secured a forged note, the mortgage itself is, of course, subject to equities: Tabor v. Foy, 56 Iowa, 539, 9 N. W. 897.

(c) **Negotiable Note does not Make Mortgage Negotiable.**—See, also, Olds v. Cummings, 31 Ill. 188 (a leading case); Towner v. McClelland, 110 Ill. 542; Shippen v. Whittier, 117 Ill. 282, 7 N. E. 642; Scott v. Magloughlin, 133 Ill. 33, 24 N. E. 1030; McAuliffe v. Reuter, 166 Ill. 491, 46 N. E. 1087; Buehler v. McCormick, 169 Ill. 269, 48 N. E. 287 (stating

of the consideration, and the like; or they may exist outside of the contract, as set-off, payment, release, the condition of accounts between the original parties, and the like. Some examples are given in the foot-note, by way of illustration.[2] It is essential, however, that the equity in

11; Baily v. Smith, 14 Ohio St. 396; 84 Am. Dec. 385. The reasoning of these Illinois decisions is, in my opinion, most in accordance with the settled doctrines of equity jurisprudence, namely, that the assignment of the mortgage, whether it be an incident of the transfer of the note, or be direct, is wholly equitable, and gives only an equitable title to the assignee, and must therefore be subject to all subsisting equities; the doctrine of *bona fide* purchase for a valuable consideration not applying to transfers of mere equitable interests.

[2] *Of the Kinds of Contract.*—Shares and obligations of corporations:[d] In re China etc. Co., L. R. 7 Eq. 240; In re Natal etc. Co., L. R. 3 Ch. 355. Bonds, or bonds and mortgages: Turton v. Benson, 1 P. Wms. 497; Western Bank v. Sherwood, 29 Barb. 383.[e] A warehouseman's receipt: Commercial Bank v. Colt, 15 Barb. 506. Assignment for benefit of creditors:[f] Marine Bank v. Jauncey, 1 Barb. 486; Maas v. Goodman, 2 Hilt. 275. Contract for the sale of land, in an action for a specific performance by an assignee of the vendee: Reeves v. Kimball, 40 N. Y. 299.[g]

considerations as to the policy of the rule); Bouton v. Cameron, 205 Ill. 50, 68 N. E. 800; Johnson v. Carpenter, 7 Minn. 120; Hostetter v. Alexander, 22 Minn. 559; Blumenthal v. Tassey, 29 Minn. 177, 12 N. W. 517; Oster v. Mickley, 35 Minn. 245, 28 N. W. 710; Olson v. Northwestern Guaranty Loan Co., 65 Minn. 475, 68 N. W. 100; Paulsen v. Koon, 85 Minn. 240, 88 N. W. 760; Woodruff v. Morristown Inst., 34 N. J. Eq. 174; Foster v. McGuire, 96 Ga. 447, 23 S. E. 398. A similar rule prevails under the Louisiana system: see Doll v. Rigotti, 20 La. Ann. 265, 96 Am. Dec. 399; Butler v. Slocomb, 33 La. Ann. 170, 39 Am. Rep. 265; State National Bank v. Flathers, 45 La. Ann. 75, 40 Am. St. Rep. 216, 12 South. 243 (stating the Louisiana rule with exactness); Layman v. Vicknair, 47 La. Ann. 679, 17 South. 265; Equitable Securities Co. v. Talbert, 49 La. Ann. 1393, 22 South. 762; Pertuit v. Damare, 50 La. Ann. 893, 24 South. 681. For further discussion of these competing rules, see *post*, § 1210, notes.

(d) See, also, Hammond v. Hastings, 134 U. S. 401, 10 Sup. Ct. 727; Jennings v. Bank of California, 79 Cal. 323, 21 Pac. 852, 12 Am. St. Rep. 145, 5 L. R. A. 233; Craig v. Hesperia L. & W. Co., 113 Cal. 7, 45 Pac. 10, 54 Am. St. Rep. 316, 35 L. R. A. 306; Hampton & Branchville R. & L. Co. v. Bank of Charleston, 48 S. C. 120, 26 S. E. 238; Reese v. Bank of Commerce, 14 Md. 271, 74 Am. Dec. 536.

(e) As to assignment of mortgages, see *post*, § 733, and notes.

(f) That an assignee for the benefit of creditors is not a purchaser for a valuable consideration, see *post*, § 749.

(g) *Non-Negotiable Note:* Spinning v. Sullivan, 48 Mich. 5, 11 N. W. 758; Robertson v. Cooper, 1 Ind. App. 78, 27 N. E. 104.

Bill of Lading, fraudulently issued

favor of the debtor should exist at the time of the assignment or before notice thereof; after receiving notice, he can-

Of Defenses.— In an action on a bond and mortgage by the assignee, the defense that they were given on consideration that the mortgagee should perform certain covenants contained in a collateral agreement between himself and the mortgagor, and that he had wholly failed to perform them, was sustained: Western Bank v. Sherwood, 29 Barb. 383. Failure or illegality of the consideration, or that the assigned obligation was given as collateral security for a debt which has been paid:[h] Ellis v. Messervie, 11 Paige, 467; Weaver v. McCorkle, 14 Serg. & R. 304; McMullen v. Wenner, 16 Serg. & R. 18; 16 Am. Dec. 543. That the bond or other obligation assigned had been wholly or partially satisfied: Simson v. Brown, 68 N. Y. 355, 361; Kelly v. Roberts, 40 N. Y. 432; Turton v. Benson, 1 P. Wms. 497; Rolt v. White, 31 Beav. 520 Smith v. Parkes, 16 Beav. 115; Ord v. White, 3 Beav. 357. A set-off existing in favor of the debtor at the time of the assignment or notice thereof:[i] Loomis v. Loomis, 26 Vt. 198; Campbell v. Day, 16 Vt. 558; Rider v. Johnson, 20 Pa. St. 190; Louden v. Tiffany, 5 Watts & S. 367; Moore v. Jervis, 2 Coll. C. C. 60; Stephens v. Venables, 30 Beav. 625; Willes v. Greenhill, 29 Beav. 376; Cavendish v. Geaves, 24 Beav. 163, 173. Where money coming due on a contract is assigned, the assignee's claim is subject to all the conditions and terms of the contract: Tooth v. Hallett, L. R. 4 Ch. 242; Myers v. United etc. Ass. Co., 7 De Gex, M. & G. 112; Bristow v. Whitmore, 9 H. L. Cas. 391. An assignment by a stockholder of his shares or of corporation obligations is subject to all equities and claims with respect thereto existing against him in favor of the company at the date of the transfer:[j] In re Natal etc. Co., L. R. 3 Ch. 355;

by the agent of the carrier, without receiving the goods named therein: Pollard v. Vinton, 105 U. S. 7; Friedlander v. T. & P. Ry. Co., 130 U. S. 416, 9 Sup. Ct. 570.

County Warrants: Wall v. County of Monroe, 103 U. S. 77.

Requisition drawn on school funds of a public school district: Shakespear v. Smith, 77 Cal. 638, 20 Pac. 294, 11 Am. St. Rep. 327.

Judgment: Anthony v. Masters, 28 Ind. App. 239, 62 N. E. 505; Johnson v. Boice, 40 La. Ann. 273, 4 South. 163, 8 Am. St. Rep. 528.

(h) Robertson v. Cooper, 1 Ind. App. 78, 27 N. E. 104 (illegality); McFarland v. Lyon, 4 Tex. Civ. App. 586, 23 S. W. 554 (failure); York v. McNutt, 16 Tex. 13, 67 Am. Dec. 607 (illegality).

(i) Porter v. Liscom, 22 Cal. 430, 83 Am. Dec. 76; Third Nat. Bank v. Western & A. R. Co., 114 Ga. 890, 40 S. E. 816; Northwestern & P. Hypotheek Bank v. Rauch, (Idaho) 66 Pac. 807; Collins v. Campbell, 97 Me. 23, 28, 53 Atl. 837, 94 Am. St. Rep. 458, 463; Rayburn v. Hurd, 20 Or. 229, 25 Pac. 635; Clement v. City of Philadelphia, 137 Pa. St. 328, 20 Atl. 1000, 21 Am. St. Rep. 876; Ketchum v. Foot, 15 Vt. 258, 40 Am. Dec. 678.

(j) Hammond v. Hastings, 134 U. S. 401, 10 Sup. Ct. 727; Jennings v. Bank of California, 79 Cal. 323, 21 Pac. 852, 12 Am. St. Rep. 145, 5 L. R. A. 233; Craig v. Hesperia L. & W. Co., 113 Cal. 7, 45 Pac. 10, 54 Am. St. Rep. 316, 35 L. R. A. 306; Reese v. Bank of Commerce, 14 Md. 271, 74 Am. Dec. 536; Hampton & Branchville R. & L. Co. v. Bank of Charleston, 48 S. C. 120, 26 S. E. 238.

not, by a payment, release, obtaining a set-off, or any other

In re China Steamship Co., L. R. 7 Eq. 240. Kleeman v. Frisbie, 63 Ill. 482 (assignment of a mortgage or deed of trust given to secure a negotiable promissory note is subject to all equities); Parmalee v. Wheeler, 32 Wis. 429 (assignment of a judgment, ditto); Broadman v. Hayne, 29 Iowa, 339 (of an order made by a board of school trustees); Downey v. Tharp, 63 Pa. St. 322 (what is not such an equity or defense. Where a demand has been twice assigned, the debtor cannot set off as against the second assignee a claim against the first). It is held in Massachusetts, under the General Statutes (c. 161, sec. 64), that when the creditor assigns a note and mortgage given as collateral security for a debt, after the debt so secured had been paid, to an assignee for a valuable consideration and without notice, the title of such innocent assignee is not affected by the fraud of his assignor, and is therefore good as against the mortgagor: Draper v. Saxton, 118 Mass. 427. Also in McMasters v. Wilhelm, 85 Pa. St. 218, it is held that the assignee of a mortgage is not affected by a collateral agreement between the mortgagor and mortgagee, made at the time of executing the mortgage, and of which he had no notice. See, as further illustrations of the doctrine stated in the text, Allen v. Watt, 79 Ill. 284; Hall v. Hickman, 2 Del. Ch. 318.[k]

(k) The debtor can set up that his contract with the assignor has not been performed. The assignee takes subject to all the terms of the contract: Pacific Rolling-Mill Co. v. English, 118 Cal. 123, 50 Pac. 383; Independent School Dist. v. Mardis, 106 Iowa, 295, 76 N. W. 794; Shuttleworth v. Kentucky Coal, I. & D. Co., 22 Ky. Law Rep. 1341, 60 S. W. 534; Fisken v. Milwaukee Bridge & Iron Works, 87 Mich. 591, 49 N. W. 873 (aff. 86 Mich. 199, 49 N. W. 133); Van Akin v. Dunn, 117 Mich. 421, 75 N. W. 938; Hoover v. Columbia Nat. Bank, 58 Neb. 420, 78 N. W. 717; Jones v. Savage, 53 N. Y. Supp. 308, 24 Misc. Rep. 158; Murray v. Governeur, 2 Johns. Cas. 438, 1 Am. Dec. 177. The debtor may set up *res adjudicata:* Porter v. Bagby, 50 Kan. 412, 31 Pac. 1058. A judgment in the hands of an assignee may be vacated or set aside for the same cause that would justify such vacation in the hands of the original plaintiff: Weber v. Tschetter, 1 S. Dak. 205, 46 N. W. 201. And see Magin v. Lamb, 43 Minn. 80, 44 N. W. 675, 19 Am. St. Rep. 216. The debtor may set up that lumber delivered had been paid for by prior advances: Tyler Car & Lumber Co. v. Wettermark, 12 Tex. Civ. App. 399, 34 S. W. 807. The assignee cannot be affected, however, by collateral transactions, secret trusts, or acts unconnected with the subject of the contract: Kountz v. Kirkpatrick, 72 Pa. St. 376, 13 Am. Rep. 687. If the assignee claims under an assignment valid as against the assignor, the debtor cannot question its validity: Van Dyke v. Gardner, 49 N. Y. Supp. 328, 22 Misc. Rep. 113 (aff. 47 N. Y. Supp. 710, 21 Misc. Rep. 542); Adair v. Adair, 5 Mich. 204, 71 Am. Dec. 779; Johnson v. Beard, 93 Ala. 96, 9 South. 535. The mere fact that the assignor could not sue does not preclude a recovery by the assignee. Thus, where statute disabled partnerships doing business under fictitious names from suing unless a certificate had been filed, the assignee of a partnership under the disability has been allowed to recover: Quan Wye v. Chin Lin Hee, 123 Cal. 185, 55 Pac. 783.

act, defeat or prejudice the right of the assignee.[1] The debtor who would have been entitled to equities under this rule may, by a writing, or by actual misrepresentations, or by conduct, or even by silence towards the assignee, estop himself from setting them up, and he may release them.[3] [m]

[3] As where the maker of an accommodation note represents, to one who is about to discount it at more than the legal rate of interest, that it is business paper, and thereby estops himself from setting up the defense of usury in its inception. Representation under similar circumstances, that the obligation about to be assigned was given upon a valuable consideration, would estop the debtor from relying upon the actual want of consideration as a defense: In re Northern etc. Co., L. R. 10 Eq. 458, 463; In re Agra etc. Bank, L. R. 2 Ch. 391; In re General Estates Co., L. R. 3 Ch. 758; In re Blakeley Ordnance Co., L. R. 3 Ch. 154; Higgs v. Northern etc. Co., L. R. 4 Ex. 387; Watson's Ex'rs v. McLaren, 19 Wend. 557; Sargeant v. Sargeant, 18 Vt. 371; Bank v. Jerome, 18 Conn. 443; Jones v. Hardesty, 10 Gill & J. 404.[n] Where A executed a bond and mortgage purporting to be for twenty thousand dollars to B, but which was actually without any consideration, and C bought the security at a large discount (for sixteen thousand dollars) upon the faith of a written statement by M. that the amount expressed in the instrument was the true consideration; held, that M. was estopped from asserting a want of consideration to the full extent of the face of the bond and mortgage: Grissler v. Powers, 81

(l) Bank of Harlem v. City of Bayonne, 48 N. J. Eq. 246, 21 Atl. 478, citing the text; affirmed, 48 N. J. Eq. 646, 25 Atl. 20; Todd v. Meding, (N. J. Eq.) 38 Atl. 349 (assignment of part of claim); Lampson v. Fletcher, 1 Vt. 168, 18 Am. Dec. 676; Sanders v. Soutter, 136 N. Y. 97, 32 N. E. 638; McCarthy v. Mt. Tecarte etc., Water Co., 110 Cal. 687, 43 Pac. 391; Kitzinger v. Beck, 4 Colo. App. 206, 35 Pac. 278; Schelling v. Mullen, 55 Minn. 122, 56 N. W. 586, 43 Am. St. Rep. 475; Oldham v. Ledbetter, 1 How. (Miss.) 43, 26 Am. Dec. 690; Ferguson v. Davidson, 147 Mo. 664, 49 S. W. 859; Field v. City of New York, 6 N. Y. (2 Seld.) 179, 57 Am. Dec. 435; Ernst v. Estey Wire Works Co., 45 N. Y. Supp. 932, 20 Misc. Rep. 365; Anniston Nat. Bank v. School Committee, 118 N. C. 383, 24 S. E. 792; Bank of Spring City v. Rea County, (Tenn. Ch. App.) 59 S. W. 442; Texas & P. Ry. Co. v. Vaughn, 16 Tex. Civ. App. 403, 40 S. W. 1065; Powell v. Galveston, H. & S. A. Ry. Co., (Tex. Civ. App.) 78 S. W. 975.

(m) Woodruff v. Morristown Inst., 34 N. J. Eq. 174 (mortgagor estopped to set up defenses); Morrison v. Beckwith, 20 Ky. (4 T. B. Monroe) 73, 16 Am. Dec. 136; Follett v. Reese, 20 Ohio, 546, 55 Am. Dec. 472; Cincinnati, N. O. & T. P. Ry. Co. v. Citizens' Nat. Bank, 56 Ohio St. 351, 47 N. E. 249, 43 L. R. A. 777; but see Rapps v. Gottlieb, 142 N. Y. 164, 36 N. E. 1052, affirming 67 Hun, 115, 22 N. Y. Supp. 52 (when mortgage is assigned, estoppel rule of § 710 does not apply to equities between the original parties).

(n) Robinson v. Montgomeryshire Brewery Co., [1896] 2 Ch. 841.

§ 705. Statutory Provision — Codes of Procedure.— Since the general doctrine concerning the rights of the debtor parties as against assignees has been expressly recognized and preserved in all the codes and practice acts of the states and territories which have adopted the reformed procedure, it will be proper to exhibit, in a very brief manner, the results of the judicial interpretation put upon these statutory provisions, although they apply to legal as well as to equitable actions. The provision found in the various codes is substantially as follows: "In the case of an assignment of a thing in action, the action of the assignee shall be without any prejudice to any set-off or other defense existing at the time of or before notice of the assignment; but this section shall not apply to negotiable promissory notes and bills of exchange [and negotiable bonds: Ohio, Kansas, Nebraska], transferred in good faith and upon good consideration before due."[1] In Ohio, Kansas, Nebraska, and Washington the language is, "The action of the assignee shall be without prejudice to any set-off or other defense now allowed."[2]

§ 706. Same Continued.— The defenses which this clause admits should be carefully distinguished from counterclaims subsequently provided for by the codes. This section speaks of defenses which simply prevent the plaintiff from succeeding, and may be available against an assignee, as

N. Y. 57; 37 Am. Rep. 475. See also, as illustrations of such estoppel, Ashton's Appeal, 73 Pa. St. 153, 161, 162; Twitchell v. McMurtrie, 77 Pa. St. 383; Scott v. Sadler, 52 Pa. St. 211; Weaver v. Lynch, 25 Pa. St. 449; 64 Am. Dec. 713; McMullen v. Wenner, 16 Serg. & R. 18; 6 Am. Dec. 543; Kellogg v. Ames, 41 N. Y. 259; Holbrook v. N. J. Zinc Co., 57 N. Y. 616, 622, 623; Petrie v. Feeter, 21 Wend. 172; Hall v. Purnell, 2 Md. Ch. 137; Foot v. Ketchum, 15 Vt. 258; 40 Am. Dec. 678; King v. Lindsay, 3 Ired. Eq. 77.

[1] New York (old code), sec. 112; (new code, sec. ——); Minnesota, sec. 27; California, sec. 368; Wisconsin, c. 122, sec. 13; Indiana, sec. 6; Kentucky, sec. 31; South Carolina, sec. 135; North Carolina, sec. 55; Oregon, secs. 28, 332; Nevada, sec. 5; Iowa, sec. 2546; Dakota, sec. 65; Idaho, sec. 5; Montana, sec. 5; Washington, sec. 3; Wyoming, sec. 33; Arizona, sec. 5.

[2] Ohio, sec. 26; Kansas, sec. 27; Nebraska, sec. 29; Washington, sec. 3, slightly varied.

well as against the original creditor. The counterclaim assumes a right of action against, and demands affirmative relief from, the plaintiff, and is therefore impossible, as against an assignee suing, if it existed against the assignor. It was not intended by the codes to alter the substantial rights of parties, but only to introduce such modifications into the modes of protecting them as were rendered necessary by the preceding section requiring the real party in interest in most cases to be the plaintiff. Taking the two sections together, the plain interpretation of them is: the assignee of a thing in action must sue upon it in his own name, but this change in the practice at law shall not work any alteration of the actual rights of the parties; the defendants are still entitled to the same defenses against the assignee who sues which they would have had if the former legal rule had continued to prevail, and the action had been brought in the name of the assignor, but to no other or different defenses. This construction is now firmly and universally established.[1] I have placed in the foot-note a number of decisions involving the meaning and effect of this statutory provision, and relating especially to the *time* at which the set-off or other defense must exist, in order that it may be available against the assignee.[2]

[1] Beckwith v. Union Bank, 9 N. Y. 211, 212, per Johnson, J.; Myers v. Davis, 22 N. Y. 489, 490, per Denio, J.

[2] *Set-off.*—There is a difference among these decisions. In some it is held that the assigned claim, and the claim in favor of the defendant, must both be existing demands, due and payable at the date of the assignment, and that it is not sufficient for the latter to become a demand due and payable after the assignment, but before notice thereof. In others it is held that a debt existing in favor of the defendant, and becoming due and payable against the assignor *at any time before notice of the assignment*, constitutes a valid set-off. The rule concerning equitable set-off, when the assignor is insolvent, is also admitted in several of these cases: Beckwith v. Union Bank, 9 N. Y. 211; Myers v. Davis, 22 N. Y. 489, 490; Martin v. Kuntzmuller, 37 N. Y. 396; Barlow v. Myers, 64 N. Y. 41; 21 Am. Rep. 582; reversing 6 N. Y. Sup. Ct. 183; Roberts v. Carter, 38 N. Y. 107; Robinson v. Howes, 20 N. Y. 84; Merrill v. Green, 55 N. Y. 270, 274; Frick v. White, 57 N. Y. 103; Blydenburgh v. Thayer, 3 Keyes, 293; Williams v. Brown, 2 Keyes, 486; Watt v. Mayor etc., 1 Sand. 23; Wells v. Stewart, 3 Barb. 40; Ogden

§ 707. 2. Equities between Successive Assignors and Assignees.[a] — The doctrine is not confined to the case of the debtor party setting up a defense against an assignee; it also applies, when the same non-negotiable thing in action has gone through successive assignments, to the second and subsequent assignees, if there were equities subsisting between the original assignor — or *any* prior assignor — and his immediate assignee in favor of the former. The instances of this application include the following, among other circumstances: When the owner transfers the thing in action upon condition, or subject to any reservations, and this immediate assignee transfers it absolutely; when the first assignment is accomplished by a forgery of the owner's name, and this assignee afterwards transfers to an innocent purchaser for value; when the original assignment is procured by fraud, duress, or undue influence, and a second assignment is then made to a purchaser for value and without notice; when the original assignment is regular on its face, executed in the name of the owner and by means of his signature voluntarily written, but the transfer is consum-

v. Prentice, 33 Barb. 160; Maas v. Goodman, 2 Hilt. 275; Lathrop v. Godfrey, 6 Thomp. & C. 96; Adams v. Rodarmel, 19 Ind. 339; Morrow's Assignees v. Bright, 20 Mo. 298; Walker v. McKay, 2 Met. (Ky.) 294; Gildersleeve v. Burrows, 24 Ohio St. 204; Norton v. Foster, 12 Kan. 44, 47, 48; Leavenson v. Lafontaine, 3 Kan. 523, 526; Harris v. Burwell, 65 N. C. 584; Richards v. Daily, 34 Iowa, 427, 429; Smith v. Fox, 48 N. Y. 674; Smith v. Felton, 43 N. Y. 419; Bradley v. Angell, 3 N. Y. 475, 478; Chance v. Isaacs, 5 Paige, 592; Martin v. Richardson, 68 N. C. 255, and cases cited; McCabe v. Grey, 20 Cal. 509; Herrick v. Woolverton, 41 N. Y. 581; 1 Am. Rep. 461; Miller & Co. v. Florer, 15 Ohio St. 148, 151; Loomis v. Eagle Bank, 10 Ohio St. 327; Casad v. Hughes, 27 Ind. 141; Lawrence v. Nelson, 21 N. Y. 158; Osgood v. De Groot, 36 N. Y. 348; Merritt v. Seaman, 6 N. Y. 168; Field v. Mayor etc., 6 N. Y. 179; 57 Am. Dec. 435.[a] And see Pomeroy on Remedies, secs. 163–170.

§ 706, (a) McKenna v. Kirkwood, 50 Mich. 544, 15 N. W. 898; Fuller v. Steiglitz, 27 Ohio St. 355, 22 Am. Rep. 312; Goldthwaite v. National Bank, 67 Ala. 549.

§ 707, (a) §§ 707–711 are cited in Sutherland v. Reeve, 151 Ill. 384, 38 N. E. 130. § 707 is cited in Graham Paper Co. v. Pembroke, 124 Cal. 117, 56 Pac. 627, 71 Am. St. Rep. 26, 44 L. R. A. 312.

mated through a breach of fiduciary duty by an agent or bailee contrary to the owner's intention, and this immediate assignee transfers to an innocent holder; and finally, when the original owner assigns the same thing in action for value and without notice, first to A and afterwards to B, and the controversy is between these two claimants, or between subsequent assignees from and deriving title through them. The decisions involving the doctrine, in its application to these various circumstances, are directly conflicting. While a complete reconciliation of this conflict is impossible, there are considerations which will bring the authorities into a partial harmony. The rule which makes the right of a subsequent assignee subject to the equities subsisting in favor of the original or any prior assignor is plainly a mere expression of the general principle, that among successive equitable interests in the same thing, the order of time prevails. The decisions which uphold the equities of the prior assignor are either expressly or impliedly based upon this principle. But the principle itself is not absolute; it prevails only where the successive equitable interests are equal; indeed, the equity resulting *merely* from priority in time has been said to be the feeblest of any, and to be resorted to only when there is no other feature or incident of superiority.[1] Whatever creates a superior equity in one of the successive holders will disturb the order of time, and many different features or incidents will have this effect. The *laches* of one having an interest prior in time may confer a superior equity upon a subsequent holder; *notice* may destroy a precedence otherwise existing; absence of a valuable consideration is always a badge of inferiority; and finally, the doctrine of estoppel may be properly invoked to prevent a prior party from asserting his right. In many of the cases which *appear* to deny the doctrine that a subse-

[1] See *supra*, vol. 1, § 414, and the opinion in Rice v. Rice, 2 Drew. 73, there quoted. This description of the right resulting from a priority in time is, in my opinion, much too strong; it can hardly be reconciled with the imposing line of authorities cited in the following paragraphs.

quent assignee takes subject to the equities of a prior assignor or of a third person, the *decision* is in fact rested upon one or the other of these well-settled exceptions to the general principle of priority in order of time among successive equitable interests, although the opinion may not perhaps state such a ground as the *ratio decidendi.* It is possible, in this manner, to effect a partial reconcilement among the authorities; some conflict of opinion, however, still remains.

§ 708. General Rule — Assignment Subject to Latent Equities. — The equities of a prior assignor, or of a third person, have sometimes been called "latent." The theory that such "latent equities" cannot prevail against the title of a second or other subsequent assignee, and that an assignee only takes subject to the equities in favor of the debtor party, has received some judicial support.[1] It is, however, unsound; it is, in effect, an extension of the peculiar qualities of negotiable instruments to things in action not negotiable.[a] The doctrine is sustained by the weight of authority, I think, and by principle, that the right of the second or other subsequent assignee is subject to all equities subsisting in favor of the original or other prior assignor, unless in some settled mode recognized by equity jurisprudence such assignee has obtained a superiority which gives him the precedence. This doctrine must be regarded as correct, as based upon principle, as long as the distinction between negotiable and non-negotiable obligations is preserved in our jurisprudence.[2 b] I shall describe,— 1. Those

[1] See cases *infra*, under § 715.

[2] Bush v. Lathrop, 22 N. Y. 535; Anderson v. Nicholas, 28 N. Y. 600; approved by Woodruff, J., in Reeves v. Kimball, 40 N. Y. 299, 311; Mason v. Lord, 40 N. Y. 476, 487, per Daniels, J.; Schafer v. Reilly, 50 N. Y. 61, 67; McNeil v. Tenth Nat. Bank, 55 Barb. 59, 68; Williams v. Thorn, 11 Paige,

(a) The text is quoted in Western Nat. Bank v. Maverick Nat. Bank, 90 Ga. 339, 16 S. E. 942, 35 Am. St. Rep. 210, holding, however, that judgments are *quasi* negotiable under the Georgia statutes.

(b) In further support of the text, see Commercial Nat. Bank v. Burch,

classes of cases in which the doctrine has been applied; and 2. Those in which it is not applicable.

§ 709. Illustrations of This Rule.—If the owner and holder of a thing in action not negotiable transfers it to an assignee upon condition, or subject to any reservations or claims in favor of the assignor, although the instrument of assignment be absolute on its face, this immediate assignee, holding a qualified and limited interest, cannot convey a greater property than he himself holds; and if he assumes to convey it to a second assignee by a transfer absolute in form, and for a full consideration, and without any notice to such purchaser of a defect in the title, this second assignee takes it, nevertheless, subject to all the equities, claims, and rights of the original holder and first assignor.[1] In the second

459; Mangles v. Dixon, 3 H. L. Cas. 702; Marvin v. Inglis, 39 How. Pr. 329; Bradley v. Root, 5 Paige, 632; Poillon v. Martin, 1 Sand. Ch. 569; Maybin v. Kirby, 4 Rich. Eq. 105; Judson v. Corcoran, 17 How. 612. Some of these decisions deal with the broad doctrine that the assignment is subject to equities in favor of all third persons. See also the numerous cases cited under the next following paragraph.

[1] Bush v. Lathrop, 22 N. Y. 535. This is altogether a leading and most instructive case, and squarely presents the question under discussion. The holder of a bond and mortgage for $1,400, assigned and delivered them, by an instrument absolute on its face, to secure an indebtedness of $270, the assignee giving back a written undertaking to return the same upon being paid the debt of $270. This assignee afterwards transferred the securities to a second, and he to a third, assignee, the latter paying full value, and having no notice of any outstanding claims or defects in the title. The original owner tendered to this assignee the $270 and interest, and demanded a return of the securities; and upon a refusal, brought an action to compel such return. It was held that the action could be maintained. The opinion of the court, by Denio, J., is a most exhaustive discussion and able review of all the authorities which seem to sustain the doctrine that so-called "latent equities" are not protected against an assignment. He shows that the expressions of judicial opinion to that effect are *obiter dicta*, while a large number of direct decisions are necessarily opposed to that view. I would add

141 Ill. 519, 31 N. E. 420, 33 Am. St. Rep. 331; Sutherland v. Reeve, 151 Ill. 384, 38 N. E. 130; Pearson's Ex'rs v. Luecht, 199 Ill. 475, 65 N. E. 363; Combs v. Hodge, 62 U. S. (21 How.) 397; Patterson v. Rabb, 38 S. C. 138, 17 S. E. 463, 19 L. R. A. 831 (assignment of mortgage subject to a latent equity of third person in the mortgaged premises); and cases cited under § 709.

place, where the original assignment is accomplished by a forgery of the holder's name, or where it is effected by a wrongful conversion of the security, together with a written instrument of transfer which has been signed by the owner, or where it is made upon an illegal consideration

that the course of authoritative decisions in reference to the sale of chattels by conditional vendees who have been put in possession, and who have been held unable to transfer an absolute title to *bona fide* purchasers for value, fully supports the reasoning and conclusions of Judge Denio. There can be no possible ground of a valid distinction between the transfer of a thing in action when the transferrer appears to be clothed with the complete ownership, but is actually not, and the transfer of a chattel by a person similarly situated and having all the outward *indicia* of perfect title: See Ballard v. Burgett, 40 N. Y. 314, and cases cited. Davis v. Bechstein, 69 N. Y. 440, 442, 25 Am. Rep. 218, is a recent case, and important as explaining and limiting the effect of certain other decisions mentioned in a following paragraph. Plaintiff had executed a bond and mortgage to R., simply as an accommodation, and to be used as collateral security for a loan which R. expected to make. R. did not procure the loan, but assigned the securities, in form absolutely, to defendant, who was a purchaser for value and without notice. Plaintiff brings this action to have the bond and mortgage canceled. The court sustained the action upon the general doctrine of the text, that a purchaser of a thing in action not negotiable takes it subject to all equities subsisting in favor of an original owner or assignor, and the immediate assignor can give no better title than he has himself. The defendant claimed that the plaintiff was estopped, according to a rule supposed to have been laid down in two former decisions of the same court. In disposing of this claim, the court said, per Church, C. J. (p. 442): "Neither the decision in McNeil v. Tenth National Bank, 46 N. Y. 325, 7 Am. Rep. 341, nor in Moore v. Metropolitan Nat. Bank, 55 N. Y. 41, 14 Am. Rep. 173, affect the question involved in this case." He quotes a passage from the opinion of Grover, J., in the last case, re-affirming the general doctrine, and adds: "It is only where the owner, *by his own affirmative act, has conferred the apparent title and absolute ownership upon another*, upon the faith of which the chose in action has been purchased for value, that he is precluded from asserting his real title, and this conclusion was arrived at by the application of the doctrine of estoppel."[a] See also Matthews v. Sheehan,

(a) The case of Smith v. Clews, 114 N. Y. 194, 21 N. E. 160, 4 L. R. A. 392, 11 Am. St. Rep. 627, though relating to the sale of chattels, is instructive in this connection. A diamond merchant delivered some diamonds to a broker, with authority merely to show them to a customer and report to the owner. The broker sold them to a purchaser for value, who had no notice of the want of authority to sell. It was contended, in an action brought by the owner against the purchaser, that the owner was estopped to question the validity of the sale. In overruling this contention, the court said: "The rightful owner may be estopped by his own acts from asserting his title. If he has invested another with the usual

between the owner and his immediate assignee, or where it is procured by fraud, duress, or undue influence upon the owner, and in either of these cases the thing in action is afterwards transferred from the first to a second or other subsequent assignee, who takes it for value and without

69 N. Y. 585 (action between the assignor and his immediate assignee). The following cases fully sustain the position of the text; and most of them are particularly important in their bearing upon the question suggested in some of the authorities, whether the original owner or assignor having the equities is not estopped from asserting them against the subsequent and innocent assignee: Reeves v. Kimball, 40 N. Y. 299, 304, per Lott, J.; 311, per Woodruff, J.; Ingraham v. Disborough, 47 N. Y. 421; Schafer v. Reilly, 50 N. Y. 61, 67, 68, per Allen, J. (equities in favor of a third person); Ledwich v. McKim, 53 N. Y. 307; Cutts v. Guild, 57 N. Y. 229, 232, 233, per Dwight, J. (the doctrine pronounced to be "well settled," and applied to the assignment of a judgment); Barry v. Equitable Life Ins. Co., 59 N. Y. 587, 591; Trustees etc. v. Wheeler, 61 N. Y. 88, 104–106, 113, 114 (an elaborate discussion and review of authorities, carefully limiting the effect of decisions which have invoked the doctrine of estoppel, and applying the rule to equities subsisting in favor of *third persons*); Greene v. Warnick, 64 N. Y. 220, 224, 225 (restricting and limiting the doctrine of estoppel as suggested in Moore v. Metropolitan Nat. Bank, 55 N. Y. 41, 14 Am. Rep. 173, and sustaining the equities subsisting in favor of third persons); Marvin v. Inglis, 39 How. Pr. 329.[b] In Sherwood v. Meadow Valley M. Co., 50 Cal. 412, an owner of a stock cer-

evidence of title, or an apparent authority to dispose of it, he will not be allowed to make claim against an innocent purchaser dealing on the faith of such apparent ownership. But mere possession has never been held to confer a power to sell, and an unauthorized sale, although for a valuable consideration, and to one having no notice that another is the true owner, vests no higher title in the vendee than was possessed by his vendor."

(b) Knox v. Eden Musée Americain Co., 148 N. Y. 441, 51 Am. St. Rep. 700, 42 N. E. 988, 31 L. R. A. 779, per Andrews, C. J.: "The case of McNeil v. Bank, 46 N. Y. 325, 7 Am. Rep. 341, . . . marks the limit to which the court has hitherto gone in subordinating the rights of the true owner of a stock certificate to the title of a transferee derived under one who, being in possession of the certificate by the consent of the true owner, has transferred it in fraud of his right." See, also, Cowdrey v. Vandenburgh, 101 U. S. 575, where it was held that the purchaser from the pledgee of a non-negotiable demand (a municipal certificate for street work done) indorsed in blank takes it subject to the pledgor's equity: Combs v. Hodge, 62 U. S. (21 How.) 397; and the very instructive case of Osborn v. McClelland, 43 Ohio St. 284, 299–307, 1 N. E. 644 (*post*, in editor's notes to §§ 710, 711), which expressly adopts the author's conclusions relating to the operation of the principle of estoppel in cases of this class, and applies them to the case of negotiable paper transferred by a bailee when overdue.

out notice, the same rule must control: the equities of the original owner must prevail over the claims of the subsequent though innocent assignee.[2]

tificate, which he had indorsed in blank, lost it, and it fell into the hands of a *bona fide* purchaser for value, and held that the original owner's title was superior to that of this purchaser. This decision agrees completely with the positions of the text; but in Winter v. Belmont M. Co., 53 Cal. 428, 432, W., being owner of shares, caused them to be entered on the transfer-books in the name of M., and a certificate thereof in due form to be issued to M., which certificate M. indorsed in blank and delivered to W. Afterwards, and while the same condition of facts existed, M. stole this certificate from W., and sold it in the market to a *bona fide* purchaser. Held, that the latter's title was good as against W. The court strongly intimated an opinion that the preceding case in 50 California was incorrectly decided.c

2 Anderson v. Nicholas, 28 N. Y. 600. Certificates of stock, with a power of attorney indorsed upon them, and signed so that they were transferable in the market, were wrongfully converted from the owner, and were sold to the defendant, and it was held that the latter acquired no higher title than that held by his immediate transferrer,— the one who wrongfully converted the stock,— and the original owner could recover the securities or their value. This case cannot, perhaps, be regarded as a *direct* authority for the doctrine contained in the text; because there were certain facts which prevented the defendant from relying upon the position of a *bona fide* purchaser, and these circumstances *may* have influenced the decision. Three opinions were delivered. Davies, J., based his judgment entirely upon the ground that an assignee of a non-negotiable thing in action could under no circumstances acquire a better title than that possessed by his assignor, and he made no allusion to the defendant's want of good faith. Denio, J., dwelt upon the facts which showed bad faith; but was very careful to protest against any inference from his course of argument to the effect that, if the purchase had been in good faith, the assignee would have been protected. Hogeboom, J., seems to have adopted the view taken by Mr. Justice Davies. On the whole, although the *fact* of bad faith was an element in the case, it was not made the *ratio decidendi*, and the doctrine laid down applies to all transfers, those in good faith as well as those in bad faith. Other decisions are directly in point. Mason v. Lord, 40 N. Y. 476, 487, is a very strong case. The lessee of premises assigned the lease by an instrument valid on its face, but in fact as a security for a usurious loan made to him by the assignee. (The statute at that time declared all securities given upon usurious loans to be void, and liable to be

(c) **Lost or Stolen Stock Certificates and other quasi-negotiable instruments.** — In the subsequent case of Barstow v. Savage Mining Co., 64 Cal. 388, 49 Am. Rep. 705, 1 Pac. 349, certificates of stock standing on the books of the company in the name of a person not the true owner, but which were properly indorsed by the person in whose name they stood, were stolen from the owner and sold to a purchaser for value and without notice. The court held that the owner's title was superior to that of the purchaser, and that he was not estopped. The decision in Sherwood v.

§ 710. When the Rule does not Apply — Effect of Estoppel.— I proceed next to consider the third case, where the original assignment is regular on its face, executed in the name of the original owner and by his signature voluntarily written, but the transfer is consummated through a breach of fidu-

canceled at the suit of the borrower, even without paying or tendering the money actually borrowed.) This lease was afterwards transferred by the assignee, passed through divers hands, and was finally purchased by the defendant, who paid full value and had no notice of any defect in the first transfer. Subsequent to the original assignment by the lessee, but before the transfer to the defendant, the plaintiffs recovered a judgment against such lessee, and the lessee's interest in the leased premises and in the lease itself, was sold on execution, bought in by the plaintiffs, and a sheriff's deed of such interest was delivered to them, which deed, however, was executed after the assignment to the defendant. The plaintiffs then commenced an action to recover possession of the leased premises, and to set aside the transfer of the lease to the defendants on account of the usury which affected and nullified the first assignment made by the lessee to his immediate assignee. The court, adopting to its full extent the doctrine as laid down in the text, held that the action could be sustained; that the lessee might have set aside the transfer from himself on account of the usury which tainted it; that the subsequent assignees, including the defendant, succeeded to all the rights, and were subject to all the liabilities, possessed by and imposed upon the first assignee, and finally, that the judgment creditors of the lessee were clothed with his rights and powers in the matter: Reid v. Sprague, 72 N. Y. 457, 462. A trustee, holding a bond and mortgage as part of the trust fund, sold and assigned it, in violation of the trust, to the defendant, who was a purchaser for value and without any notice. A suit on behalf of the *cestui que trust* to set aside the assignment and regain the securities was sustained, the court holding that the defendant took them subject to all the claims of the *cestui que trust*. See also Davis v. Bechstein, 69 N. Y. 440; 25 Am. Rep. 218 (*supra*, under § 700); Ingraham v. Disborough, 47 N. Y. 421 (failure of consideration); Schafer v. Reilly, 50 N. Y. 61, 67, 68; Ledwich v. McKim, 53 N. Y. 307; Cutts v. Guild, 57 N. Y. 229, 232, 233; Barry v. Equitable Life Ins. Co., 59 N. Y. 587, 591 (where an assignment of a non-negotiable thing in action — a life policy — is obtained from the owner by undue influence or coercion, and is then transferred to an innocent purchaser for value, this second assignee takes subject to all the rights of the original holder); Trustees etc. v. Wheeler, 61 N. Y.

Meadow Valley M. Co., 50 Cal. 412, was followed and approved, and the decision in Winter v. Belmont M. Co., 53 Cal. 428, so far as it departed therefrom, was disapproved. The court said that the doctrine of estoppel should not be applied, "unless the facts presented by a case should bring it within the law as stated in McNeil v. Tenth National Bank, 46 N. Y. 325; 7 Am. Rep. 341." The court further said: "If the purchaser from one who has not the title, and has no authority to sell, relies for his protection on the negligence of the true owner, he must

ciary duty by an agent or bailee contrary to the owner's intention, and this immediate assignee may afterwards transfer to an innocent holder. In relation to this particular condition of facts, a rule has been adopted by most able courts, and may be regarded, I think, as settled, which is entirely consistent with that stated in the preceding paragraphs. It is based upon the doctrine of estoppel. This special rule may be formulated as follows: The owner of certain kinds of things in action not technically negotiable, but which, in the course of business customs, have acquired a semi-negotiable character in fact, may assign or part with them for a special purpose, and at the same time may clothe

88, 104–106, 113, 114; Greene v. Warnick, 64 N. Y. 220, 224, 225; Hall v. Erwin, 66 N. Y. 649; Crane v. Turner, 67 N. Y. 437, 440 (equities in favor of third persons).[d]

show that such negligence was the proximate cause of the deceit." In France v. Clark, L. R. 26 Ch. Div. 256, it was held that a person who without inquiry takes from another an instrument signed in blank by a third party, and fills up the blanks, cannot, even in the case of a negotiable instrument, claim the benefit of being a purchaser for value without notice, so as to acquire a greater right than the person from whom he himself received the instrument. For further cases where the true owner of stock certificates indorsed in blank and lost or stolen without his fault or negligence was held to have an equity superior to that of a subsequent *bona fide* assignee, see Knox v. Eden Musée Americain Co., 148 N. Y. 441, 51 Am. St. Rep. 700, 42 N. E. 988, 31 L. R. A. 779; Bangor Electric Lt. & Power Co. v. Robinson, 52 Fed. 520; East Birmingham Land Co. v. Denison, 85 Ala. 565, 5 South. 317, 7 Am. St. Rep. 73, 2 L. R. A. 836; O'Herron v. Gray, 168 Mass. 573, 47 N. E. 429, 40 L. R. A. 498, 60 Am. St. Rep. 411; Farmers' Bank v. Diebold Safe & Lock Co., 66 Ohio St. 367, 64 N. E. 518, 90 Am. St. Rep. 586, 58 L. R. A. 620. In Scollans v. Rollins, 173 Mass. 279, 73 Am. St. Rep. 284, 53 N. E. 863; s. c., 179 Mass. 346, 88 Am. St. Rep. 386, 60 N. E. 983, the instrument in question was a municipal certificate of indebtedness, with blank indorsement, which, by custom, was considered negotiable to the same extent as stock certificates, and to which the principle of estoppel would similarly apply if it were entrusted to another and negotiated by him to a *bona fide* purchaser. It was held, however, that delivery for safekeeping to a broker, in a *sealed envelope*, was not evidence that the instrument was so entrusted, and its subsequent transfer by the broker was equivalent to a theft from the owner, so far as his title was thereby affected.

(d) See, also, Sutherland v. Reeve, 151 Ill. 384, 38 N. E. 130 (original assignment obtained by fraud). For the cases of lost or stolen instruments, see the previous notes to this paragraph.

the assignee or person to whom they have been delivered with such *apparent indicia* of title, and instruments of complete ownership over them, and power to dispose of them, as to *estop* himself from setting up against a second assignee, to whom the securities have been transferred without notice and for value, the fact that the title of the first assignee or holder was not perfect and absolute. The ordinary and most important application of this rule is confined to the customary mode of dealing with certificates of stock. If the owner of stock certificates assigns them as collateral security, or pledges them, or puts them into the hands of another for any purpose, and accompanies the delivery by a blank assignment and power of attorney to transfer the same in the usual form, signed by himself, and this assignee or pledgee wrongfully transfers them to an innocent purchaser for value in the regular course of business, such original owner is *estopped* from asserting, as against this purchaser in good faith, his own higher title and the want of actual title and authority in his own immediate assignee or bailee.[1a] This conclusion is in no respect necessarily

[1] McNeil v. Tenth Nat. Bank, 46 N. Y. 325; 7 Am. Rep. 341; reversing 55 Barb. 59. The supreme court held,— 1. That certificates of stock are in no respect negotiable; and 2. The rule as laid down by Denio, J., in Bush v. Lathrop, 22 N. Y. 535. The law of estoppel was not alluded to. In the court of appeals the doctrine of latent equities was discussed; the decision of the court in Bush v. Lathrop, 22 N. Y. 535, and the reasoning of Denio, J., were expressly recognized as correct, and as applicable to all cases in which the facts do not warrant the application of the principle of estoppel. Mr. Justice Rapallo, in his able judgment, does not discuss the rule in relation to things in action of all kinds; he confines himself exclusively to the particular species of security then before the court,— certificates of shares in stock corporations; and while he does not claim for them absolute negotiability, he does in fact render them *indirectly* negotiable by means of the estoppel which arises upon dealing with them in the manner universally prevalent among business men. Speaking of Judge Denio's opinion, he says (p. 329): "But in no part of his learned and exhaustive opinion does he seek to apply its

(a) As regards the assignment of stock certificates, the rule of McNeil v. Bank, stated in the text, has been almost universally adopted in this country. Among innumerable cases, see Nelson v. Owen, 113 Ala. 372, 21 South. 75; Brittan v. Oakland Bank of Savings, 124 Cal. 282, 57 Pac. 84,

antagonistic to the general doctrine concerning the assignment of things in action heretofore stated. The courts have simply recognized the growing and universal tendency of business men, in their customary modes of dealing, to treat stock certificates as though they were in all respects negotiable instruments; and they have felt themselves bound to give validity and effect to this general practice of merchants, as far as that could be done consistently with

doctrine to shares in corporations or other personal property the *legal* title to which is capable of being transferred by assignment; and the free transmission of which from hand to hand is essential to the prosperity of a commercial people. The question of estoppel does not seem to have been considered in that case, and perhaps it would have been inappropriate." He expressly approves the rule frequently laid down as to chattels, and while invoking the aid of estoppel, is very careful to state the narrow limits within which it may be used, and the kind of facts necessary to its use. He says (pp. 329, 330): "Simply intrusting the possession of a chattel to another as depositary, pledgee, or other bailee, or even under a conditional executory contract of sale, is clearly insufficient to preclude the real owner from reclaiming his property in case of an unauthorized disposition of it by the person so interested: Ballard v. Burgett, 40 N. Y. 314. 'The mere possession of chattels, by whatever means acquired, if there be no other evidence of property or authority to sell from the true owner, will not enable the possessor to give a good title.' But if the owner intrusts to another not merely the possession of the property, but also written evidence over his own signature of title thereto, *and of an unconditional power of disposition over it*, the case is vastly different." The following seems to be the only rule sanctioned by the court in this important decision: If the owner of a thing in action, *of the particular species*

71 Am. St. Rep. 58; Krouse v. Woodward, (Cal.) 42 Pac. 1085; Supply Ditch Co. v. Elliott, 10 Colo. 327, 15 Pac. 691, 3 Am. St. Rep. 586; National Safe Dep., S. & T. Co. v. Gray, 12 App. D. C. 276, 287; Otis v. Gardner, 105 Ill. 436; Russell v. American, etc. Co., 180 Mass. 467, 62 N. E. 751; Walker v. Detroit Transit Ry. Co., 47 Mich. 338, 11 N. W. 187; Rough v. Breitung, 117 Mich. 48, 75 N. W. 147; Joslyn v. St. Paul Distilling Co., 44 Minn. 183, 46 N. W. 337; Dueber Watch-Case Mfg. Co. v. Daugherty, 62 Ohio St. 589, 57 N. E. 455, citing the text; Pennsylvania R. R. Co.'s Appeal, 86 Pa. St. 81; Wood's Appeal, 92 Pa. St. 379, 37 Am. Rep. 694; Burton's Appeal, 93 Pa. St. 214; Gilbert v. Erie Bldg Ass'n, 184 Pa. St. 554, 39 Atl. 291; Westinghouse v. German Nat. Bank, 196 Pa. St. 249, 46 Atl. 380; State Bank v. Cox, 11 Rich. Eq. 344, 78 Am. Dec. 458. See, however, for the rule in Maryland, German Sav. Bank v. Renshaw, 78 Md. 475, 28 Atl. 281; Taliaferro v. Bank, 71 Md. 209, 17 Atl. 1036, 72 Md. 169, 19 Atl. 364, and earlier Maryland cases there cited. The estoppel rule does not apply to the protection of purchasers

the established doctrines of the law. It is another instance of the manner in which mercantile customs have been adopted and incorporated into the law by the progressive course of judicial legislation. The decisions announcing the rule are based exclusively upon the form of the blank assignment and power of attorney, executed by the assignor and delivered to the assignee, which clothed him with all the *apparent* rights of ownership that are recognized by busi-

described, delivers it to an assignee for a special purpose, with a simple written assignment, even absolute on its face, this of itself is not enough to raise the estoppel; but if, as a part of or accompanying this writing, the owner further gives "an unconditional power of disposition" over the security, then the estoppel may be involved. It remains to inquire whether other decisions have been confined to this narrow rule. In Holbrook v. N. J. Zinc Co., 57 N. Y. 616, 622, 623, the doctrine of estoppel was applied to the corporation itself whose stock had been transferred in good faith, and in the usual manner, to the plaintiff. In Combes v. Chandler, 33 Ohio St. 178, 181–185, the supreme court commission of Ohio applied the doctrine of McNeil v. Tenth Nat. Bank, 46 N. Y. 325, 7 Am. Rep. 341, to the assignment of a non-negotiable promissory note,— an instrument in the form of a promissory note, but payable to the payee named, without any words of negotiability. The payee indorsed and delivered the note, but without any consideration, and by the fraud of the immediate assignee; by this person it was transferred to a second assignee for value and without notice. The court held that the payee — the original owner — was estopped from asserting his title as against that of the second and innocent purchaser. This decision may be sustained on

who are put on inquiry: Ryman v. Gerlach, 153 Pa. St. 197, 25 Atl. 1031, 26 Atl. 302; or are not *bona fide* purchasers for value: Bronson Electric Co. v. Rheubottom, 122 Mich. 608, 81 N. W. 563; Tecumseh Nat. Bank v. Russell, 50 Nebr. 277, 69 N. W. 673; Cowles v. Kichel, 65 N. Y. Suppl. 349; American Press Assn. v. Brantingham, 78 N. Y. Suppl. 305, 75 App. Div. 435.

The opinion in Dueber Watch-Case Co. v. Daugherty, 62 Ohio St. 589, 57 N. E. 455, is instructive. The company issued a certificate of its stock with the usual power of attorney, to C., for the purpose of qualifying him to become a director, on his secret agreement to reconvey upon ceasing to be a director. C. agreed to assign the certificate to D. on consideration of D.'s becoming his surety on a note, which the latter did without notice of C.'s agreement with the company. Held, that D.'s equity arising from such agreement was superior to that of the company, on the principle of estoppel. Held, further, that on receiving notice of the company's equity, D. might, for his further protection, clothe himself with the legal title by taking a transfer of the stock from C.; citing §§ 727, 729, *post*.

Rule of McNeil v. Bank in England. — In Colonial Bank v. Cady, 15 App.

ness men, in their usual course of dealing with like securities, as sufficient to confer a complete title and power of disposition upon the assignee. Should the doctrine thus invoked to protect the customary modes of transacting business with certificates of stock and similar *quasi* negotiable securities be extended to all other things in action? Should the effect of an estoppel be produced from *a mere assignment of any security, absolute on its face, executed by the original owner, and delivered to his assignee?* There are cases which seem to have reached this result. The tendency

principle, by reason of the peculiar nature of the security itself.[b] Although it is commonly said, in general terms, that the transferee of a promissory note *after maturity*, when it has become non-negotiable, takes it subject to all equities and defenses, yet this proposition is not true as to all kinds of equities even in favor of the maker. It is well settled that the assignment under such circumstances is subject only to the equities and defenses *inherent in the security itself transferred*, and not to those which are collateral or incidental. The same rule would probably embrace notes non-negotiable from the want of words of negotiability: See Story on Promissory Notes, sec. 178; Kyle v. Thompson, 11 Ohio St. 616; Hayward v. Stearns, 39 Cal. 58; In re Overend, Gurney, & Co., L. R. 6 Eq. 344; In re European Bank, L. R. 5 Ch. 358; Sturtevant v. Ford. 4 Maule & G. 101; Oulds v. Harrison, 10 Ex. 572; Burrough v. Moss, 10 Barn. & C. 558; Holmes v. Kidd, 3 Hurl. & N.

Cas. 267, 278, 285, affirming 38 Ch. Div. 388 and reversing 36 Ch. Div. 659, it appears to be held that the rule is applicable, in an appropriate case, to English dealings with American shares; although the Court of Appeal had intimated (38 Ch. Div. 388, 400) that the rule would not be followed in England. The case did not call for an express decision of the question, however; the transfer was not signed by the registered owner, named in the certificate, but by his executors. Their signatures alone would not entitle the holder to obtain a registration in the company's books: (per Lord Watson), such signatures "are not accepted in commercial circles as sufficient vouchers of title, unless they are accompanied by an extract of probate and an attestation of the genuineness of the executors' signatures."

(b) See, also, Moore v. Moore, 112 Ind. 149, 13 N. E. 673, 2 Am. St. Rep. 170 (citing the above paragraph of the text), where the note was transferred after maturity. In the case of Osborn v. McClelland, 43 Ohio St. 284, 298–307, 1 N. E. 644, the Supreme Court of Ohio, relying on the conclusions of the author in §§ 710, 711, limits the case of Combes v. Chandler to the facts there involved. The court says, per Johnson, J. (p. 306), "This case goes to the verge. . . . Combes, the payee and assignor, intended to part with the *title and ownership of the paper*, for what he then supposed was an adequate

of these decisions is towards the conclusion that whenever the owner of any non-negotiable thing in action delivers the same to another person with an assignment thereof absolute on its face, and this person transfers it to a purchaser for value, who relies upon the apparent ownership created by the written assignment, and has no notice of anything limiting that title, the original owner is estopped from as-

891. While the *decision* itself is thus undoubtedly correct, I do not think that some observations of the learned judge concerning the effect of estoppel upon assignors in general can be sustained by McNeil v. Tenth Nat. Bank, 46 N. Y. 325, 7 Am. Rep. 341, as explained by the later cases in the same court cited in the two preceding notes. In several of those cases, as I have shown, it is expressly held that the rule of McNeil v. Tenth Nat. Bank, 46 N. Y. 325, 7 Am. Rep. 341, and Moore v. Metropolitan Bank, 55 N. Y. 41, 14 Am. Rep. 173, does not apply to assignments of ordinary things in action, even when absolute on their face, when procured by fraud or coercion, or upon an illegal consideration, or without any consideration. The following decisions are also supported by and illustrations of the text: Brewster v. Sime, 42 Cal. 139, 147; Thompson v. Toland, 48 Cal. 99; Winter v. Belmont Min. Co., 53 Cal. 428, 432; but see Sherwood v. Meadow Val. M. Co., 50 Cal. 412.

consideration. In analogy to the common-law rule applicable to personal property, that when such is the intention, and possession is delivered, a fraudulent vendee may convey absolute ownership on a *bona fide* purchaser for value, the court held that Combes having intended to, and having in fact conferred the title and absolute ownership of the paper and its possession upon Chandler, he, though a fraudulent vendee, could confer such title and ownership upon Woods, who was a *bona fide* purchaser. It was held that Combes so acted as to estop himself." In Osborn v. McClelland, on the other hand, Mrs. F., the payee of a negotiable note before due loaned it indorsed in blank to B. and S., bankers, for a special purpose and solely for their accommodation, they promising to safely keep and return it. B. and S. did not use the note, but it remained in their custody until after it became due, when S., the survivor of B. and S., transferred it by delivery to M., a *bona fide* purchaser for value, who relied solely on the blank indorsement of F. and the possession of the note by S. The court says (p. 307): "This distinction between the acts of Combes in the above case and of Mrs. F. in the present case is so clear that it requires no comment. Mrs. F. did no act intending to part with her title other than as accommodation indorser. She never intended to authorize S. to transfer title and ownership to M. or any one else. No act of hers is shown that amounts to an estoppel. She was careless in allowing S. to remain a bailee of the paper, but such bailee can confer no better title than he actually had." For further observations of the court in this case, see note to § 711.

The following is the syllabus of a recent English case, involving the assignment of a bond: "Where an

serting against such purchaser any equities existing between himself and his immediate assignee, and any interest or property in the security which he may have notwithstanding the written transfer, even when those equities might arise from fraud, coercion, violation of a fiduciary duty, absence or illegality of consideration, and the like.[2]

2 Moore v. Metropolitan Bank, 55 N. Y. 41, 46–49, 14 Am. Rep. 173. Moore, the owner of a certificate of indebtedness for ten thousand dollars, delivered it to one Miller for a certain special purpose, but not intending to transfer any property therein; in fact, M. was to procure it to be discounted, and to hand over the proceeds, or else to return the certificate. Moore, however, gave M. the following writing, indorsed on the instrument: "For value received, I hereby transfer, assign, and set over to Isaac Miller the within described amount, say ten thousand dollars. Levi Moore." Miller assigned the certificate to the defendant for value, who took it on the faith of this written assignment without notice of the true relations between Moore and Miller. The action was brought to recover possession of the certificate. The court said, per Grover, J. (pp. 46–49), that it did not intend to abandon the *general* doctrine concerning assignments being subject to equities as declared in Bush v. Lathrop, 22 N. Y. 535, and other authorities, but held that this case was controlled by McNeil v. Tenth Nat. Bank, 46 N. Y. 325, 7 Am. Rep. 341, and that the judgment in the latter case was inconsistent with the reasoning of Denio, J., in Bush v. Lathrop, 22 N. Y. 535, and with the decision made on the facts of that case. Grover, J., does not allude to the careful distinction drawn by Rapallo, J., between the circumstances of the two cases, nor his approval of the general doctrine and course of reasoning contained in Judge Denio's masterly opinion. Nor does Judge Grover make the slightest allusion to the narrow limits placed by Rapallo, J., upon the use of the estoppel, namely, to those cases in which the assignor, by a written instrument over his signature, confers not only the apparent title, but *the unconditional power of disposition* over the security. While the judgment of Rapallo, J., in McNeil v. Tenth Nat. Bank, 46 N. Y. 325, 7 Am. Rep. 341, was guarded and cautious, and eminently proper in respect to the peculiar class of securities, that of Grover, J., is, I think, unsupported by authority, and unsound in principle. In comparing and weighing such conflicting decisions, it is proper for me to express the opinion that the authority of Judge Denio, for ability, learning, and

owner of property gives all the *indicia* of title to another person with the intention that he should deal with the property, the principles of agency apply, and any limit which he has imposed on his agent's dealing cannot be enforced against an innocent purchaser or mortgagee from the agent, who has no notice of the limit. If the owner has not only transferred property to an agent or trustee, but has acknowledged that the transferee has paid full consideration for it, he is estopped from asserting his equitable title against a person to whom the transferee has disposed of the property for value": Rimmer v. Webster, [1902] 2 Ch. 163.

§ 711. True Limits of Estoppel as Applied to Assignments of Things in Action.—While the particular application of the doctrine of estoppel to the usual dealings with shares of stock, as made in McNeil v. Tenth National Bank[1] and kindred cases, is clearly a step in the interests of commerce, since it recognizes and validates mercantile customs which had become universal throughout this country, the extension of the same rule to all things in action, as described in the preceding paragraph, plainly tends to undermine, shake, and finally abrogate the well-settled doctrine which renders the assignments of non-negotiable things in action subject to the equities subsisting in favor of the debtor parties, as well as those outstanding in favor of third persons; or at all events, it tends to confine the operation of that doctrine to cases in which the assignment is so drawn that it is, on

experience, is immeasurably superior to that of Judge Grover, and is not, perhaps, surpassed by that of any of his contemporaries among the American judiciary. In fact, the special force of the decision in Moore v. Metropolitan Bank, 55 N. Y. 41, 14 Am. Rep. 173, has been completely destroyed, and it has been strictly confined to the doctrine laid down in McNeil v. Tenth Nat. Bank, 46 N. Y. 325, 7 Am. Rep. 341, by the more recent cases in the same court heretofore cited. While these cases have not *expressly* overruled Moore v. Metropolitan Bank, 55 N. Y. 41, 14 Am. Rep. 173, it is plain that they are wholly inconsistent with it; if its reasoning and result were correct, most of these cases would of necessity have been differently decided: See Trustees etc. v. Wheeler, 61 N. Y. 88; Greene v. Warnick, 64 N. Y. 220, and other cases quoted *supra*, in note 2, under § 709. In Farmers' Nat. Bank v. Fletcher, 44 Iowa, 252, this same doctrine of estoppel was applied to the assignor of a mortgage, as against an assignee for value and without notice.c

[1] 46 N. Y. 325; 7 Am. Rep. 341.

(c) In the recent case of Fairbanks v. Sargent, 104 N. Y. 117, 58 Am. Rep. 490, 9 N. E. 870, the New York court of appeals took occasion to say that the doctrine announced in Bush v. Lathrop, 22 N. Y. 535, remains in "full force unquestioned," except so far as they have been modified in "the case of a purchase in good faith of a non-negotiable instrument from an assignee of the real owner, upon whom he has by assignment conferred the apparent absolute ownership, when such purchase has been made in reliance upon the title apparently acquired by such assignee." See, also, the remark of Andrews, C. J., in Knox v. Eden Musée Americain Co., 148 N. Y. 441, 42 N. E. 988, 31 L. R. A. 779, 51 Am. St. Rep. 700, quoted *ante*, § 709, note b.

its face, constructive notice to all subsequent assignees deriving title through it. In the class of decisions alluded to, — Moore v. Metropolitan Bank[2] and like cases,— the estoppel is made to arise from a mere naked transfer in writing, absolute in form; the *ratio decidendi* is the apparent ownership thus conferred upon the assignee; and these elements of the rule will apply to so many cases that things in action are practically rendered negotiable as between the series of successive holders,— the assignors and assignees. This point being reached, it will be an easy and almost necessary step to extend the estoppel to the debtor party himself,— the obligor or promisor who utters the security. If negotiability is produced by means of an estoppel between the assignor and assignee, arising from the fact and form of a transfer from one to another, by parity of reasoning the debtor may be regarded as estopped by the fact and form *of his issuing the undertaking and delivering it to the first holder,* and thus creating an apparent liability against himself. In short, there seems to be exactly the same reason for holding the debtor estopped from denying his liability upon a written instrument which apparently creates an absolute liability, when that instrument has passed into the hands of a purchaser who had no notice of the actual relations between the original parties, as for holding an assignor estopped from denying the completeness of a transfer made by him simply because it is absolute on its face. This result, if reached, would make all things in action practically negotiable.[a] According to the law merchant,

[2] 55 N. Y. 41; 14 Am. Rep. 173.

(a) In Osborn v. McClelland, 43 Ohio St. 284, 306, 1 N. E. 644, the Supreme Court of Ohio adopts the author's conclusions, as follows: "This doctrine [of estoppel in relation to assignments of things in action] is fully and ably discussed, and the cases, especially in New York, where the principle has, in the interest of commerce, been extended beyond reason, as shown by Prof. Pomeroy, as above cited [§§ 698–711]. He clearly demonstrates that this principle is not applicable to commercial paper, so as to change or modify the rights and liabilities aris-

"negotiability" consisted of two elements: 1. The fact that the transferee obtained the legal title and could sue at law in his own name; and 2. The fact that the transferee in good faith and for value took free from all equities and nearly all defenses subsisting in favor of prior parties to the paper. The first of these elements now belongs, in the great majority of the states, to all things in action. There is, as it seems to me, an evident *tendency,* on the part of the courts in many states, to enlarge the scope of the second element, and to extend it also to all species of things in action which are embodied in contracts or instruments in writing.

§ 712. **Subsequent Assignee Obtaining the Legal Title may be Protected as a Bona Fide Purchaser.**—In the discussions of the foregoing paragraphs,[1] it has been constantly assumed that the assignee had acquired only an equitable title, in order that he might take subject to the equities subsisting in favor of a prior assignee or of a third person. If, in addition to his equitable interest conferred by the assignment, he has also obtained the *legal* title, or even if his situation is such that he has the best right to call for the legal title, then the doctrine of purchase for a valuable consideration and without notice may apply so as to protect him against all such outstanding equities. It should be constantly borne in mind that priority of time gives precedence of right among successive and conflicting equitable interests only when these equitable interests are *equal* in their nature or incidents. An illustration may be seen in the decisions of many able courts with respect to dealings in shares of stock. Where a transfer of a certificate has been made by

[1] Viz., from §§ 707 to 711.

ing thereon, when the only *indicia* of title or ownership is derived from a blank indorsement. . . . Mr. Pomeroy conclusively shows that any other rule would estop every debtor, and give to choses in action all the qualities of commercial paper before due." For the facts of this case, see *ante,* editor's note to § 710.

the owner's own signature, but procured only through the fraud, breach of duty, or conversion of the person who actually effects the first assignment, or without consideration, or upon an illegal consideration, and even where the transfer is accomplished solely by a forgery of the owner's name to the indorsement and power of attorney, and the certificate thus comes into the hands of a purchaser for a valuable consideration and without notice, and he perfects his legal title by surrendering the original certificate to the corporation and receiving a new one in his own name, and by procuring the transaction to be properly entered upon the company's transfer-books, which thereupon show him to be the legal owner of the shares, the assignee under these circumstances, as is held in many cases, obtains a complete precedence over the original owner; he is not liable to the owner for the shares nor for their value; the owner's remedy, if any exists at all, is against the corporation alone, to compel it either to issue new shares or to pay the value of the old ones.[2] These decisions should, on principle, apply

2 This conclusion has been reached in cases of *forgery*, and it would *a fortiori* seem to follow in cases of fraud, conversion, want of consideration, etc.; in the latter cases, however, the corporation *might* not be liable: Pratt v. Taunton Copper M. Co., 123 Mass. 110, 112; 25 Am. Rep. 37. Plaintiff's certificate of shares, with a forged power of attorney, was delivered, without his knowledge or assent, to an auctioneer for sale; this certificate was surrendered to the corporation, and it issued a new one in the name of the auctioneer, who sold and delivered it to a *bona fide* purchaser for value and without notice, and this assignee in turn surrendered the second certificate and received a third one issued to himself. The owner brought a suit in equity against the corporation and the purchaser. The court held, — 1. That the plaintiff could maintain a suit against the corporation to compel it to issue a certificate of a like number of shares to him, and to pay him all the dividends thereon; citing Ashby v. Blackwell, 2 Eden, 299; Amb. 503; Sloman v. Bank of England, 14 Sim. 475; Midland R'y v. Taylor, 8 H. L. Cas. 751; Pollock v. National Bank, 7 N. Y. 274; 57 Am. Dec. 520; but 2. The plaintiff was entitled to no relief against the purchaser, who was a purchaser in good faith for a valuable consideration and without notice, and who *did not hold the certificate of shares which the plaintiff had;* citing Bank v. Lanier, 11 Wall. 369; In re Bahia etc. R'y, L. R. 3 Q. B. 584; and the Massachusetts cases hereafter named in this note; 3. If the purchaser claimed under a transfer which he knew or was bound to know to be forged or invalid, a different case would be presented; citing Cottam v. Eastern Co. R'y, 1 Johns. & H. 243; Johnston v. Renton, L. R. 9

to and protect the assignee of every other species of thing in action who has acquired the legal title.

§ 713. Successive Assignments by Same Assignor to Different Assignees.— The remaining case to be considered under this head, as mentioned in a former paragraph,[1] is that of successive transfers of the same thing in action made by the same person — the creditor party — to different assignees. The American decisions upon this particular case cannot be reconciled. I can only present those settled doctrines of equity which, it would seem, should apply to and govern such a condition of circumstances. In England and in several of the states the rule giving to the assignee who first notifies the debtor party or trustee a precedence over all others, even those who are earlier in date, furnishes a certain and simple criterion for determining the priority, it being remembered that this rule is confined to pure personal things in action, and does not extend to liens and other equitable interests in real estate.[2] [a] In the states where the rule referred to does not prevail, the question must turn upon other doctrines. If the interests are equitable in their nature, and the equity of no assignee is intrinsically su-

Eq. 181; Tayler v. Great Ind. Pen. R'y, 4 De Gex & J. 559; Denny v. Lyon, 38 Pa. St. 98; 80 Am. Dec. 463. See also, to the same effect, Sewall v. Boston Water P. Co., 4 Allen, 277; 81 Am. Dec. 701; Loring v. Salisbury Mills, 125 Mass. 138; Pratt v. Boston & A. R. R., 126 Mass. 443; Machinists' Nat. Bank v. Field, 126 Mass. 345 (this case holds that the bank, after having obeyed the decree under the circumstances stated in 123 Mass. 110, cannot maintain any suit for reimbursement against the purchaser); Telegraph Co. v. Davenport, 97 U. S. 369 (holds the corporation liable, but rather implies than expressly declares the purchaser not to be liable). The following California decisions involve, if they do not expressly declare, the same rule: Brewster v. Sime, 42 Cal. 139, 147; Thompson v. Toland, 48 Cal. 99; Winter v. Belmont Min. Co., 53 Cal. 428, 432 (but see Sherwood v. Meadow Valley M. Co., 50 Cal. 412); People v. Elmore, 35 Cal. 653; Weston v. Bear River etc. Co., 5 Cal. 186; 63 Am. Dec. 117; 6 Cal. 425; Naglee v. Pac. Wharf Co., 20 Cal. 529, 533.

[1] See § 707.

[2] See *supra*, §§ 695–697.

(a) This paragraph of the text was quoted by the Orphans' Court in In re Phillips' Estate, 205 Pa. 515, 55 Atl. 213, 97 Am. St. Rep. 746, adopting the English rule.

perior to the others, the settled principle of equity should control, that the order of time determines the order of priority; or in other words, that the subsequent assignee takes subject to the rights of the one prior in time; and this principle has been applied, in such cases, by many able decisions.[3 b] On the other hand, if the subsequent assignee has acquired the legal title, and was a purchaser in good faith for a valuable consideration and without notice, he is protected; and this doctrine of *bona fide* purchase seems to have been extended, by some decisions, to subsequent assignees who had only obtained an equitable interest.[4 c]

§ 714. 3. Equities in Favor of Third Persons.— Equities in favor of third persons through whom the title to the thing in action has never passed, and those in favor of a former assignor, are intimately connected; indeed, they are only different phases of the same doctrine, and must stand or fall together. If the imperfection of an assignee's title is not

[3] Taylor v. Bates, 5 Cow. 376; Muir v. Schenck, 3 Hill, 228; 38 Am. Dec. 633; Pratt's Appeal, 77 Pa. St. 378, 381; Coon v. Reed, 79 Pa. St. 240; Lindsay v. Wilson, 2 Dev. & B. Eq. 85; Allen v. Smitherman, 6 Ired. Eq. 341; Wallston v. Braswell, 1 Jones Eq. 137; Downer v. Bank, 39 Vt. 25, 32.

[4] See Judson v. Corcoran, 17 How. 612, and other decisions, where a subsequent assignee without notice has been protected by obtaining a legal title or advantage, or by his diligence, or the laches, etc., of the prior assignee, *supra*, § 698, and notes.

(b) See also *supra*, last note to § 695; Fortunato v. Patten, 147 N. Y. 277, 41 N. E. 572; Farmers' Bank v. Diebold Safe & Lock Co., 66 Ohio St. 367, 64 N. E. 518, 90 Am. St. Rep. 586, 58 L. R. A. 620 (double assignment of stock certificate); Fairbanks v. Sargent, 104 N. Y. 108, 58 Am. Rep. 490; s. c., 117 N. Y. 320, 22 N. E. 1039, 6 L. R. A. 475; York v. Conde, 147 N. Y. 486, 42 N. E. 193, 61 Hun, 26, 15 N. Y. Suppl. 380; Niles v. Mathusa, 162 N. Y. 546, 57 N. E. 184; Central Trust Co. v. West India Imp. Co., 169 N. Y. 314, 62 N. E. 387; Mitchell v. Hockett, 25 Cal. 538, 85 Am. Dec. 151; Gillette v. Murphy, 7 Okl. 91, 54 Pac. 413; Harris County v. Donaldson, 20 Tex. Civ. App. 9, 48 S. W. 791; Clark v. Hogeman, 13 W. Va. 718; Columbia Finance & Trust Co. v. First Nat. Bank, 25 Ky. Law Rep. 561, 76 S. W. 156.

(c) For an instructive illustration, see Dueber Watch-Case Mfg. Co. v. Daugherty, 62 Ohio St. 589, 57 N. E. 455, the facts of which are stated *ante*, in editor's note to § 710. See, also, Fairbanks v. Sargent, 117 N. Y. 320, 22 N. E. 1039, 6 L. R. A. 475.

confined to equities subsisting in favor of the debtor party, there is no reason, in the nature of things, why it should not extend to the equities of all other parties,— third persons as well as previous holders and assignors; in fact, the doctrine would apply with fewer exceptions in the case of third persons than in the case of prior assignors. As a third person, although having some interest or claim which constitutes his "equity," has never been an owner or holder of the chose in action, and has never transferred it, his conduct towards it cannot, in general, enable the assignee to invoke against him the doctrine of estoppel. These conclusions are fully sustained by judicial authority. Wherever the narrower view that an assignee takes subject *only* to the equities of the debtor has been rejected, and the theory of "latent" equities has been disregarded, the courts have described the assignment as subject to *all* claims existing against the assignor,— have laid down the rule in comprehensive and positive terms, that the assignee takes subject to *all* equities, latent or open, of third persons. Of course the "equity," in such a case, must be some subsisting claim to or against the thing in action itself, or the fund which it represents, which the third person held and could have enforced if it had remained in the hands of the assignor; as, for example, a lien or charge upon the fund or some part of it, or upon the security, or an equitable ownership or right to the fund or security, and the like.[1] [a] The case of subse-

[1] Davies v. Austen, 1 Ves. 247, per Lord Thurlow; Mangles v. Dixon, 3 H. L. Cas. 702, 731; Bebee v. Bank of New York, 1 Johns. 529, 552, per Spencer, J.; 549, per Tompkins, J. (in these cases the rule is laid down in the most general form); Shropshire etc. R'y v. The Queen, L. R. 7 H. L. 496 (A. for value and without notice, obtained an equitable interest by assignment in certain shares of stock from B, *who had the legal title*. A's interest was held subject to the rights of a *cestui que trust*, C, for whom B really held the shares

(a) See, also, Owen v. Evans, 134 N. Y. 514, 31 N. E. 999 (assignment of mortgage); David Stevenson Brewing Co. v. Iba, 155 N. Y. 224, 49 N. E. 677 (assignment of chattel mortgage subject to mortgagee's agreement giving another mortgage priority); Ames v. Richardson, 29 Minn. 330 (assignment of proceeds of insurance subject to latent equitable lien of mort-

quent execution or attachment creditors of the assignor stands upon a somewhat different footing, since their equities *in* the subject-matter are not existing at the time of the assignment.[c]

as trustee. See the cases cited in the opinions);[b] Bush v. Lathrop, 22 N. Y. 535, per Denio, J. (a most able review of the preceding authorities); Schafer v. Reilly, 50 N. Y. 61, 67, 68, per Allen, J.; Trustees etc. v. Wheeler, 61 N. Y. 88, 104–106, 113, 114, per Dwight, J.; Greene v. Warnick, 64 N. Y. 220, 224, 225 (the rule fully discussed and applied to equities of third persons); Van Rensselaer v. Stafford, Hopk. Ch. 569, 575; affirmed 9 Cow. 316, 318 (Van D. bought lands from Van R. on credit; sold part to W., from whom he took two mortgages of the same date for the price, intending to assign one of them to Van R. as security for the debt due him. Both mortgages were recorded at the same time; he first assigned one of them to Van R., and afterwards assigned the other to S. S., who was a *bona fide* purchaser for value, etc. Held, that the mortgage assigned to Van R. obtained a priority, and S. S. took the one assigned to him subject to all the equities which Van R. had against the assignor, Van D., and in or upon the land); Taylor v. Bates, 5 Cow. 376 (A, a *bona fide* assignee of an entire pecuniary demand held subject to the rights of B, who, by a previous arrangement with the creditor-assignor, was entitled to a portion of the proceeds); Muir v. Schenck, 3 Hill, 228; 38 Am. Dec. 633 (disapproving of *dicta* of Chancellor Kent in Murray v. Lylburn, 2 Johns. Ch. 441, 443); Brooks v. Record, 47 Ill. 30 (assignee of a negotiable note and chattel mortgage after maturity held subject to the rights of one who had purchased the chattels for value and without notice after the mortgage was given; the *mortgagee* had estopped himself by his conduct from enforcing the mortgage against such purchaser, and the assignee was affected by the same equity); Allen v. Watt, 79 Ill. 284 (assignee of a judgment held subject to a lien acquired by

gagee of the insured premises); Patterson v. Rabb, 38 S. C. 138, 17 S. E. 463, 19 L. R. A. 831 (assignment of mortgage is subject to a latent equity of a third person in the mortgaged premises). But the doctrine has its exceptions: it does not apply against a purchaser in good faith and for value of a real estate mortgage executed by one in possession of and holding the legal title to land, whose conveyance was procured by fraud on his grantor: Simpson v. Del. Hoyo, 94 N. Y. 189.

(b) *Equitable Assignment by Trustee of Shares of Stock.*— For other cases presenting substantially the same facts, viz., a pledge of shares by a trustee or other transfer not passing the legal title, and therefore subject to the rights of the *cestui que trust*, see Société Générale de Paris v. Walker, 11 App. Cas. 20; Roots v. Williamson, 38 Ch. Div. 485; Moore v. Northwestern Bank, [1891] 2 Ch. 599; Powell v. London & Provincial Bank, [1893] 1 Ch. 610 (stock transferred by an imperfectly executed deed, passing only an equitable title); Ireland v. Hart, [1902] 1 Ch. 522 (transferee did not obtain a "present absolute unconditional right to registration").

(c) For cases postponing the equities of the assignor's creditors, see *ante*, §§ 694, and note, 700, and note.

§ 715. **Contrary Rule, that Assignments of Things in Action are Free from Latent Equities in Favor of Third Persons or Previous Assignors.**—On the other hand, the conclusions reached by this imposing line of authorities have been wholly rejected. Able judges and courts have maintained the position that assignments of things in action are subject only to equities of *the debtor* party; that they are never subject to equities in favor of third persons, and especially that they are free from that kind of prior claim often called "latent equities."[1a] Although this direct conflict cannot

creditors previous to the assignment); Pindall v. Trevor, 30 Ark. 249; Trabue v. Bankhead, 2 Tenn. Ch. 412; Parrish v. Brooks, 4 Brewst. 154; Bradley v. Root, 5 Paige, 632; Poillon v. Martin, 1 Sand. Ch. 569; Maybin v. Kirby, 4 Rich. Eq. 105; Judson v. Corcoran, 17 How. 612.

[1] Livingston v. Dean, 2 Johns. Ch. 479; Murray v. Lylburn, 2 Johns. Ch. 441, 443 (the opinion of Kent, C., in these cases seems to be the authority on which all the later similar decisions are rested. His opinion on this point has been repeatedly overruled by the New York courts: See Muir v. Schenck, 3 Hill, 228; 38 Am. Dec. 633; Bush v. Lathrop, 22 N. Y. 535); Bebee v. Bank of New York, 1 Johns. 529, 573, per Kent, C. J.; James v. Morey, 2 Cow. 246, 298; 14 Am. Dec. 475, per Sutherland, J.; Losey v. Simpson, 11 N. J. Eq. 246; Bloomer v. Henderson, 8 Mich. 395, 402; 77 Am. Dec. 453; Croft v. Bunster, 9 Wis. 503, 508; Mott v. Clark, 9 Pa. St. 399, 404; 49 Am. Dec. 566; Taylor v. Gitt, 10 Pa. St. 428; Metzgar v. Metzgar, 1 Rawle, 227; McConnell v. Wenrich, 16 Pa. St. 365; Moore v. Holcombe, 3 Leigh, 597; 24 Am. Dec. 683; Ohio Life Ins. Co. v. Ross, 2 Md. Ch. 25, 39. An assignee for value and without notice of a chattel mortgage, fraudulent as against the creditors of the mortgagor, obtains a good title superior to the equities of such creditors: Sleeper v. Chapman, 121 Mass. 404; see also, upon the general question discussed in the text, Sumner v. Waugh, 56 Ill. 531.

(a) See, also, Winter v. Montgomery G. L. Co., 89 Ala. 544, 7 South. 773 (*bona fide* assignee of stock certificate takes it free from secret trust on which the original owner held the stock); First Nat. Bank v. Perris Irr. Dist., 107 Cal. 55, 40 Pac. 45; Western Nat. Bank v. Maverick Nat. Bank, 90 Ga. 339, 16 S. E. 942, 35 Am. St. Rep. 210 (assignee of judgment takes it free from equity of a person not a party thereto to share in the proceeds, since, by statute, such assignee obtains the legal title); Yarnell v. Brown, 170 Ill. 362, 48 N. E. 909, 62 Am. St. Rep. 380 (assignment of judgment based on attachment); Garland v. Plummer, 72 Me. 397 (assignee of a cause of action to recover for injury to chattels takes proceeds free from a mortgage on the chattels which, as against a purchaser thereof, would have been void for want of recording); Duke v. Clark, 58 Miss. 465 (assignment of judgment); William

be completely reconciled, yet the apparent discrepancy which exists among similar cases may be explained, and at least partly removed, by certain well-settled principles of equity which are recognized by all courts. The equity of the second assignee may, from some intrinsic element or some external incident, be "superior," and may therefore be entitled to a precedence; or the second assignee may have obtained a legal title, so that the doctrine of *bona fide* purchaser for a valuable consideration will apply and give him protection;[b] or the holder of the prior equity may have been guilty of laches or other conduct making it inequitable to subject an innocent subsequent assignee to his claim.[2]

§ 716. Equitable Estates, Mortgages, Liens, and Other Interests.— Having thus considered the general principles concerning priority in their effect upon assignments of pure things in action, I shall now examine their application to another group of equitable interests in property, including estates, liens, charges, and the like. The general doctrines which control these kinds of interests, and determine their order of priority, have been presented in the former part of this section, and require no further discussion; it only remains to illustrate their application under various circum-

2 See *supra*, § 698, quotation from Judson v. Corcoran, 17 How. 612, and other cases cited.

v. Donnelly, 54 Neb. 193, 74 N. W. 601; Appeal of Mifflin Co. Bank, 98 Pa. St. 150 (assignment of judgment). In Yarnell v. Brown, 170 Ill. 362, 48 N. E. 909, 62 Am. St. Rep. 380, it was held that the equity of the assignee, in order to be protected, must be at least *equal* to the "latent" equity; if he is a donee, or his lien is essentially inferior, he is not preferred. The lien of a judgment, being general, is inferior to the equity of a mortgagee whose mortgage, by mistake, did not correctly describe the land; but the lien of an attachment, being specific, is equal to the equity of such mortgagee, and the assignee of a judgment based on the attachment takes, therefore, free from the mortgagee's "latent" equity.

(b) As in Western Nat. Bank v. Maverick Nat. Bank, 90 Ga. 339, 16 S. E. 942, 35 Am. St. Rep. 210; Winter v. Montgomery G. L. Co., 89 Ala. 544, 7 South. 773 (*bona fide* purchaser of stock certificate with the usual indorsement from a trustee takes it free from the trust, since he obtains the legal title against all persons except the company).

stances to different conditions of fact. It will be remembered that among equitable interests only in the same subject-matter, otherwise equal, the order of time controls; that between two or more equities, one may be intrinsically superior in its nature, and thus entitled to the precedence; that between an equitable title and a legal title in the same thing, the latter generally prevails; and finally, the priority resulting from order of time merely, or that resulting from the superior nature of the equity itself, or that belonging to a legal title, may be postponed or defeated in various manners and by various incidents, among which the most important are, notice given to or fraud or negligence of the holder of the interest which would otherwise have been preferred.[1] [a]

§ 717. **Doctrine of Priorities Greatly Modified by the Recording Acts.**— These doctrines, forming a most important part of the equity jurisprudence, have been well settled, applied to every kind of equitable estate, lien, and interest, and illustrated by innumerable examples. The scope and operation of these purely equitable doctrines throughout the United States have been greatly broken in upon and modified by the various recording acts; so that any uniformity of the practical rules has been made virtually impossible. The provisions of the recording acts differ exceedingly in the different commonwealths, as has been shown in the preceding section.[1] In some states only "conveyances," including deeds and mortgages, are to be recorded; in others, every kind of instrument creating or assigning any interest in or lien or charge upon land, and even instruments dealing only with personal property, may be recorded. A similar

§ 716, [1] See *supra*, §§ 683–692.
§ 717, [1] See *supra*, § 646.

(a) § 716 is cited in Gilchrist v. Helena Co., 58 Fed. 708; in Hooper v. Central Trust Co., 81 Md. 559, 32 Atl. 505, 29 L. R. A. 262 (prior lien postponed on account of fraud); §§ 716 *et seq.*, are cited in Trentman v. Eldridge, 98 Ind. 525.

diversity exists in the statutory provisions regulating the effect of docketed judgments. Another cause which has disturbed the uniformity of rules upon this general subject is found in the various theories which prevail concerning the nature and effect of mortgages of land,— theories which are not only unlike the common law and equitable system originally settled in England, but which greatly differ among themselves. To discuss in an exhaustive manner the subject of priorities *as modified* by the statutory legislation, and to present all the rules growing out of their local recording acts, as settled in the various states, would plainly transcend the limits of this work, and would, in fact, require a volume by itself; for such an extended and minute treatment the reader must be referred to treatises upon mortgages and conveyancing, and to the decisions in each state which have given a construction to its own statutes. I shall endeavor simply to illustrate the well-settled doctrines of equity, independent of statutory rules, and then to describe some effects of the registration system, with the modifications, somewhat different in different commonwealths, which it has introduced.

§ 718. **I. Priority of Time among Equal Equities.**— The general doctrine is well settled, as already stated,[1] that among successive equitable estates, liens, and interests which are equal,— that is, where neither claimant holds the legal estate or has the best right to call for it, and neither is intrinsically superior to the others, nor is affected with any collateral incident, such as negligence or fraud,— the order of time controls, even though a subsequent holder acquired his interest without any notice of the prior one. Under these circumstances the maxim, *Qui prior est tempore, potior est jure,* applies. The doctrine has been fully recognized and constantly enforced by American courts, wherever its operation has not been interfered with or

[1] See *supra,* §§ 678, 682.

modified by the recording acts.[2][a] The equities to which this rule has been most frequently applied by the English courts are equitable mortgages, especially those created by a deposit of title deeds,— a kind of security almost unknown in this country. In order to accurately appreciate the decisions upon this subject, it is important to keep in mind the peculiar rules concerning the nature of legal and equitable mortgages which prevail in the English law, and which are in many respects different from our own system.[3]

2 Phillips v. Phillips, 4 De Gex, F. & G. 208, 215, 218; Cave v. Cave, L. R. 15 Ch. Div. 639, 646 (interest of a *cestui que trust* and an equitable mortgage); Rice v. Rice, 2 Drew. 73 (vendor's lien and equitable mortgage); Bradley v. Riches, L. R. 9 Ch. Div. 189 (two equitable mortgages); Dixon v. Muckleston, L. R. 8 Ch. 155; Newton v. Newton, L. R. 4 Ch. 143; 6 Eq. 135, 140; Waldy v. Gray, L. R. 20 Eq. 238; Thorpe v. Holdsworth, L. R. 7 Eq. 139; Cory v. Eyre, 1 De Gex, J. & S. 149, 163; Roberts v. Croft, 2 De Gex & J. 1; Beckett v. Cordley, 1 Brown Ch. 353, 358; Mackreth v. Symmons, 15 Ves. 329, 354; Wilmot v. Pike, 5 Hare, 14; Potter v. Sanders, 6 Hare, 1; Ford v. White, 16 Beav. 120; Berry v. Mut. Ins. Co., 2 Johns. Ch. 603; Cherry v. Monro, 2 Barb. Ch. 618; Grosvenor v. Allen, 9 Paige, 74, 76; Thorpe v. Durbon, 45 Iowa, 192; Hoadley v. Hadley, 48 Ind. 452; Stevens v. Watson, 4 Abb. App. 302; Littlefield v. Nichols, 42 Cal. 372; Walker v. Matthews, 58 Ill. 196.

3 With respect to priorities between successive *equitable* mortgages, see Bradley v. Riches, L. R. 9 Ch. Div. 189; Dixon v. Muckleston, L. R. 8 Ch. 155; Waldy v. Gray, L. R. 20 Eq. 238; Thorpe v. Holdsworth, L. R. 7 Eq. 139, and other cases cited in last note. With respect to such priority where there has been negligence on the part of the one first in order of time, see Layard v. Maud, L. R. 4 Eq. 397, 406; Hunter v. Walters, L. R. 11 Eq. 292; Pease v. Jackson, L. R. 3 Ch. 576.[b] If the legal owner of land gives a first mortgage on it to A in the ordinary form known to the common law, of a deed with a condition, this is, of course, a legal mortgage; A obtains and holds the *legal* title and estate, if the mortgage is of the fee, then his estate is the legal fee. While this first mortgage is outstanding, all subsequent mortgages of the same land to B, C, D, etc., no matter what may be their forms, are necessarily *equitable* mortgages; even if such a subsequent mortgage be in the form of a legal conveyance, it can only convey an equitable estate, since the legal estate has already been conveyed away and is vested in the first mortgagee, A. This is the settled rule necessarily resulting from the English theory of mortgages. Again, if the legal owner of land creates a first mortgage upon it by depositing all his title deeds with A, A's interest is certainly an equitable mortgage;

(a) See, also, Carlisle v. Jumper, 81 Ky. 282 (successive assignments of a grantor's reserved lien to different persons).

(b) See *ante*, § 687, and notes; In re Castell & Brown, [1898] 1 Ch. 315, 67 Law J. (Ch.) 169, 78 Law T. (N. S.) 109, 46 Wkly. Rep. 248.

§ 719. Illustrations — Simultaneous Mortgages, Substituted Liens, etc.— It has naturally followed, from the provisions of the recording acts, and from the quite different modes of conducting business prevailing in this country, that the questions presented to the American courts for decision have been of another character, arising from other circumstances. Among these questions, one relates to simultaneous mortgages or other liens.[1] Two or more mort-

but since he is first in order of time, and possesses all the legal muniments of title, and has the right to call for the execution of an ordinary legal mortgage by conveyance in order to perfect his security, his position is plainly similar to that of a legal mortgagee.

[1] Morse v. Brockett, 67 Barb. 234. A first mortgage being given to A and a second to B, both on the same land, and as a part of one and the same arrangement, no money passing between the parties at the time, B may insist that, as against his own mortgage, A's mortgage has no force except to the extent that A has performed the agreement under which they were given. The consideration of A's mortgage was his undertaking to satisfy the mortgagor's liabilities to the amount of twenty thousand dollars. Held, that he could only enforce to the extent he had performed his agreement. Also, by his agreement, he became, as between himself and the mortgagor, with respect to these liabilities, the principal debtor; and when he had satisfied judgments against the mortgagor, he could not hold them as assignee, and enforce them against the mortgagor: Van Aken v. Gleason, 34 Mich. 477. Where two mortgages are of even date, and intended to be simultaneous, but recorded on different days, the foreclosure of one of them by advertisement would not settle the equities of the purchaser at the sale and of the person holding the other; a suit in equity would be necessary to determine their respective rights. The fact that the one recorded on the later day bore an acknowledgment of an earlier date does not show that it was intended to be the prior security: Gausen v. Tomlinson, 23 N. J. Eq. 405. Where two mortgages on the same land are given at the same time to the same person, an earlier record of one will not give it any precedence over the other, even when between assignees. Such mortgages, in the hands of different assignees, are concurrent liens, payable ratably, if necessary: Gausen v. Tomlinson, 23 N. J. Eq. 405; Howard v. Chase, 104 Mass. 249. Where two simultaneous mortgages are given with an agreement that they are to be equal liens, the earlier record of one gives no priority over the other, even to an assignee of the one first recorded. Such assignee is charged with notice by the record of the other mortgage. If both the mortgages, or either of them, contain a stipulation that they are to be simultaneous, or a statement that both were given for purchase-money, then the first record of one will give it no priority, either in the hands of the mortgagee or of an assignee: Greene v. Warnick, 64 N. Y. 220. On the other hand, if simultaneous mortgages are given to different persons as parts of the same transaction, each having notice of the other, their priorities as

gages having been given at the same time, or as parts of the same single transaction, with the intention that they should be simultaneous liens, they may perhaps be recorded on different days, and the court may be called upon to settle the equities between the mortgagees or their assignees.

between the mortgagees will depend upon the equities intrinsically belonging to them, without reference to the order of recording: Rhodes v. Canfield, 8 Paige, 545; Jones v. Phelps, 2 Barb. Ch. 440; Pomeroy v. Latting, 15 Gray, 435; Sparks v. State Bank, 7 Blackf. 469.[a] If, however, one of these mortgages is assigned to a *bona fide* purchaser for value and without notice, he may, by obtaining the earliest record, secure the priority over the other which has intrinsically a superior equity: Corning v. Murray, 3 Barb. 652. If a grantee of land, as a part of his purchase, and the whole constituting one transaction, gives a mortgage back to his grantor for purchase-money, and also a mortgage to another person, and the deed and two mortgages are recorded at the same time, the purchase-money mortgage to the grantor is entitled to the priority: Clark v. Brown, 3 Allen, 509; and see Dusenbury v. Hulbert, 2 Thomp. & C. 177. This subject is more fully discussed in 1 Jones on Mortgages, secs. 566–568, from which a portion of this note has been borrowed.[b]

(a) See, also, Lampkin v. First Nat. Bank, 96 Ga. 487, 23 S. E. 390.

(b) No presumption of priority arises from the fact of prior recording, nor does such fact tend to show that the one first recorded was executed and delivered before the other: Walker v. Buffandeau, 63 Cal. 312. If, however, facts appearing on the face of the mortgages show that it was the intention of the parties to give preference to one over the other, that lien will be given priority: Coleman v. Carhart, 74 Ga. 392. Where, however, as between the simultaneous mortgagees, an equitable priority exists in favor of one, and the other assigns for value, and the assignee has no notice, actual or constructive, of such priority, he will take his mortgage discharged of the equity: Riddle v. George, 58 N. H. 25. And where the concurrent mortgages are held by the same person, and one is assigned by the mortgagee, with a representation that it is the first lien, such representation will give it priority as against the mortgagee, but not as against a subsequent assignee of the other mortgage without notice: Vredenburgh v. Burnet, 31 N. J. Eq. 229. But the fact that one of the mortgages becomes due before the other is held not to give it priority: Collerd v. Huson, 34 N. J. Eq. 38. In Utley v. Dunkelberger, 86 Iowa, 469, 53 N. W. 408, two mortgages were executed and recorded simultaneously: one was accepted with the understanding that it was to be first; the other was accepted the next day, with full knowledge of the existence of the former, but not of its priority: held, that the priority was determined by the time of acceptance. In Naylor v. Throckmorton, 7 Leigh (Va.), 98, 30 Am. Dec. 492, priority between simultaneous mortgages was determined by order of record, in the absence of an agreement making them equal.

Agreement Affecting Priority, see *post*, § 726, notes.

A second and most important question concerns the respective claims of precedence between a prior unrecorded mortgage or other specified equitable lien, and a subsequent docketed judgment.[2] Another question relates to the effect of substituting a different lien in the place of one already existing, whether the substituted lien retains the precedence which belonged to the one which it has replaced.[3]

2 This particular question, which has given rise to a direct conflict of opinion, is more fully examined under the next head (*infra*, §§ 721–724), and I simply here cite some of the cases involving it: Galway v. Malchow, 7 Neb. 285; King v. Portis, 77 N. C. 25; Corpman v. Baccastow, 84 Pa. St. 363; Van Thorniley v. Peters, 26 Ohio St. 471; Stevens v. Watson, 4 Abb. App. 302; Merriman v. Polk, 5 Heisk. 717; Fain v. Inman, 6 Heisk. 5; Wheeler v. Kirtland, 24 N. J. Eq. 552; Knell v. Building Ass'n, 34 Md. 67.

3 It will be found, I think, from the decisions that no general rule can be formulated which shall be an answer to this question. The effect of the substitution, in retaining the original priority, must depend, it would seem, both upon the intent of the parties, and upon the mode in which it was consummated. Each case must therefore, to a certain extent, turn upon its own special circumstances. In Thorpe v. Durbon, 45 Iowa, 192, it is said that in exchanging one form of security for another, for the same debt, no other lien can intervene and obtain a precedence. A vendor in a land contract retained his lien on the land for the unpaid price, which was prior to a mechanic's lien which had subsequently arisen and attached for the building of a house by the vendee. Afterwards the vendor gave a deed of conveyance and took back a mortgage to secure the purchase price. The lien of this mortgage, it was held, being substituted for the vendor's lien, retained the precedence which had belonged to the latter, and prevailed over the mechanic's lien, although actually later in date:[c] Eggeman v. Eggeman, 37 Mich. 436. The parties to a mortgage agreed that a new one should be substituted. On the same day that this substituted security was completed, but executed and recorded before it, another mortgage was secretly given to the mortgagor's father-in-law, for money which he had previously advanced to mortgagor's wife. It was made with the design of giving him priority, but without his participation. Held, that this mortgage must be postponed to that of the plaintiff, since, on the assumption that it was not fraudulent, the mortgagee had no equities which could make it anything but a second mortgage against the plaintiff's substituted security.[d] In Kitchell v. Mudgett, 37 Mich. 81, there were three suc-

(c) See, also, Jones v. Davis, 121 Ala. 348, 25 South. 789 (substituting purchase-money mortgage for vendor's lien does not waive the lien, so as to give an intervening mortgage priority); Maas v. Tacquard's Ex'rs, (Tex. Civ. App.) 75 S. W. 350 (same). As to substituting other security for purchase-money mortgage, see *post*, § 725.

(d) **Substituted Mortgage.**— In general, where a recorded mortgage is discharged of record, in ignorance of a second recorded mortgage or other

Very many cases have arisen, involving special facts, and depending for their decision upon their particular circumstances. Some of them have been placed as illustrations in the foot-note.[4]

§ 720. II. One Equity Intrinsically the Superior — Prior General and Subsequent Specific Lien.[a]—The doctrine has already been stated[1] that where one of two equities is intrinsically the superior, it is entitled to precedence;[2] and that an equi-

cessive mortgages, and K. paid off *and discharged* the first and second, and then took a new mortgage for the amount which he had thus paid. Held, that this one was subject to the mortgage No. 3, and K. could not keep alive the lien of the first two, so as to give his mortgage the priority.e

4 Deere v. Young, 39 Iowa, 588; Hemminway v. Davis, 24 Ohio St. 150; Dusenbury v. Hulbert, 2 Thomp. & C. 177; Lowry v. McKinney, 68 Pa. St. 294; Armstrong v. Ross, 20 N. J. Eq. 109.

1 See *supra*, §§ 684–692.

2 As an illustration, in Rice v. Rice, 2 Drew. 73, a vendor conveyed, without receiving the purchase price, but indorsing the receipt of it upon the deed, and delivering the title deeds to the grantee. This grantee then made an equitable

intervening lien, and a new mortgage is substituted between the same parties, without intent to affect the security, the first mortgage may be restored and its original priority established: Roberts v. Doan, 180 Ill. 187, 54 N. E. 207 (the second mortgage was by agreement subject to the first); Austin v. Underwood, 37 Ill. 438, 87 Am. Dec. 254 (substituting other security for purchase-money mortgage); Christie v. Hale, 46 Ill. 117 (mortgage substituted for deed with defeasance); Shaver v. Williams, 87 Ill. 469; Hardin v. Emmons, 24 Nev. 329, 53 Pac. 854; International Trust Co. v. Davis & Farnum Mfg. Co., 70 N. H. 118, 46 Atl. 1054 (intervening attachment lien); Laconia Sav. Bank v. Vittum, 71 N. H. 465, 52 Atl. 848, 93 Am. St. Rep. 561; Pearce v. Buell, 22 Oreg. 29, 29 Pac. 78 (intervening judgment lien); Kern v. A. P. Hotaling Co., 27 Oreg. 205, 40 Pac. 168, 50 Am. St. Rep. 710 (the new note and mortgage must have been intended as a continuance of the old, and not as payment thereof); Upton v. Hugos, 7 S. Dak. 476, 64 N. W. 523 (second mortgage taken subject to the first); Edwards v. Weil, 99 Fed. 822, 40 C. C. A. 105 (Tennessee). Of course, if the first mortgagee *knew* of the existence of the second mortgage at the time of the discharge, the priority of the former is not retained: Workingman's B. & S. Assn. v. Williams, (Tenn. Ch. App.) 37 S. W. 1019.

(e) For cases where the substituted mortgage is to a different person from the original mortgagee, see Seeley v. Bacon, (N. J. Eq.) 34 Atl. 139 (priority retained); Laconia Sav. Bank v. Vittum, 71 N. H. 465, 52 Atl. 848, 93 Am. St. Rep. 561; and *post*, §§ 1211–1214, "Equitable Assignment by Subrogation."

(a) This section is cited in Gates Iron Works v. Cohen, 7 Colo. App. 341, 43 Pac. 667.

table interest *in rem,* such as that created by a mortgage, contract, trust, and the like, is superior to a mere voluntary interest, and to the general lien of a judgment. It would seem to be a general rule, at all events a correct deduction from settled principles, that where there is a prior general lien, embracing, among other things, a certain subject-matter, and a specific lien is subsequently created upon that same particular subject-matter, not voluntary, but arising from a new and valuable consideration, such subsequent specific lien would be intrinsically superior, and therefore entitled to the precedence, at least if it were acquired by the holder thereof without notice of the prior general encumbrance. This rule is certainly recognized by some decisions.[3]

mortgage by a deposit of the title deeds, and absconded. Held, that the vendor's lien for the unpaid price, although prior in time, must be postponed to the equitable mortgage, because the possession of the title deeds and *the fact of the indorsement of the receipt on the deed* made the mortgagee's equity superior.[b] See also Newton v. McLean, 41 Barb. 285.

3 In re Hamilton's etc. Ironworks, L. R. 12 Ch. Div. 707, 710, 711. A company gave a mortgage of all its land, fixtures, stock in trade, and its undertaking, to secure its bond-holders and other creditors. The company afterwards borrowed a sum of money to use in carrying on its business from A, who knew of the previous mortgage, and gave him as security a charge by way of assignment on a certain sum of money about to become due to the company for the completion of certain work. The work being completed, and the money due, it was held that A's claim to it was entitled to preference over that of the mortgagees. The same rule seems to be sustained by the following cases: In Stevens v. Watson, 4 Abb. App. 302, it is held that while a mortgage by a railroad company of all its property then existing or afterwards to be acquired, creates a valid equitable lien upon all the after-acquired property, which is superior to that of an ordinary subsequent judgment, still, if such subsequent judgment is confessed to secure the payment of money advanced at the time on the faith of it by the judgment creditor, the latter lien thereby becomes entitled to a precedence over the prior encumbrance by the mortgage; citing, to the same effect, Hulett v. Whipple, 58 Barb. 224. In Fain v. Inman, 6

(b) See, also, Hume v. Dixon, 37 Ohio St. 66. K., having the legal title to land, subject to a grantor's lien in favor of D., sold and undertook to convey the same to H., for a valuable consideration, but the deed was defective as a conveyance of the legal title, because the officer taking the acknowledgment omitted to subscribe the same. Held, in reliance on Rice v. Rice, that H.'s equity was superior.

§ 721. **Prior Unrecorded Mortgage Superior to Subsequent Docketed Judgment.**—The most important question under this head which has come before the American courts relates to the respective claims arising from a prior specific and a subsequent general lien. The doctrine is certainly established as part of the equity jurisprudence, and rests upon the solid basis of principle, that prior equitable interests *in rem,* including equitable liens upon specific parcels of land, have priority of right over the general statutory lien of subsequent docketed judgments, although the latter is legal in its nature. Judgment creditors are not "purchasers" within the meaning of the recording acts, and unless expressly put upon the same footing, they do not obtain the benefit which a subsequent purchaser does by a prior record. The equitable doctrine is, that a judgment and the legal lien of its docket binds only the actual interest of the judgment debtor, and is subject to all existing equities which are valid as against such debtor.[1] [a] It

Heisk. 5, it is held that where the vendor conveys the legal title without retaining a lien for the purchase-money in any express manner, his right to enforce payment against the land in the hands of the vendee is a mere "equity," and must be postponed to a specific lien subsequently acquired, either with or without notice, by a creditor of the vendee. This case seems to recognize the rule stated in the text, but, in my opinion, by a mistaken course of reasoning. By the overwhelming weight of authority, the lien of a vendor, even when not reserved by any express language, is more than a mere equity; it is an equitable interest *in rem,* and entitled to preference over all subsequent equitable interests of no higher nature: See Rice v. Rice, 2 Drew. 73.[c]

[1] The doctrine was well stated by Bartley, J., in White v. Denman, 1 Ohio St. 110, 112, although the decision upon the authority of earlier Ohio cases was not in accordance with it. "It is a principle of familiar application in equity jurisprudence that a specific equitable interest in real estate, whether

(c) See, however, *post,* § 1253, and note. In Wales v. Sammis, 120 Iowa, 293, 94 N. W. 840, it appears to have been correctly held that the mere inchoate right, not amounting to a lien, of a *cestui que trust* whose property has been misappropriated by his trustee, to charge the individual property of the trustee for reimbursement does not take precedence of an attachment levied upon such land by the trustee's creditor.

(a) The text is quoted in Harney v. First Nat. Bank, 52 N. J. Eq. 697, 29 Atl. 221; Dawson v. McCarty, 21 Wash. 314, 57 Pac. 816, 75 Am. St. Rep. 841, citing many cases. Cited, in Martin v. Bowen, 51 N. J. Eq. 452,

follows, as a necessary consequence, that, unless prevented by express statutory provisions, the equitable lien of a prior unrecorded mortgage given upon a specific parcel of land

it be created by an executory agreement for the sale of land, or by deed so defectively executed as not to pass the legal estate, but treated in equity as a contract to convey, or even a vendor's lien, is upheld by courts of equity, and uniformly takes priority over judgment liens, assignments in bankruptcy, and assignments for the benefit of creditors generally." See also Finch v. Earl of Winchelsea, 1 P. Wms. 277; Legard v. Hodges, 1 Ves. 477; Burn v. Burn, 3 Ves. 573, 582; Lodge v. Tyseley, 4 Sim. 70; Beavan v. Earl of Oxford, 6 De Gex, M. & G. 507, 517, 518; Newlands v. Paynter, 4 Mylne & C. 408; Langton v. Horton, 1 Hare, 549; Everett v. Stone, 3 Story, 446, 455; Briggs v. French, 2 Sum. 251. In the following cases the doctrine has been applied to a great variety of equitable interests,— that of a vendee, to the lien of a vendor, to the interest of a *cestui que trust*, whether the trust was express

26 Atl. 823 (judgment creditors, independently of statute, inferior to prior equitable mortgage). See, also, Riley v. Martinelli, 97 Cal. 575, 32 Pac. 599, 33 Am. St. Rep. 209, 21 L. R. A. 33; Lowe v. Allen, 68 Ga. 225 (deed reformed as against grantor's judgment creditors); Lowe v. Matson, 140 Ill. 108, 29 N. E. 1036 (assignment for creditors); Boyd v. Anderson, 102 Ind. 217, 1 N. E. 724 (equity to reform judgment debtor's prior deed for mistake: judgment creditor cannot make the defense that the mistake was one of law, not of fact); Heberd v. Wine, 105 Ind. 237, 4 N. E. 457 (land subject to resulting trust); Wells v. Benton, 108 Ind. 585 (equity to reform judgment debtor's prior deed so as to include land omitted by mistake); Peck v. Williams, 113 Ind. 256, 15 N. E. 270 (contract to sell the land); Justice v. Justice, 115 Ind. 201, 16 N. E. 615 (attorney's lien for professional services upon land recovered as result of suit superior to subsequent judgment against his client); Leonard v. Broughton, 120 Ind. 536, 22 N. E. 731, 16 Am. St. Rep. 347; Koons v. Millett, 121 Ind. 591, 23 N. E. 95, 7 L. R. A. 231; Warren v. Hull, 123 Ind. 126, 24 N. E. 96 (land subject to resulting trust); Rea v. Wilson, 112 Iowa, 517, 84 N. W. 539; Burke v. Johnson, 37 Kan. 337, 15 Pac. 204, 1 Am. St. Rep. 252 (contract for sale of the land); Valentine v. Seiss, 79 Md. 187, 28 Atl. 892 (unrecorded contract for sale); Horton v. Hubbard, 83 Mich. 123, 47 N. W. 115 (contract for sale); Westervelt v. Hagge, 61 Nebr. 647, 85 N. W. 852, 54 L. R. A. 333 (attachment inferior to equity of creditors of debtor's grantor to set aside the conveyance as in fraud of their rights); Depeyster v. Gould, 3 N. J. Eq. (2 H. W. Green) 474, 29 Am. Dec. 723 (resulting trust is prior to subsequent attachment); Summers v. Darne, 31 Gratt. 791; Cowardin v. Anderson, 78 Va. 88; Hurt v. Prillaman, 79 Va. 257; Sinclair v. Sinclair, 79 Va. 40; Bowman v. Hicks, 80 Va. 806. In Wales v. Sammis, 120 Iowa, 293, 94 N. W. 840, it was held that a *cestui que trust* whose property has been misappropriated by his trustee has no lien for the purpose of reimbursement upon the property of the trustee, not acquired by the use of trust

should have precedence over the general legal lien of a subsequent docketed judgment against the owner of the mortgaged premises, even when the judgment was recovered and docketed without any notice to the judgment cred-

or by operation of law, to equitable mortgages or liens arising from contract, or from intended legal mortgages defectively executed, etc.: Ells v. Tousley, 1 Paige, 280; In re Howe, 1 Paige, 125; White v. Carpenter, 2 Paige, 217, 266; Gouverneur v. Titus, 6 Paige, 347; Kiersted v. Avery, 4 Paige, 9; Arnold v. Patrick, 6 Paige, 310; Morris v. Mowatt, 2 Paige, 586, 590; 22 Am. Dec. 661; Buchan v. Sumner, 2 Barb. Ch. 165, 207; 47 Am. Dec. 305; Hoagland v. Latourette, 2 N. J. Eq. 254; Dunlap v. Burnett, 5 Smedes & M. 702; 45 Am. Dec. 269; Money v. Dorsey, 7 Smedes & M. 15; Bank v. Campbell, 2 Rich. Eq. 179; Watkins v. Wassell, 15 Ark. 73, 94, 95; Cover v. Black, 1 Pa. St. 493; Shryock v. Waggoner, 28 Pa. St. 430; Hampson v. Edelen, 2

funds. His mere inchoate right to charge the trustee's land, therefore, does not take precedence of an attachment levied upon the land.

In many states where by the express terms of the recording acts the judgment lien is superior to a prior unrecorded mortgage or conveyance, it is held to be inferior to a prior trust arising by operation of law, which necessarily cannot be made a matter of record: Overall v. Taylor, (Ala.) 11 South. 738; Morgan v. Morgan, 3 Stew. 383, 21 Am. Dec. 638; Yarnell v. Brown, 170 Ill. 362, 48 N. E. 909, 62 Am. St. Rep. 380 (inferior to the equity of a mortgage which, by mistake, did not correctly describe the land); School District No. 10 v. Peterson, 74 Minn. 122, 76 N. W. 1126, 73 Am. St. Rep. 337; Lissa v. Posey, 64 Miss. 362, 1 South. 500; Harney v. First Nat. Bank, 52 N. J. Eq. 697, 29 Atl. 221; Miller v. Baker, 166 Pa. St. 414, 31 Atl. 121, 45 Am. St. Rep. 680; Senter v. Lambeth, 59 Tex. 259; Calvert v. Roche, 59 Tex. 463; McKamey v. Thorp, 61 Tex. 648; Parker v. Coop, 60 Tex. 111; Yoe v. Montgomery, 68 Tex. 341, 4 S. W. 622; Hicks v. Pogue, (Tex. Civ. App.) 76 S. W. 786; Blankenship v. Douglas, 26 Tex. 225, 82 Am. Dec. 608; Hawkins v. Willard, (Tex. Civ. App.) 38 S. W. 365 (equitable right). See last note to § 721. Thus, the equity of partners to have partnership lands, the record title to which stands in the names of individual partners, applied to partnership debts, is superior to the liens of judgment creditors of the individual partners: Harney v. First Nat. Bank, 52 N. J. Eq. 697, 29 Atl. 221. In Snyder v. Martin, 17 W. Va. 276, 41 Am. Rep. 670, and Snyder v. Botkin, 37 W. Va. 355, 16 S. E. 591, it was held that a parol contract to convey land, accompanied by possession and payment, is valid, and not subject to registry laws. Hence, it has priority over a subsequent judgment against the vendor. See the opinion of Green, Pr., in the first of these two cases, for an instructive discussion and review of cases. To the same effect are Floyd v. Harding, 28 Gratt. 401, 414, 416; Long v. Hagerstown Agricultural Co., 30 Gratt. 665; Brown v. Butler, 87 Va. 621, 13 S. E. 71; Powell v. Bell's Admr., 81 Va. 222. Compare Fulkerson v. Taylor, (Va.) 46 S. E. 309.

itor of such outstanding mortgage. This rule, which is plainly correct, as being in accordance with principle and preserving the consistency and symmetry of the equity jurisprudence, has been adopted and firmly established by the courts in many of the states.[2c] The general rule,

Har. & J. 64; 3 Am. Dec. 530; Hackett v. Callender, 32 Vt. 97, 108, 109; Hart v. Farmer's etc. Bank, 33 Vt. 252; Brown v. Pierce, 7 Wall. 205; Baker v. Morton, 12 Wall. 150. In these two latter cases the doctrine was applied to the equitable interest of a grantor who had executed a deed through duress, but had remained in possession, against a judgment creditor of the grantee. Notwithstanding this imposing array of authorities, the doctrine has been rejected or departed from in a few cases. In Richeson v. Richeson, 2 Gratt. 497, the lien of a vendor was held subordinate to the right of the vendee's creditor. In Bayley v. Greenleaf, 7 Wheat. 46, 51, the same preference was given to a subsequent judgment against the vendee over the lien of the vendor. The decision cannot be of any weight, since Marshall, C. J., doubts whether the vendor's lien exists at all in the law of this country, and expressly declares that there is no American case protecting it.[b]

2 In some of these cases it is a prior unrecorded deed that prevails over the subsequent judgment; but where this is so held of a deed, it must of necessity be also held of a mortgage: Stevens v. Watson, 4 Abb. App. 302; Wheeler v. Kirtland, 24 N. J. Eq. 552; Knell v. Building Ass'n, 34 Md. 67; Galway v. Malchow, 7 Neb. 285; Jackson v. Dubois, 4 Johns. 216; Schmitt v. Hoyt, 1 Edw. Ch. 652; Thomas v. Kelsey, 30 Barb. 268; Wilder v. Butterfield, 50 How. Pr. 385; In re Howe, 1 Paige, 125 (contract for a mortgage); Schroeder v. Gurney, 73 N. Y. 430 (a deed); Moyer v. Hinman, 13 N. Y. 180; 17 Barb. 137 (equitable interest of a vendee); Wilcoxon v. Miller, 49 Cal. 193 (deed); Pixley v. Huggins, 15 Cal. 127 (deed); Plant v. Smythe, 45 Cal. 161; Hunter v. Watson, 12 Cal. 363; 73 Am. Dec. 543; Rose v. Munie, 4 Cal. 173; First Nat. Bank v. Hayzlett, 40 Iowa, 659; Hoy v. Allen, 27 Iowa, 208; Churchill v. Morse, 23 Iowa, 229; 92 Am. Dec. 422; Evans v. McGlasson, 18 Iowa, 150; Welton v. Tizzard, 15 Iowa, 495; Patterson v. Linder, 14 Iowa, 414; Bell v. Evans, 10 Iowa, 353; Norton v. Williams, 9 Iowa, 528; Sappington v. Oeschli, 49 Mo. 244; Potter v. McDowell, 43 Mo.

(b) **Vendor's or Grantor's Lien on Conveyance.**—The author subsequently changed his opinion on the question of priority between the grantor's implied lien and that of the grantee's judgment creditor; see *post*, § 1253, note, where he argues that the lien, being less than an equitable estate, and not superior in quality to that of a judgment, should yield thereto, because of the latter's *legal* character. See, also, Cutler v. Ammon, 65 Iowa, 281, 21 N. W. 604; Gordon v. Rixey, 76 Va. 694. *Contra*, that the lien is superior to the judgment against the grantee, see Walton v. Hargroves, 42 Miss. 18, 97 Am. Dec. 433.

(c) **Prior Unrecorded Mortgage superior to judgment or attachment:** Martin v. Ogden, 41 Ark. 186; Bank of Ukiah v. Petaluma Sav. Bank,

wherever it thus prevails, is still susceptible to modifications and exceptions depending upon special circumstances.[3]

§ 722. **Contrary Rule, in Some States, that the Subsequent Judgment has Precedence.**— A very different rule prevails in many states, in which it is settled that the lien of a subsequent docketed judgment prevails over that of a prior unrecorded mortgage or other prior equitable interest or lien

93; Stillwell v. McDonald, 39 Mo. 282; Valentine v. Havener, 20 Mo. 133; Apperson v. Burgett, 33 Ark. 328; Kelly v. Mills, 41 Miss. 267; Righter v. Forrester, 1 Bush, 278; Morton v. Robards, 4 Dana, 258; Greenleaf v. Edes, 2 Minn. 264; Orth v. Jennings, 8 Blackf. 420; Hampton v. Levy, 1 McCord Ch. 107, 111. In Galway v. Mulchow, 7 Neb. 285, it is held that where land is omitted from a mortgage by mistake, the lien of a subsequent judgment against the mortgagor is still subject to the equity of the mortgagee and to the mortgage when corrected. This is a correct application of the equitable doctrine.[d]

[3] As illustrations: In Stevens v. Watson, 4 Abb. App. 302, while the rule is expressly recognized as ordinarily controlling, it is said to be otherwise where the subsequent judgment is one confessed to secure the repayment advanced at the time on the faith of it by the judgment creditor; and to the same effect is Hulett v. Whipple, 58 Barb. 224. In Wheeler v. Kirtland, 24 N. J. Eq. 552, it is held that an equitable mortgage for a precedent debt will not prevail over the lien of a subsequent valid judgment; between two such

100 Cal. 590, 35 Pac. 170; Rea v. Wilson, 112 Iowa, 517, 84 N. W. 539; Swarts v. Stees, 2 Kan. 236, 85 Am. Dec. 588; Hord v. Harlan, 143 Mo. 469, 45 S. W. 274; Vaughn v. Schmalsde, 10 Mont. 186, 25 Pac. 102, 10 L. R. A. 411, and cases cited; Kohn v. Lapham, 13 S. Dak. 78, 82 N. W. 408, and cases cited; Dawson v. McCarthy, 21 Wash. 314, 57 Pac. 816, 75 Am. St. Rep. 841.

Prior Unrecorded Deed superior to judgment or attachment: Morrow v. Graves, 77 Cal. 218, 19 Pac. 489; Hoag v. Howard, 55 Cal. 564; Donovan v. Simmons, 96 Ga. 340, 22 S. E. 966; Lytle v. Black, 107 Ga. 386, 33 S. E. 414; Shirk v. Thomas, 121 Ind. 147, 22 N. E. 976, 16 Am. St. Rep. 381; Moorman v. Gibbs, 75 Iowa, 537, 39 N. W. 832; Smith v. Savage, 3 Kan. App. 556, 43 Pac. 847; Columbia Bank v. Jacobs, 10 Mich. 349, 81 Am. Dec. 792; Hope v. Blair, 105 Mo. 85, 16 S. W. 595, 24 Am. St. Rep. 366; Naudain v. Fullenwider, (Neb.) 100 N. W. 296; Roblin v. Palmer, 9 S. Dak. 36, 67 N. W. 949 (attachment); Murphy v. Plankington Bank, 13 S. Dak. 501, 83 N. W. 575 (attachment); Reynolds v. Haskins, 68 Vt. 426, 35 Atl. 349 (attachment); Stanhilber v. Graves, 97 Wis. 515, 73 N. W. 48; Frank v. Hicks, 4 Wyo. 502, 35 Pac. 475, 1025. And in general, see Taylor v. Mississippi Mills, 47 Ark. 247, 1 S. W. 283 (attaching creditor not a *bona fide* purchaser); Bush v. Bush, 33 Kan. 556, 6 Pac. 794; Carraway v. Carraway, 27 S. C. 576, 5 S. E. 157.

(d) **Equity to Reform Deed or Mortgage for mistake in omitting to include lands intended to be conveyed**

not recorded, of which the judgment creditor had no notice at the time of recovering and docketing his judgment. This result is reached, in some of the states, from express provisions of the statutes; in others, from what was deemed to be the necessary interpretation of the statutory language; and in a few, as it would seem, from an intentional rejection of the equitable doctrine which lies at the basis of the whole subject.[1] [a]

contestants, the first perfected legal lien should have preference. If the prior equitable mortgage arose upon a new consideration paid at the time, it would have priority of right. And in Dwight v. Newell, 3 N. Y. 185, it it said that where an equitable lien and a judgment lien come into existence at the same time, the former will not prevail, unless it was given upon a new consideration advanced on the faith of it.

[1] For the statutes, see *ante*, § 646; Corpman v. Baccastow, 84 Pa. St. 363 (an absolute deed and a defeasance made at the same time constitute a mortgage, and if the deed only is recorded, and the defeasance is not, they are to be regarded as an unrecorded mortgage, and postponed to a subsequent judgment); King v. Portis, 77 N. C. 25; Van Thorniley v. Peters, 26 Ohio St. 471 (a defective recorded mortgage when reformed will not affect the lien of a judgment docketed between the execution and the reformation of the mortgage); White v. Denman, 1 Ohio St. 110, 112, 114; Mayham v. Coombes, 14 Ohio, 428; Jackson v. Luce, 14 Ohio, 514; Holliday v. Franklin Bank, 16 Ohio, 533; Guiteau v. Wisely, 47 Ill. 433; McFadden v. Worthington, 45 Ill. 362; Massey v. Westcott, 40 Ill. 160; Reichert v. McClure, 23 Ill. 516; Barker v. Bell, 37 Ala. 354; Mainwaring v. Templeman, 51 Tex. 205; Firebaugh v. Ward, 51 Tex. 409; Cavanaugh v. Peterson, 47 Tex. 197; Grace v. Wade, 45 Tex. 522; Andrews v. Mathews, 59 Ga. 466; Young v. Devries, 31 Gratt. 304; Eidson v. Huff, 29 Gratt. 338; McClure v. Thistle's Ex'rs, 2 Gratt. 182; Anderson v. Nagle, 12 W. Va. 98; Uhler v. Hutchinson, 23 Pa. St. 110; Jaques v. Weeks, 7 Watts, 261; Hulings v. Guthrie, 4 Pa. St. 123; Hibberd v. Bovier, 1 Grant Cas. 266; Mallory v. Stodder, 6 Ala. 801; Ohio Life Ins. & T. Co. v. Ledyard, 8 Ala. 866; Pollard v. Cocke, 19 Ala. 188 (these three cases are of unrecorded deeds).

or mortgaged, is superior to lien of subsequent judgments against the grantor or mortgagor. See, also, Lowe v. Allen, 68 Ga. 225; Boyd v. Anderson, 102 Ind. 217; Wells v. Benton, 108 Ind. 585; Yarnell v. Brown, 170 Ill. 362, 48 N. E. 909, 62 Am. St. Rep. 380 (but the equity of an *attachment* lien, being specific, is equal); Welton v. Tizzard, 15 Iowa, 495; Duncan v. Miller, 64 Iowa, 223, 20 N. W. 161 (superior to subsequent attachment); Rea v. Wilson, 112 Iowa, 517, 84 N. W. 539 (same); Martin v. Nixon, 92 Mo. 26, 4 S. W. 503. *Contra*, Van Thorniley v. Peters, 26 Ohio St. 471, in author's note to § 722; Wilcox v. Leominster Nat. Bank, 43 Minn. 541, 45 N. W. 1136, 19 Am. St. Rep. 259.

(a) The text is quoted in Harney v. First Nat. Bank, 52 N. J. Eq. 697,

§ 723. Subsequent Judgment Creditor had Notice of the Prior Unrecorded Mortgage.— In a large number of the states, including many of those which have adopted the rule as laid down in the last paragraph, if the judgment creditor has notice of a prior unrecorded mortgage, or other outstanding equitable lien upon or interest in the land of his judgment debtor, at the time when he recovers the judgment,

29 Atl. 221; Dawson v. McCarty, 21 Wash. 314, 57 Pac. 816, 75 Am. St. Rep. 841. See, also, McCoy v. Rhodes, 52 U. S. (11 How.) 131 (Louisiana); Stevenson v. Texas Ry. Co., 105 U. S. 703 (Texas); United States v. Devereux, 90 Fed. 182, 32 C. C. A. 564 (North Carolina); Motley v. Jones, 98 Ala. 443, 13 South. 782; Hall v. Griffin, 119 Ala. 214, 24 South. 27; Berney Nat. Bank v. Pinckard, 87 Ala. 577, 6 South. 364; Teller v. Hill, (Colo. App.) 72 Pac. 811 (prior to secret lien); Doyle v. Wade, 23 Fla. 90, 1 South. 516, 11 Am. St. Rep. 334; Lusk v. Reel, 36 Fla. 418, 18 South. 582, 51 Am. St. Rep. 32; Columbus Buggy Co. v. Graves, 108 Ill. 459; Smith v. Willard, 174 Ill. 538, 51 N. E. 835, 66 Am. St. Rep. 313; Cutler v. Ammon, 65 Iowa, 281, 21 N. W. 604 (grantor's lien); Baker v. Atkins, 107 La. 490, 32 South. 69; Dutton v. McReynolds, 31 Minn. 66, 16 N. W. 468; Wilkins v. Bevier, 43 Minn. 213, 45 N. W. 157, 19 Am. St. Rep. 238; Wilcox v. Leominster Nat. Bank, 43 Minn. 541, 45 N. W. 1136, 19 Am. St. Rep. 259 (superior to equity of debtor's grantee to have deed reformed so as to include land in question); Berryhill v. Smith, 59 Minn. 285, 61 N. W. 144; Hall v. Sauntry, 72 Minn. 420, 75 N. W. 720, 71 Am. St. Rep. 497; Gen. Stat. Minn. (1894), § 4180; Loughridge v. Bowland, 52 Miss. 546; Mississippi Val. Co. v. C., etc., R. R. Co., 58 Miss. 846; Nugent v. Priebatch, 61 Miss. 402; Reed v. Austin's Heirs, 9 Mo. 722, 45 Am. Dec. 336; Tarboro v. Micks, 118 N. C. 162, 24 S. E. 729; National Bank of Columbus v. Tennessee C. I. & R. Co., 62 Ohio St. 564, 57 N. E. 450; Lewis v. Atherton, 5 Okl. 90, 47 Pac. 1070; Oak Cliff College for Young Ladies v. Armstrong, (Tex. Civ. App.) 50 S. W. 610; Stovall v. Odell, 10 Tex. Civ. App. 169, 30 S. W. 66; Robinson v. Commercial & F. Bank, (Va.) 17 S. E. 739; Heermans v. Montague, (Va.) 20 S. E. 899; Hockman v. Hockman, 93 Va. 455, 25 S. E. 534, 57 Am. St. Rep. 815; Price v. Wall, 97 Va. 334, 33 S. E. 599, 75 Am. St. Rep. 788; Jones v. Byrne's Ex'x. 94 Va. 751, 27 S. E. 591; March, Price & Co. v. Chambers, 30 Gratt. 299 (prior written contract of sale of land); Calvert v. Roche, 59 Tex. 463; Senter v. Lambeth, 59 Tex. 259. In Alabama the statute (Code, sec. 122) gives judgment creditors having a lien a priority over secret equities,— such as a vendor's lien: Dickerson v. Carroll, 76 Ala. 377. In Georgia, the statute requires mortgages to be recorded within thirty days of their date, and if not so recorded, intervening judgments are given priority: Code, § 1957; Cabot v. Armstrong, 100 Ga. 438, 28 S. E. 123; New England Mortg. Sec. Co. v. Ober, 84 Ga. 294, 10 S. E. 625. The statute makes no such provision in regard to deeds, and accordingly it is held that an unrecorded deed is prior to

the lien arising from the docket of his judgment is postponed to such prior encumbrance or equity.[1] [a] In a few of the states, however, the statutory language is regarded as so peremptory, and the necessity of recording so complete, that even notice of an unrecorded mortgage or other subsisting equity, given to the creditor before the recovery and docketing of his judgment, is held not to affect the

[1] Priest v. Rice, 1 Pick. 164; 11 Am. Dec. 156; Hart v. Farmers' etc. Bank, 33 Vt. 252; Hackett v. Callender, 32 Vt. 97, 108, 109; Cover v. Black, 1 Pa. St. 493; O'Rourke v. O'Connor, 39 Cal. 442; Britton's Appeal, 45 Pa. St. 172; Mellon's Appeal, 32 Pa. St. 121; Lawrence v. Stratton, 6 Cush. 163, 167; Goddard v. Prentice, 17 Conn. 546; Cox v. Milner, 23 Ill. 476; Ogden v. Haven, 24 Ill. 57; Dixon v. Doe, 1 Smedes & M. 70; Ayres v. Duprey, 27 Tex. 593; 86 Am. Dec. 657; Wyatt v. Stewart, 34 Ala. 716, 721; Burt v. Cassety, 12 Ala. 734; Wallis v. Rhea, 10 Ala. 451; 12 Ala. 646; Garwood v. Garwood, 9 N. J. L. 193.

a subsequent judgment. See cases cited in editor's note, *ante*, § 721. Where a statute makes an unrecorded mortgage void as to judgment creditors and gives judgment creditors priority in the order in which executions are issued, a judgment rendered after the recording of a mortgage is not given priority over it merely because it has priority over a judgment rendered before the record: Meeker v. Warren, (N. J. Eq.) 57 Atl. 421. In many states the same priority is given, by statute, to holders of *attachment* liens: Jerome v. Carbonate Nat. Bank, 22 Colo. 37, 43 Pac. 215; Wahrenberger v. Waid, 8 Colo. App. 200, 45 Pac. 518; Wicks v. McConnell, 102 Ky. 434, 43 S. W. 205; First Nat. Bank v. Ft. Wayne Artificial Ice Co., 105 La. 133, 29 South. 379; D'Arcy v. Mooshkin, 183 Mass. 382, 67 N. E. 339; Cushing v. Hurd, 21 Mass. (4 Pick.) 253, 16 Am. Dec. 335; Rev. Laws Mass. c. 127, § 4; Security Sav. & Tr. Co. v. Loewenberg, 38 Or. 159, 62 Pac. 647; Robertson v. McClay, 19 Tex. Civ. App. 513, 48 S. W. 35. But this rule does not apply to personalty: Gates Iron Works v. Cohen, 7 Colo. App. 341, 43 Pac. 667. The statutes are usually interpreted to the effect that the subsequent judgment lien is inferior to a trust arising from operation of law which is necessarily incapable of record; *ante*, note to § 721. A statute declaring an unrecorded conveyance void as against a subsequent attachment applies only when the attachment is against the person holding the record title; hence, an attachment against a vendee of land under an unrecorded contract, who has assigned the contract prior to the attachment, is inferior to the right of the assignee: Lyman v. Gaar, 75 Minn. 207, 77 N. W. 828, 74 Am. St. Rep. 452.

(a) McAdow v. Wachob, (Fla.) 33 South. 702 (citing the text; notice by possession); Campbell v. First Nat. Bank, 22 Colo. 177, 43 Pac. 1007 (notice to agent); Adam v. Tolman, 180 Ill. 61, 54 N. E. 61 (notice by possession); A. R. Beck Lumber Co. v. Rupp, 188 Ill. 562, 59 N. E. 429, 80 Am. St. Rep. 190; Priest v. Rice,

priority of the lien acquired by the subsequent docketed judgment.[2]

§ 724. **Between Prior Unrecorded Mortgage and a Purchase at Execution Sale under Subsequent Judgment.**— Having thus examined the relations subsisting between unrecorded mortgages and other equities, and the *liens* of subsequent docketed judgments, it remains to consider the effects produced by a judicial sale under such judgments. Several varying conditions of fact may exist, and conflicting rules concerning them prevail to a certain extent, in different states. In the first place, it is a rule universally adopted, and in strict accordance with the general doctrine concerning *bona fide* purchasers as established in this country, that in all the instances heretofore mentioned, even where the *lien* of a subsequent judgment is subject to an outstanding equity, if the judgment is enforced at a sheriff's sale, and the judgment debtor's land is sold and conveyed to a *bona fide* purchaser for a valuable consideration and without any

2 Guerrant v. Anderson, 4 Rand. 208; Davidson v. Cowan, 1 Dev. Eq. 474; Davey v. Littlejohn, 2 Ired. Eq. 495; Mayham v. Coombs, 14 Ohio, 428; Butler v. Maury, 10 Humph. 420; Lillard v. Ruckers, 9 Yerg. 64.

18 Mass. (1 Pick.) 164, 11 Am. Dec. 156; Littauer v. Houck, 92 Mich. 162, 52 N. W. 464, 31 Am. St. Rep. 572 (unrecorded chattel mortgage); Jorgenson v. Minneapolis Threshing Co., 64 Minn. 489, 67 N. W. 364; Berryhill v. Potter, 42 Minn. 279, 44 N. W. 251; Lebanon Sav. Bank v. Hollenbeck, 29 Minn. 322, 13 N. W. 145; Wahn v. Fall, 55 Nebr. 547, 76 N. W. 13, 70 Am. St. Rep. 397 (notice by possession); Merchants' B. & L. Assn. v. Barber, (N. J. Eq.) 30 Atl. 865 (attachment creditor who, before the completion of his levy, discovers an unrecorded deed, has sufficient notice to deprive his subsequent judgment of priority); H. C. Tack Co. v. Ayers, 56 N. J. Eq. 56, 38 Atl. 194 (whatever is sufficient to charge a purchaser with notice is sufficient to charge a judgment creditor); Gardom v. Chester, 60 N. J. Eq. 238, 46 Atl. 602 (notice from grantee's possession); Laurent v. Lanning, 32 Oreg. 11, 51 Pac. 80; Security Sav. & Tr. Co. v. Loewenberg, 38 Or. 159, 62 Pac. 647; Glendenning v. Bell, 70 Tex. 632, 8 S. W. 324 (notice by possession); Barnett v. Squyres, (Tex. Civ. App.) 52 S. W. 612; Hirsch v. Howell, (Tex. Civ. App.) 60 S. W. 887; Walker v. Downs, (Tex. Civ. App.) 64 S. W. 682; Burkholder v. Ludlam, 30 Gratt. 255, 32 Am. Rep. 668. But an assignee of a judgment is not affected by his assignor's notice, before its rendition, of an unrecorded deed, but he must have the notice himself: Clark v. Duke, 59 Miss. 575.

notice, he stands in the position of any other *bona fide* purchaser who acquires the legal estate, and takes the land free from any unrecorded mortgage and any outstanding equitable interest or lien *not appearing of record* which might have affected the land in the hands of the judgment debtor. In other words, such a purchaser at the execution sale is to all intents a purchaser in good faith for a valuable consideration and without notice, as is described in the succeeding section.[1 a] Secondly, where the lien of the sub-

[1] Orth v. Jennings, 8 Blackf. 420; Rodgers v. Gibson, 4 Yeates, 111; Heister v. Fortner, 2 Binn. 40; 4 Am. Dec. 417; Sieman v. Schurck, 29 N. Y. 598; Jackson v. Chamberlain, 8 Wend. 620, 625; Jackson v. Post, 15 Wend. 588; 9 Cow. 120; Jackson v. Town, 4 Cow. 599; 15 Am. Dec. 405; Gouverneur v. Titus, 6 Paige, 347; Den v. Richman, 13 N. J. L. 43; Morrison v. Funk, 23 Pa. St. 421; Stewart v. Freeman, 22 Pa. St. 120, 123; Kellam v. Janson, 17 Pa. St. 467; Mann's Appeal, 1 Pa. St. 24; Wilson v. Shoneberger, 34 Pa. St. 121; Scribner v. Lockwood, 9 Ohio, 184; Paine v. Mooreland, 15 Ohio, 435; 45 Am. Dec. 585; Runyan v. McClellan, 24 Ind. 165; Ehle v. Brown, 31 Wis. 405, 414; Rogers v. Hussey, 36 Iowa, 664; Draper v. Bryson, 26 Mo. 108; 69 Am. Dec. 483; Harrison v. Cachelin, 23 Mo. 117, 126; Waldo v. Russell, 5 Mo. 387; Ohio Life Ins. & T. Co. v. Ledyard, 8 Ala. 866; Ayres

(a) This portion of the text is quoted in Tennant v. Watson, 58 Ark. 252, 24 S. W. 495. The text is cited in Harney v. First Nat. Bank, 52 N. J. Eq. 697, 29 Atl. 221; Troy v. Walter, 87 Ala. 233, 6 South. 54. See, also, Carden v. Lane, 48 Ark. 316, 2 S. W. 709, 3 Am. St. Rep. 228; Smith v. Richards, 6 Cal. 47, 65 Am. Dec. 475; McCandless v. Inland Acid Co., 108 Ga. 618, 34 S. E. 618; Johnson v. Equitable Securities Co., 114 Ga. 604, 40 S. E. 787, 56 L. R. A. 933; Sills v. Lawson, 133 Ind. 137, 32 N. E. 875; Halley v. Oldham, 5 B. Mon. 233, 41 Am. Dec. 262; Luton v. Sharp, 94 Mich. 202, 53 N. W. 1054; Gardner v. Mason, 130 Mich. 436, 9 Detroit Leg. N. 94, 90 N. W. 28; Duke v. Clark, 58 Miss. 465; Voorhis v. Westervelt, 43 N. J. Eq. 642, 12 Atl. 533, 3 Am. St. Rep. 315; Oviatt v. Brown, 14 Ohio, 285, 45 Am. Dec. 539; Lance v. Gorman, 136 Pa. St. 200, 20 Atl. 792, 20 Am. St. Rep. 914; West v. Loeb, 16 Tex. Civ. App. 399, 42 S. W. 612; Lebreton v. Lemaire, (Tex. Civ. App.) 43 S. W. 31; Central City Tr. Co. v. Waco Bldg. Assn., 95 Tex. 48, 64 S. W. 998; Barnard v. Whipple, 29 Vt. 401, 70 Am. Dec. 422 (prior to assignment of church pew). One redeeming from an execution sale is, in effect, a purchaser, and entitled to the same protection: Martin v. Baldwin, 30 Minn. 537, 16 N. W. 449. But a purchaser at a bankrupt sale is not a *bona fide* purchaser: Renick v. Dawson, 55 Tex. 102. In Hawkins v. Files, 51 Ark. 417, 11 S. W. 681, the lien acquired by the levy of an execution is held superior to that of a prior unrecorded mortgage, although the mortgage be subsequently filed for record before the sale of the land.

sequent judgment is, in pursuance of the settled doctrine of equity, subject to a prior unrecorded mortgage or other outstanding equity, even without notice thereof to the judgment creditor, and also where the lien of the judgment is thus subject because the judgment creditor had received notice before its recovery, if the judgment is enforced, and the land is sold and conveyed to a purchaser who has duly

v. Duprey, 27 Tex. 593, 605; 86 Am. Dec. 657; Cooper v. Blakey, 10 Ga. 263; Miles v. King, 5 S. C. 146. It has even been held that if the judgment creditor purchases at the sheriff's sale without notice, takes a conveyance, and has his bid applied in partial or full discharge of his judgment, he becomes a *bona fide* purchaser for value without notice, with all the rights belonging to that position:[b] Gower v. Doheney, 33 Iowa, 36, 39; Halloway v. Platner,

(b) **Judgment Creditor Purchasing at his own sale, held to be a *bona fide* purchaser:** Hunter v. Watson, 12 Cal. 377, 73 Am. Dec. 543; Foorman v. Wallace, 75 Cal. 552, 17 Pac. 680; Richards v. Griffith, 92 Cal. 493, 27 Am. St. Rep. 156, 28 Pac. 484; Riley v. Martinelli, 97 Cal. 575, 32 Pac. 579, 33 Am. St. Rep. 209, 21 L. R. A. 33, and cases cited; McMurtrie v. Riddell, 9 Colo. 497, 13 Pac. 181; Union Cent. Life Ins. Co. v. Dodds, 155 Ind. 365, 58 N. E. 258; Pugh v. Highley, 152 Ind. 252, 53 N. E. 171, 71 Am. St. Rep. 327, 44 L. R. A. 392, citing many cases and discussing the conflicting Indiana *dicta* on this question; Butterfield v. Walsh, 21 Iowa, 99, 89 Am. Dec. 557; Ettenheimer v. Northgraves, 75 Iowa. 28, 39 N. W. 120; Walker v. McKnight, 15 B. Mon. 467, 61 Am. Dec. 190; Hart v. Gardner, 81 Miss. 650, 33 South. 442, 497; Sipley v. Wass, 49 N. J. Eq. 463, 24 Atl. 463; Sternberger v. Ragland, 57 Ohio St. 148, 48 N. E. 811; Russell v. Nall, 2 Tex. Civ. App. 60, 23 S. W. 901; Stephens v. Keating, (Tex.) 17 S. W. 37. "If A. advances money to B., which is not paid, and he obtains judgment, issues execution, levies upon the property of B., attends the sale, and being the highest bidder, purchases the property, it is difficult to see why he is in a different position from any other purchaser. In such a case the law seizes the property and sells it to the highest bidder, and the judgment creditor takes it, not in his capacity as creditor, but as purchaser. The law of this state, with a view, no doubt, of benefiting the debtor by causing his property to bring the best attainable price, permits and encourages the creditor, alike with others, to purchase at sales under execution, and having done so, the fact that he advanced the purchase price last month or last year should not militate against his rights or alter his *status* in the eye of the law. It has been repeatedly held in this court that a conveyance in consideration of the cancellation of a pre-existing indebtedness is a conveyance for a valuable consideration within the meaning of § 1214 of our Civil Code": Riley v. Martinelli, 97 Cal. 575, 32 Pac. 579, 33 Am. St. Rep. 209, 21 L. R. A. 33. In Pugh v. Highley, 152 Ind. 252, 53 N. E. 171, 71 Am. St. Rep. 327, 44 L. R. A. 392, the arguments in favor of this view are stated with much

received notice of the prior unrecorded mortgage or other subsisting equity, the inferiority of the judgment *lien* still remains and attaches to the conveyance which is the result of that lien. The purchaser under these circumstances is not a *bona fide* purchaser; he takes the *land* subject to the same encumbrances and equities which affected the lien of the docketed judgment.[2] [d] Thirdly, wherever, in pursuance

20 Iowa, 121; 89 Am. Dec. 517; and see Wood v. Chapin, 13 N. Y. 509; 67 Am. Dec. 62. But this conclusion is clearly inconsistent with the settled doctrine concerning the nature of the "valuable consideration" which entitles a purchaser to the rights of a *bona fide* purchaser, and has been rejected by many decisions:[c] Arnold v. Patrick, 6 Paige, 310, 316; Dickerson v. Tillinghast, 4 Paige, 215; 25 Am. Dec. 528; Wright v. Douglass, 10 Barb. 97; Sargent v. Sturm, 23 Cal. 359; 83 Am. Dec. 118; Orme v. Roberts, 33 Tex. 768; Ayres v. Duprey, 27 Tex. 593; 86 Am. Dec. 657.

2 This rule must clearly apply to the case of the judgment creditor who, having received notice, himself becomes the purchaser at the sheriff's sale:

force. In Indiana, as in California, the cancellation of a pre-existing debt constitutes a valuable consideration; and it is held that the judgment creditor purchaser parts with value and, under the statutes, changes his position for the worse.

(c) Judgment Creditor Purchasing at his own sale and crediting his bid upon the judgment, not a purchaser for a valuable consideration: Williams v. McIlroy, 34 Ark. 85; Beidler v. Beidler, (Ark.) 74 S. W. 13; Shirk v. Thomas, 121 Ind. 147, 22 N. E. 976, 16 Am. St. Rep. 381; Boos v. Morgan, 130 Ind. 305, 30 N. E. 141, 30 Am. St. Rep. 237; Old Nat. Bank v. Findley, 131 Ind. 225, 31 N. E. 62 (but these Indiana cases have been overruled; see editor's note last preceding); Lewis v. Taylor, 96 Ky. 556, 29 S. W. 444; Walton v. Hargraves, 42 Miss. 18, 97 Am. Dec. 429; McAdow v. Black, 6 Mont. 601, 13 Pac. 377; Williams v. Hollingsworth, 1 Strob. Eq. 103, 47 Am. Dec. 527; McKamey v. Thorp, 61 Tex. 648, and cases cited; Delespine v. Campbell, 52 Tex. 12; Benney v. Cleen, 15 Wash. 581, 46 Pac. 1037; Hacker v. White, 22 Wash. 415, 60 Pac. 1114, 79 Am. St. Rep. 945; London & S. F. Bank, Lt. v. Dexter, Horton & Co., (C. C. A.) 126 Fed. 593, (Washington); Collins v. Smith, 57 Wis. 284, 15 N. W. 192 (he is presumed to have notice of all defects in the record and proceedings). "This view is founded upon the theory that to constitute a person a *bona fide* purchaser within the meaning of the law, he must, upon the faith of the purchase of the property, have advanced for it a valuable consideration, and that a creditor, antecedent to his purchase, who pays for a purchase by a credit on his own demand, has parted with no consideration on the faith of the purchase, and is not such a *bona fide* purchaser as is entitled to protection against equities of which he has no notice": Riley v. Martinelli, 97 Cal. 575, 32 Pac. 579, 33 Am. St. Rep. 209, 21 L. R. A. 33. Such creditor, however, acquires all the rights of the defendant in the execution: Walker v. Elledge, 65 Ala. 51.

(d) Walker v. Elledge, 65 Ala. 51; Murphy v. Green, 120 Ala. 112, 22 South. 112; Peck v. Williams, 113

of the rule adopted in many states, the lien of a subsequent judgment is paramount to that of a prior unrecorded mortgage and to any outstanding equitable interest not of record, if the judgment is enforced and the land sold and conveyed to a purchaser *who has received notice* of the prior encumbrances or equities, the superiority of the lien still continues and attaches to the conveyance. The purchaser holds the land free from all such claims not of record, on the ground that when a right has once been vested and made absolute, it cannot be divested or defeated by any mere notice. The judgment creditor having obtained a complete and fixed right, any notice which he might afterwards receive could not affect that right; nor would it be affected by a transfer to a purchaser having notice.[3] [e]

Ells v. Tousley, 1 Paige, 280; Gouverneur v. Titus, 6 Paige, 347; Morris v. Mowatt, 2 Paige, 586, 590; 22 Am. Dec. 661; Parks v. Jackson, 11 Wend. 442; 25 Am. Dec. 656; Siemon v. Schurck, 29 N. Y. 598; Moyer v. Hinman, 13 N. Y. 180, and cases cited, per Denio, J.; Bank v. Campbell, 2 Rich. Eq. 179; Churchill v. Morse, 23 Iowa, 229; 92 Am. Dec. 422; Hoy v. Allen, 27 Iowa, 208; Chapman v. Coats, 26 Iowa, 288; O'Rourke v. O'Connor, 39 Cal. 442; Davis v. Ownsby, 14 Mo. 170; 55 Am. Dec. 105; Valentine v. Havener, 20 Mo. 133; Sappington v. Oeschli, 49 Mo. 244, 246; Byers v. Engles, 16 Ark. 543; Prescott v. Heard, 10 Mass. 60; Ogden v. Haven, 24 Ill. 57; Ayres v. Duprey, 27 Tex. 593; 86 Am. Dec. 657.

[3] Jaques v. Weeks, 7 Watts, 261, 270; Uhler v. Hutchinson, 23 Pa. St. 110; Calder v. Chapman, 52 Pa. St. 359, 362; 91 Am. Dec. 163; Massey v. Westcott, 40 Ill. 160; McFadden v. Worthington, 45 Ill. 362; Guiteau v. Wisely, 47 Ill. 433; Potter v. McDowell, 43 Mo. 93; Stillwell v. McDonald, 39 Mo. 282; Davis v. Ownsby, 14 Mo. 170; 55 Am. Dec. 105; Greenleaf v. Edes, 2 Minn. 264; Henderson v. Downing, 24 Miss. 106; Kelly v. Mills, 41 Miss. 267, 273; Fash v. Ravesies, 32 Ala. 451; De Vendell v. Hamilton, 27 Ala. 156;

Ind. 256, 15 N. E. 270 (judgment creditor); Zuber v. Johnson, 108 Iowa, 273, 79 N. W. 76; Bean v. Everett, 21 Ky. Law Rep. 1790, 56 S. W. 403; Spring v. Raymond, (Mich.) 95 N. W. 1003; Campbell v. Keys, 130 Mich. 127, 8 Detroit Leg. N. 1164, 89 N. W. 720; Hope v. Blair, 105 Mo. 85, 16 S. W. 595, 24 Am. St. Rep. 366; Miller v. Baker, 166 Pa. St. 414, 31 Atl. 121, 45 Am. St. Rep. 680; Armstrong v. Carwile, 56 S. C. 463, 35 S. E. 196; Yoe v. Montgomery, 68 Tex. 341, 4 S. W. 622; Glendenning v. Bell, 70 Tex. 632, 8 S. W. 324; Hicks v. Pogue, (Tex. Civ. App.) 76 S. W. 786; Holt v. Hunt, 18 Tex. Civ. App. 363, 44 S. W. 889; Caldwell v. Bryan's Ex'r, (Tex. Civ. App.) 49 S. W. 240.

(e) Winston v. Hodges, 102 Ala. 304, 15 South. 528; Danner v. Crew, (Ala.) 34 South. 822; Lusk v. Reel, 36 Fla. 418, 18 South. 582, 51 Am. St.

§ 725. Purchase-money Mortgages.— Another very important instance in this country, of intrinsic superiority, is that of the purchase-money mortgage.[1] A mortgage to secure the purchase-money of land, given at the same time with the deed of conveyance, or in pursuance of agreement as a part of the same transaction, has precedence, so far as it is a charge upon the particular parcel of land, over judgments and other debts of the mortgagor.[2] It is a familiar rule in those states where the common-law dower exists that such a mortgage, although not executed by the wife, takes precedence over her dower right in the same land.[3] [a] The statutes of some states give a purchase-money mortgage

Pollard v. Cocke, 19 Ala. 188; Smith v. Jordan, 25 Ga. 687. The conclusion reached by these cases, which seems to be in such direct antagonism with well-settled doctrines concerning the effect of notice upon the rights of purchasers, is in most instances the result of what is supposed to be the imperative language of the recording statutes.

1 See 1 Jones on Mortgages, secs. 464–466, from which I have borrowed in this paragraph.

2 In many states this is expressly enacted by statute.

3 Mills v. Van Voorhies, 20 N. Y. 412; McGowan v. Smith, 44 Barb. 232; Kittle v. Van Dyck, 1 Sand. Ch. 76; Clark v. Munroe, 14 Mass. 351; Young v. Tarbell, 37 Me. 509; Birnie v. Main, 29 Ark. 591.

Rep. 32, and cases cited; Doyle v. Wade, 23 Fla. 90, 1 South. 516, 11 Am. St. Rep. 334; Nugent v. Priebatch, 61 Miss. 402; Reed v. Austin's Heirs, 9 Mo. 722, 45 Am. Dec. 336; Condit v. Wilson, 36 N. J. Eq. 370 (judgment creditor purchasing); McKnight v. Gordon, 13 Rich. Eq. 222, 94 Am. Dec. 164; Grace v. Wade, 45 Tex. 522; Wallace v. Campbell, 54 Tex. 87, and cases cited; McKamey v. Thorp, 61 Tex. 648; Russell v. Nall, 2 Tex. Civ. App. 60, 23 S. W. 901; Robertson v. McClay, (Tex. Civ. App.) 48 S. W. 35; Barnett v. Squyres, 93 Tex. 193, 54 S. W. 241, 77 Am. St. Rep. 854; Stovall v. Odell, 10 Tex. Civ. App. 169, 30 S. W. 66; Stevenson v. Texas R'y Co., 105 U. S. 703 (Texas). In Wallace v. Campbell, 54 Tex. 87, the rule is said to be "analogous to the familiar doctrine, that one who purchases the legal title, even with notice of the superior title in another, will be protected if he claims under a *bona fide* purchaser for value without notice": see *post*, § 754.

(a) The text is cited in Demeter v. Wilcox, 115 Mo. 634, 22 S. W. 613, 37 Am. St. Rep. 422. See, also, Frederick v. Emig, 186 Ill. 319, 59 N. E. 883, 78 Am. St. Rep. 283; Lohmeyer v. Durbin, 206 Ill. 574, 69 N. E. 523; Agnew v. Renwick, 27 S. C. 562, 4 S. E. 223; Seibert v. Todd, 31 S. C. 206, 9 S. E. 822, 4 L. R. A. 606; Kneen v. Halin, 6 Idaho, 621, 59 Pac. 14 (superior to wife's interest in the land as "community" property).

precedence over a previous judgment recovered against the mortgagor. This provision applies only to mortgages executed by the grantee directly to his grantor, and not to those executed to third persons as security for money loaned for the purpose of paying the purchase price.[4 b] Even in the absence of any statute, and upon the general principles of equity, a purchase-money mortgage given at the same time as the deed, or as a part of the same transaction, has precedence over any prior general lien, such as that of a prior judgment against the mortgagor.[5 c] The same equitable

[4] Heuisler v. Nickum, 38 Md. 270; Alderson v. Ames, 6 Md. 52, 56; Clabaugh v. Byerly, 7 Gill, 354; 48 Am. Dec. 575; Stansele v. Roberts, 13 Ohio, 148. As to other matters arising under such statutes, see Ahern v. White, 39 Md. 409; Heuisler v. Nickum, 38 Md. 270; Cake's Appeal, 23 Pa. St. 186; 62 Am. Dec. 328; Foster's Appeal, 3 Pa. St. 79; Banning v. Edes, 6 Minn. 402; Stephenson v. Haines, 16 Ohio St. 478; Maybury v. Brien, 15 Pet. 21.

[5] Curtis v. Root, 20 Ill. 53; Fitts v. Davis, 42 Ill. 391; Grant v. Dodge, 43 Me. 489; Banning v. Edes, 6 Minn. 402; Bolles v. Carli, 12 Minn. 113. In Curtis v. Root, 20 Ill. 53, Caton, C. J., said: "It is a principle of law, too

(b) In some states the statute is held to apply to purchase-money mortgages executed to third persons: Hopler v. Cutler, (N. J. Eq.) 34 Atl. 746; Beebe v. Austin, 15 Johns. 477; Kneen v. Halin, 6 Idaho, 621, 59 Pac. 14. A., the grantee in a deed intended as a mortgage, conveyed the premises to the grantor, B., and he to C., who gave back a mortgage to A. for the amount to which A. had been secured. Held, a purchase-money mortgage, under the statute, and entitled to priority over an earlier judgment against C.: Bradley v. Bryan, 43 N. J. Eq. 396, 13 Atl. 806.

(c) Courson v. Walker, 94 Ga. 175, 21 S. E. 287; Roane v. Baker, 120 Ill. 308, 11 N. E. 246; Chandler v. Parsons, 100 Mich. 313, 58 N. W. 1011; Wendler v. Lambeth, 163 Mo. 428, 63 S. W. 684, quoting from this paragraph of the text; Pope v. Mead, 99 N. Y. 201, 1 N. E. 671; Weil v. Casey, 125 N. C. 356, 34 S. E. 506, 74 Am. St. Rep. 644; Appeal of Cake, 23 Pa. St. (11 Harris) 186, 62 Am. Dec. 328; Masterson v. Burnett, 27 Tex. Civ. App. 370, 66 S. W. 90; Cowardin v. Anderson, 78 Va. 88; Straus v. Bodeker's Ex'x, 86 Va. 543, 10 S. E. 570; Bisbee v. Carey, 17 Wash. 224, 49 Pac. 220; Rees v. Ludington, 13 Wis. 276, 80 Am. Dec. 741; but such judgment is superior to a mortgage for any other purpose than payment of purchase-money executed by the grantee immediately after the conveyance: Weil v. Casey, 125 N. C. 356, 34 S. E. 506, 74 Am. St. Rep. 644. In Jacob's Appeal, 107 Pa. St. 137, it was held that the entry of a judgment bond for part of the purchase-money must be a continuous act with the giving of the deed, in order to entitle the judgment to priority as a purchase-money lien: compare Stewart v. Smith, 36 Minn. 82, 30 N. W. 430, 1 Am. St. Rep. 651.

rule applies in like manner to a mortgage given by the grantee to a third person, as security for money loaned for the purpose of being used, and which is actually used, in paying the purchase price.[6 e] A substitution of one species of

familiar to justify a reference to authorities, that a mortgage given for the purchase-money of land, and executed at the same time the deed is executed to the mortgagor, takes precedence of a judgment against the mortgagor. The execution of the deed and mortgage being simultaneous acts, the title to the land does not for a single moment vest in the purchaser, but merely passes through his hands and vests in the mortgagee, without stopping at all in the purchaser, and during this instantaneous passage the judgment lien cannot attach to the title. This is the reason assigned by the books why the mortgage takes precedence of the judgment, rather than any supposed equity which the vendor may be supposed to have for the purchase-money."[d] Whatever of truth there may be in the reason thus assigned, it is certainly not all the truth. In the first place, the notion that the title passes through the mortgagor and vests in the mortgagee, and that the mortgagor obtains but an instantaneous seisin, has been entirely abandoned in very many of the states, and the mortgagee is regarded as acquiring only a lien. In the second place, since the grantor exchanges his ownership of the land for the lien of the mortgage, so that the mortgage in his hands represents the title to the land which he has conveyed, it is very clear that the mortgage, so far as it is a specific charge upon the very land, is intrinsically superior to any other general lien, although existing prior in time.

[6] Beebe v. Austin, 15 Johns. 477; Haywood v. Nooney, 3 Barb. 643; Adams v. Hill, 29 N. H. 202; Curtis v. Root, 20 Ill. 53.

(d) The "instantaneous seisin" theory of the purchase-money mortgage's priority is criticised in New Jersey B. L. & Inv. Co. v. Bachelor, 54 N. J. Eq. 600, 35 Atl. 745.

(e) The text is quoted in Rogers v. Tucker, 94 Mo. 346, 7 S. W. 414; cited, in Demeter v. Wilcox, 115 Mo. 634, 22 S. W. 613, 37 Am. St. Rep. 422. See, also, Lassen v. Vance, 8 Cal. 271, 68 Am. Dec. 322 (superior to homestead); Hill v. Cole, 84 Ga. 245, 10 S. E. 739; Achey v. Coleman, 92 Ga. 745, 19 S. E. 710 (superior to judgment); Laidley v. Aiken, 80 Iowa, 112, 20 Am. St. Rep. 408, 45 N. W. 384; Stewart v. Smith, 36 Minn. 82, 30 N. W. 430, 1 Am. St. Rep. 651; Henry McShane Mfg. Co. v. Kolb, 59 N. J. Eq. 146, 45 Atl. 533 (superior to judgment); New Jersey B. L. & Inv. Co. v. Bachelor, 54 N. J. Eq. 600, 35 Atl. 745 (superior to mechanic's lien); Cowardin v. Anderson, 78 Va. 88 (superior to judgment). "But the claims of third persons to have their mortgages upheld as purchase-money mortgages have been recognized only when it has been made to appear that the money was loaned to the purchaser for the express purpose of paying for the property." Van Loben Sels v. Bunnell, 120 Cal. 680, 53 Pac. 266. In some states this result is reached by interpretation of the statute giving priority to purchase-money mortgages generally: Hopler v. Cutler, (N. J. Eq.) 34 Atl. 746; Beebe v. Austin, 15 Johns. 477; Kneen v. Halin, 6 Idaho, 621, 59

lien for another, by changing the form of the security given for the purchase-money, does not affect the operation of the rule.[7 f] The purchase-money mortgage not only thus takes precedence of a prior judgment, but it also cuts off or prevents the attachment of any other lien upon the premises which might otherwise have affected them.[8 g]

7 As, for example, substituting a deed of trust for the mortgage: Curtis v. Root, 20 Ill. 53; Austin v. Underwood, 37 Ill. 438; 87 Am. Dec. 254.

8 As illustrations: A lien for work and materials furnished, or a mechanic's lien for a building erected, on behalf of the grantee, after the purchase was

Pac. 14. The grantor's equity, however, is intrinsically superior to that of the third person; therefore, as between a purchase-money mortgage given to the grantor to secure a balance due on the purchase price, and a mortgage given to a third person, to secure the money used in making the cash payment to the grantor, the mortgage to the grantor has preference, although it was recorded three hours later than the other: Rogers v. Tucker, 94 Mo. 346, 7 S. W. 414 (citing Bank's Appeal, 91 Pa. St. 163, and Turk v. Funk, 68 Mo. 18, 30 Am. Rep. 771). See, also, Protection B. & L. Ass'n v. Chickering, 54 N. J. Eq. 519, 34 Atl. 1083, affirmed on appeal, 55 N. J. Eq. 822, 41 Atl. 1116; Schoch v. Birdsall, 48 Minn. 441, 51 N. W. 382.

(f) As to substituted liens, see *ante*, § 719, and notes.

(g) In general, see Commonwealth Title Ins. & T. Co. v. Ellis, 192 Pa. St. 321, 43 Atl. 1034, 73 Am. St. Rep. 816; Barb v. Sayers, 107 Pa. St. 246 (the purchaser at foreclosure sale of the mortgage is also entitled to the same priority).

The Purchase-Money Mortgage is Superior to a Mortgage made and recorded prior to the passing of title to the grantee-mortgagor; the grantor-mortgagee is not required to search the records for incumbrances placed upon the property prior to the execution of the deed: *ante*, § 658, and notes; Balen v. Mercier, 75 Mich. 42, 42 N. W. 666; Elder v. Derby, 98 Ill. 228; Protection B. & L. Assn. v. Chickering, 54 N. J. Eq. 519, 34 Atl. 1083, affirmed on appeal, 55 N. J. Eq. 822, 41 Atl. 1116 (though such prior mortgage was also for purchase-money); Gould v. Wise, 97 Cal. 532, 32 Pac. 576, 33 Pac. 323; Ely v. Pingry, 56 Kan. 17, 42 Pac. 330; Schoch v. Birdsall, 48 Minn. 441, 51 N. W. 382 (though such prior mortgage was also for purchase-money); Turk v. Funk, 68 Mo. 18, 30 Am. Rep. 771 (same); Demeter v. Wilcox, 115 Mo. 634, 22 S. W. 613, 37 Am. St. Rep. 422 (mortgage to third person who advanced the purchase money has similar priority over previous mortgage of the vendee's equity in the land); Daly v. New York & G. L. R. Co., 55 N. J. Eq. 595, 38 Atl. 202 (priority not lost by delay in recording the purchase-money mortgage); and it has even been held that the grantor-mortgagee who has delayed in putting his deed and mortgage on record is not postponed to a mortgage made by the grantee intermediate between the execution and the recording of the deed: Continental I. & L. Soc. v.

§ 726. Other Illustrations.— In addition to these most important questions of priority between different equitable liens, there may be many other particular instances in which a subsequent interest is intrinsically superior, or an earlier one intrinsically inferior, so as to determine the precedence between them. A few may be mentioned by way of illustration. Fraud inhering in a prior mortgage, encumbrance, or other apparent claim will, of course, post-

arranged, but before the deed and mortgage were executed:[h] Virgin v. Brubaker, 4 Nev. 31; Guy v. Carriere, 5 Cal. 511; Strong v. Van Deursen, 23 N. J. Eq. 369; Lamb v. Cannon, 38 N. J. L. 362; Macintosh v. Thurston, 25 N. J. Eq. 242. A contract concerning the premises made by the grantee before the purchase: Bolles v. Carli, 12 Minn. 113; Morris v. Pate, 31 Mo. 315. A homestead right on the land:[i] Hopper v. Parkinson, 5 Nev. 233; Nichols v. Overacker, 16 Kan. 54; Pratt v. Topeka Bank, 12 Kan. 570; Carr v. Caldwell, 10 Cal. 380; 70 Am. Dec. 740; Magee v. Magee, 51 Ill. 500; 99 Am. Dec. 571; Allen v. Hawley, 66 Ill. 164, 168; Austin v. Underwood, 37

Wood, 168 Ill. 421, 48 N. E. 221; but see *contra*, editor's note to § 658, *ante*. In order that a purchase-money mortgage shall have priority over a mortgage made *after* the title has passed and the deed has been recorded it must be recorded first: Trigg v. Vermillion, 113 Mo. 230, 20 S. W. 1047; Koon v. Tramel, 71 Iowa, 137, 32 N. W. 243.

The purchase-money mortgage is not entitled to priority over a subsequent deed which is first recorded: Jackson v. Reid, 30 Kan. 10, 1 Pac. 308. Where a prior mortgagee, pending the negotiations for his mortgage, acquires knowledge that the property offered for security belongs to a third person, and was to be purchased by the mortgagor, and that negotiations for its purchase were then pending, he is charged with notice of the terms upon which the purchase is to be made; and when such terms involve the execution of a mortgage to the vendor to secure the purchase price, the latter mortgage, although subsequently recorded, takes priority: Montgomery v. Keppel, 75 Cal. 128, 19 Pac. 178, 7 Am. St. Rep. 125.

(h) Superior to Mechanic's Lien.— Saunders v. Bennett, 160 Mass. 48, 35 N. E. 111, 39 Am. St. Rep. 456; New Jersey B. L. & Inv. Co. v. Bachelor, 54 N. J. Eq. 600, 35 Atl. 745 (purchase-money mortgage to third person; inferior so far as the mortgage did not secure purchase-money); Rees v. Ludington, 13 Wis. 276, 80 Am. Dec. 741. In California, however, the mechanic's lien statute is interpreted as demanding the inferiority of the purchase-money mortgage in such cases: Avery v. Clark, 87 Cal. 619, 25 Pac. 919, 22 Am. St. Rep. 272.

(i) Superior to Homestead Right, if made by the owner of the premises, though not also executed by wife or husband of the owner: Roby v. Bismarck Nat. Bank, 4 N. Dak. 156, 59 N. W. 719, 50 Am. St. Rep. 633, and cases cited (but void so far as it secures indebtedness other than the purchase-money); and see Lassen v. Vance, 8 Cal. 271, 68 Am. Dec. 322.

pone it to a subsequent valid lien.[1] [a] A prior equitable lien upon chattels arising from contract will not prevail against a subsequent chattel mortgage which has been perfected and filed according to statute.[2] The priority among liens may also be fixed by express agreement among the parties at the time they are created, so as even to follow them sometimes into the hands of an assignee.[3] [b]

§ 727. III. A Subsequent Equity Protected by the Legal Title. — The case to be considered is not that merely of an equitable interest held by A, and a subsequent conveyance of the legal estate to B, in which the latter's superior right

Ill. 438; 87 Am. Dec. 254; Amphlett v. Hibbard, 29 Mich. 298; New England etc. Co. v. Merriam, 2 Allen, 391; Lane v. Collier, 46 Ga. 580.

If a grantee, as a part of the same transaction, gives back a purchase-money mortgage to his grantor, and also gives another mortgage to a third person, and the deed and two mortgages are all recorded at the same time, the purchase-money mortgage is entitled to a precedence over the other: Clark v. Brown, 3 Allen, 509. As to the effect of delay in the recording, see Dusenbury v. Hulbert, 2 Thomp. & C. 177.

1 Kelly v. Lenihan, 56 Ind. 448 (fraudulent mortgage and subsequent judgment); Eggeman v. Eggeman, 37 Mich. 436 (prior fraudulent and subsequent valid mortgage).

2 Smith v. Worman, 19 Ohio St. 145. The equitable lien in favor of a lessor, arising from a stipulation in the lease, upon the lessee's chattels which were placed upon the premises, postponed to a subsequent chattel mortgage given by the tenant, which had been duly filed, etc.

3 Balkum v. Owens, 47 Ala. 266, as an illustration.

(a) See Hooper v. Central Trust Co., 81 Md. 559, 32 Atl. 505, 29 L. R. A. 262, citing the text.

(b) McCaslin v. Advance Mfg. Co., 155 Ind. 298, 58 N. E. 67 (agreement that if another mortgage shall be subsequently executed on the property, it shall be a prior lien); Rose v. Provident S., L. & I. Assn., 28 Ind. App. 25, 62 N. E. 293; Loewen v. Forsee, (Mo.) 35 S. W. 1138 (the agreement may be by parol); Hopler v. Cutler, (N. J. Eq.) 34 Atl. 746 (same); Hendrickson v. Wooley, 39 N. J. Eq. 307 (same; mortgagee may waive his priority in favor of a mortgage to be subsequently executed); Coe v. Columbus, P. & I. R. Co., 10 Ohio St. 372, 75 Am. Dec. 518; Collier v. Miller, 137 N. Y. 332, 33 N. E. 374, affirming 62 Hun, 99, 42 N. Y. St. Rep. 66, 16 N. Y. Supp. 633; Rigler v. Light, 90 Pa. St. 235; Trompczynski v. Struck, 105 Wis. 437, 81 N. W. 650. But when the mortgage so postponed is recorded first, a purchaser at its foreclosure sale without any actual notice of the agreement is preferred: Loewen v. Forsee. (Mo.) 35 S. W. 1138. See, also, *ante*, § 719, and notes, as to simultaneous mortgages.

would be a simple application of the doctrine concerning *bona fide* purchase for a valuable consideration. The subject to be examined assumes the existence of successive equities held by different persons, equal in their nature, and acquired in such a manner that, having regard to these interests alone, the priority of right among them would depend upon their order of time. Under these circumstances, it is assumed that one of the parties acquires, in some manner, the legal title in addition to his equity. The settled doctrine is, that if a second or other subsequent holder, who would otherwise be postponed to the earlier ones, obtains the legal estate, or acquires the best right to call for the legal estate, he thereby secures an advantage which entitles him to a priority.[1] It is absolutely essential, however, that he should have acquired his *equitable* interest without any notice of the prior claims, and that his subsequent procurement of the legal estate should be free from fraud and from undue negligence.[2] [a] Several illustrations are placed in the foot-note.[3]

1 In this country the practical examples of this rule would generally, if not always, be instances of *bona fide* purchase for a valuable consideration, and governed by the doctrine on that subject; but the rule does not require such a state of facts. In other words, the rule does not require that the one who protects himself by getting the legal estate should be in all respects a *bona fide* purchaser of that estate for a valuable consideration and without notice. The rights of mere priority and the rights of a *bona fide* purchase are by no means identical.

2 The effects of fraud and negligence in defeating the precedence which would otherwise follow the legal title are considered in the subsequent head V. (§§ 731, 732).

3 Cave v. Cave, L. R. 15 Ch. Div. 639: A trust existed in favor of A. The trustee used the funds in purchasing an estate which was conveyed to B (the trustee's brother), so that the legal title was vested in him. Afterwards money was raised for or in the name of B, and secured by a first legal mortgage on the land given to C, one of the lenders, and subsequent equitable mortgages given to D and E, other lenders. All these transactions were made without any notice of the original trust given to C, D, or E. Held, that as between the original *cestui que trust* A, and the first mortgagee C, the latter

(a) This paragraph of the text is quoted and followed in Dueber Watch-Case Mfg. Co. v. Daugherty, 62 Ohio St. 589, 57 N. E. 455, and cited in Swepson v. Johnston, 84 N. C. 449.

§ 728. **Legal Estate Obtained from a Trustee.**[a]— Such being the general rule, there are special circumstances in which the acquisition of the legal estate, even without notice, will not confer a priority. Thus it seems now to be settled by the most recent English decisions that where the legal estate is vested in a trustee, and the holder of a subsequent equitable interest, even without notice of the prior equities, ob-

was entitled to the precedence, since he had a legal estate; but as between A and the mortgagees D and E, A was prior in right, since all their interests were equitable and he was prior in time. This case well illustrates both rules. Hunter v. Walters, L. R. 7 Ch. 75: There were two outstanding mortgages upon a piece of land, of which the first alone was legal, and both mortgagees employed the same solicitor, A. By his procurement both mortgagees united in a deed of conveyance to their solicitor, A. This deed was given voluntarily, and intending to vest the legal title in A, but was in fact grossly fraudulent as against the mortgagees. Still the apparent legal title was held by A, although liable to be set aside. He took possession of the land, and, claiming to be owner, gave an equitable mortgage on it to B, to secure payment of money borrowed from B, he acting in good faith and without notice. B's equitable mortgage was held entitled to priority over the two original mortgagees, because he held under the legal title in A, and through the laches of the original mortgagees, which made the fraud possible, he obtained a higher right as against them. See also Ratcliffe v. Barnard, L. R. 6 Ch. 652, and Hewitt v. Loosemore, 9 Hare, 449. Fitzsimmons v. Ogden, 7 Cranch, 2; Newton v. McLean, 41 Barb. 285: Land was conveyed to A by a deed absolute on its face, and vesting an apparently perfect legal estate, but in fact the land was held in trust for B, and it was not intended that A should have any beneficial interest. In this condition A executed a mortgage on the land to C for a valuable consideration and without notice. Held, that C was protected against B's interest, because the mortgage clothed him with the legal estate. This can hardly be the correct reason according to the law of New York, by which a mortgage never conveys the legal estate. C would probably be protected by the recording acts. Beall v. Butler, 54 Ga. 43: The statutory lien of a laborer on his employer's property is cut off by a sale and conveyance to a purchaser without notice. In Jones v. Lapham, 15 Kan. 540, it is held that, between a prior lien upon an equitable interest, and a subsequent lien upon the full legal estate, the latter is preferred, if the holder acquired without notice; but not if at the time of obtaining his lien he knew of the outstanding equity and the prior lien thereon. Fox v. Palmer, 25 N. J. Eq. 416: A mortgage signed in blank and given to an agent, by whom it is afterwards filled up and delivered, is not a valid and legal mortgage. At most, it only creates an equitable lien which can be enforced between proper parties. As such, it will not prevail over the subsequent

(a) See, in connection with this paragraph and § 729, *post*, §§ 769. 770.

tains a conveyance of the legal estate from the trustee, which would of itself be a breach of the trust, provided the conveyance is not so made as to constitute himself a *bona fide* purchaser from the trustee for a valuable consideration and without notice, he does not thereby acquire a precedence over the existing equities which are prior in time, because the act is necessarily a breach of trust.[1] It is settled that where the legal estate is vested in a trustee for a prior encumbrancer, a subsequent equitable encumbrancer gains no priority by obtaining a conveyance of it from such trustee.[2] Also where there are successive equitable mortgages, the

equitable interest of another, who has also the legal title: Straus v. Kerngood, 21 Gratt. 584. Between two equal equitable liens, the holder who obtains the legal advantage of a judgment will prevail over the other.[b]

1 It must be carefully borne in mind, or else confusion will be inevitable, that the question under examination is one of *priority* merely, and not of the rights obtained through a *bona fide* purchase for value: Mumford v. Stohwasser, L. R. 18 Eq. 556, 562, 563. Sir George Jessel, M. R., after quoting with approval the language of James, L. J., in Pilcher v. Rawlins, L. R. 7 Ch. 259, adds: "This would be the case of a trustee knowing that he was a trustee assigning over the legal estate to a person who did not know he was a trustee, that person having previously acquired an equitable interest; and I should hold, if that point came for decision, which I think does not in this case, that the second equitable encumbrancer or the purchaser of the equity did not thereby gain any priority; in other words, that a person, knowing he is a trustee, cannot, *without receiving value at the time*, by committing a breach of trust, deprive his own *cestui que trust* of his rights." [b] See also Pilcher v. Rawlins, L. R. 7 Ch. 259, 268, per James, L. J.

2 Allen v. Knight, 5 Hare, 272, affirmed in 11 Jur. 527; and see Wilmot v. Pike, 5 Hare, 22.

§ 727, [b] In Georgia, a purchaser of land who has paid the consideration and taken possession has a "perfect equity," on which he can either maintain or defend ejectment, and is entitled to priority over a prior equitable estate of which he had no notice: Temples v. Temples, 70 Ga. 480.

§ 728, [b] This passage from the opinion in Mumford v. Stohwasser, L. R. 18 Eq. 556, 562, 563, was quoted with approval in Central Trust Co. v. West India Imp. Co., 169 N. Y. 314, 62 N. E. 387. See, also, Harpham v. Shacklock, L. R. 19 Ch. Div. 207; Newman v. Newman, L. R. 28 Ch. Div. 674. In the latter case, a trustee, holding the legal estate, who takes from his *cestui que trust* an assignment of the equitable interest as security for money advanced to the *cestui que trust*, was held entitled to avail himself of the legal estate as a protection against a prior encumbrance of which he had no notice.

legal estate remaining in the mortgagor, the mortgagor cannot *himself* give priority to a subsequent encumbrancer by conveying the legal estate to him. Here, also, it must be understood that the second encumbrancer getting the legal title is not a *bona fide* purchaser for a valuable consideration.[3] [c]

§ 729. Legal Estate Obtained after Notice of a Prior Equity. — One further question remains to be examined. It has already been stated as an essential part of the general rule that the subsequent equitable lien or other interest must be completely acquired, and of course the consideration upon which it is founded fully parted with, without notice of any prior equity, in order that the holder may be protected by getting the legal estate. The question is, whether the legal estate must also be obtained before any notice is received of the prior equity. One particular case involving this question, but depending upon special reasons, is well settled. If a person becomes holder in good faith of an equitable interest without notice of an existing trust, and afterwards, upon receiving notice of the trust, he obtains a conveyance of the legal estate from the trustee, he cannot protect himself against, nor even assert priority over, the right of the *cestui que trust,* for his act has necessarily made him a party to a breach of trust.[1] [a] Does the same rule extend

[3] Sharples v. Adams, 32 Beav. 213, 216. The reason undoubtedly is, that under such circumstances the mortgagor is regarded as a trustee for all the equitable mortgagees.

[1] Mumford v. Stohwasser, L. R. 18 Eq. 556, 563; Saunders v. Dehew, 2 Vern. 271; Allen v. Knight, 5 Hare, 272; Sharples v. Adams, 32 Beav. 213; Carter v. Carter, 3 Kay & J. 617. In fact, it seems that the mere obtaining the legal estate from the trustee without notice would not give him *priority.*

(c) This portion of the text was quoted in Central Trust Co. v. West India Imp. Co., 169 N. Y. 314, 62 N. E. 387.

(a) See, also, Harpham v. Shacklock. L. R. 19 Ch. Div. 207. "An equitable mortgagee, who has made an advance without notice of a prior equitable title, may gain priority by getting in the legal title, unless there are circumstances which make it inequitable for him to do so. One case which falls within this exception is where the mortgagee has notice that the legal title, at the time when it is so got in, is held on an express trust

to all instances of a legal estate procured by the holders of subsequent equitable mortgages, liens, and other equitable interests? There is some conflict, or apparent conflict, of opinion upon this point, but it all arises, I think, from the failure to distinguish mere rights of priority from the more complete rights of defense belonging to the *bona fide* purchaser for a valuable consideration. The confounding of these two entirely distinct and separate matters can only lead to a confusion of decisions and rules.[2] The very object of the rule is, that a person who has in good faith become holder of an equitable lien or interest, on discovering his danger of being postponed to an outstanding equity already in the hands of another, may protect himself and secure his priority by procuring the legal title. Principle and authority seem to be agreed that such a holder of a subsequent equity, who obtained it for value and without notice, may, even after notice of an earlier equity in favor of a third person, secure the advantage given by a conveyance of the legal estate, and thus establish his own priority. By this act the subsequent holder would become entitled to *priority*. The decisions and *dicta* which conflict with this conclusion will be found, upon examination, to be dealing with the alleged rights of a *bona fide* purchaser for value, and not with a mere question of priority.[3] [b]

2 In a case of priorities merely, the court in a proper proceeding awards the subject-matter to the various claimants in the order of precedence; in the other case it refuses any relief to the plaintiff attempting to establish his title or claim against the *bona fide* purchaser. This most important distinction is not always sufficiently observed in the exhaustive American notes to Basset v. Nosworthy, and Le Neve v. Le Neve, in 2 Leading Cases in Equity.

3 While the proposition of the text is implied by many text-writers, it is expressly announced by Mr. Adams as a settled rule in the adjustment of priorities: Adams's Equity, 161, 162; 6th Am. ed., 339. See also Brace v.

in favor of persons who assert a claim to the property:" Taylor v. London & County Banking Co.,[1901] 2 Ch. 231; Taylor v. Russell, [1892] App. Cas. 244, 259.

(b) See, also, Dueber Watch-Case Mfg. Co. v. Daugherty, 62 Ohio St. 589, 57 N. E. 455, citing and following the text; Bailey v. Barnes, [1894] 1 Ch. 25.

§ 730. **IV. Notice of Existing Equities.**— The doctrine is universally settled, and has already been fully examined, that, among successive interests wholly equitable, and between an earlier equity and a subsequent legal estate, even when purchased for a valuable consideration, the one who acquires the subsequent estate or interest with notice of the earlier equity in favor of another person will hold his acquisition subject and subordinate to such outstanding interest or right; in the contest for priority between the two claimants, he must be postponed; he takes his interest burdened with the obligation of recognizing, providing for, and carrying out the previous equity according to its nature. This subordinating effect is produced alike by every species of notice; actual notice proved by direct or inferred from circumstantial evidence, and constructive notice arising from information sufficient to put the prudent man upon an inquiry,— from possession, from the contents of title deeds, from *lis pendens,* from registration, from information given to an agent, or from any other cause,— when once established, are followed by the same consequences upon the rights of the subsequent holder or purchaser. The doctrine applies to all successive equities in the same sub-

Duchess of Marlborough, 2 P. Wms. 491; Belchier v. Butler, 1 Eden, 523; Wortley v. Birkhead, 2 Ves. Sr. 571; Ex parte Knott, 11 Ves. 609, 619; Leach v. Ansbacher, 55 Pa. St. 85; Baggerly v. Gaither, 2 Jones Eq. 80; Carroll v. Johnston, 2 Jones Eq. 120, 123; Fitzsimmons v. Ogden, 7 Cranch, 2, 18; Siter v. McClanachan, 2 Gratt. 280, 283; Zollman v. Moore, 21 Gratt. 313; Osborn v. Carr, 12 Conn. 195, 208; Gibler v. Trimble, 14 Ohio, 323; Campbell v. Brackenridge, 8 Blackf. 471.c In some of these American decisions the rule may, under a mistaken view of the English authorities, be carried too far, and applied to a party who was asserting the rights to a *bona fide* purchaser. The cases of Grimstone v. Carter, 3 Paige, 421, 437, 24 Am. Dec. 230, and Fash v. Ravesies, 32 Ala. 451, appear to be opposed to this rule, but they are really dealing with the *bona fide* purchaser, and not with priorities. In the first, the chancellor says that "*to enable a party to defend himself as a bona fide purchaser,* he must state, not only that there was equal equity in himself by reason of his having paid the purchase-money, but also that he had clothed his equity with the legal title before he had notice of the prior equity."

(c) Also, Taylor v. Russell, [1891] 1 Ch. 9.

ject-matter, even where they are equal and governed by the order of time, and in such a case it does not disturb the priority already existing. Its special and more important application is where the subsequent equitable interest is superior in its intrinsic nature or from some incident, or where the subsequent interest is a legal estate, or where it possesses the advantage resulting from the compliance with some statutory requirement, so that the holder thereof would, in the absence of notice, be entitled to the preference; and its effect is then to defeat the precedence which would otherwise have existed, and to restore the priority from order of time among the successive claimants. By far the most frequent application of the doctrine in this country has been in connection with the recording acts, where the superiority of title or of lien otherwise acquired by the recording of a conveyance, mortgage, or other instrument has been held to be lost by reason of a notice of some outstanding unrecorded estate, title, mortgage, lien, or other equitable interest. As the doctrine of notice, both with respect to its nature and its effects, has already been discussed as fully as my limits will permit, I shall add nothing further here except a few cases placed in the foot-note by way of illustration.[1] [a]

[1] Bradley v. Riches, L. R. 9 Ch. Div. 189; Greaves v. Tofield, L. R. 14 Ch. Div. 563; Baker v. Gray, L. R. 1 Ch. Div. 491; Maxfield v. Burton, L. R. 17 Eq. 15; Dryden v. Frost, 3 Mylne & C. 670; Whitbread v. Jordan, 1 Younge & C. 303; Holmes v. Powell, 8 De Gex, M. & G. 572; Atterbury v. Wallis, 8 De Gex, M. & G. 454; Penny v. Watts, 1 Maen. & G. 150; Jones v. Smith, 1 Hare, 43, 55; Ware v. Lord Egmont, 4 De Gex, M. & G. 460, 473; Greenfield v. Edwards, 2 De Gex, J. & S. 582; Montefiore v. Browne, 7 H. L. Cas. 241, 269; Wason v. Wareing, 15 Beav. 151; Hipkins v. Amery, 2 Giff. 292; Prosser v. Rice, 28 Beav. 68, 74; Barnhart v. Greenshields, 9 Moore P. C. C. 18; Birch v. Ellames, 2 Anstr. 427; Gibson v. Ingo, 6 Hare, 112, 124; Jones v. Williams, 24 Beav. 47; Mackreth v. Symmons, 15 Ves. 329, 350; Tourville

(a) This paragraph of the text is cited in Central Trust Co. v. West India Imp. Co., 169 N. Y. 314, 62 N. E. 387. See, also, Durant v. Crowell, 97 N. C. 367, 2 S. E. 541 (purchaser of legal title with notice of equity); Poe v. Paxton, 26 W. Va. 607, and cases cited in notes to § 688, *ante*.

§ 731. V. Effect of Fraud or Negligence upon Priorities.— A priority which would otherwise have existed may also be disturbed and defeated by fraud or negligence in obtaining the interest or in failing to secure it properly. It is therefore a settled doctrine, that among successive equities otherwise equal, and also between a legal title or superior equitable interest earlier in time and a subsequent equity, the holder of the interest which is prior in time and would be prior in right may lose his precedence, and be postponed to the subsequent one by his own fraud or negligence, or that of his agent. The same rule applies to the holder of a subsequent legal estate who would otherwise have the precedence over a prior equitable interest; he may be postponed by reason of his neglect or fraud. While the general rule has been fully adopted by the American courts, the cases involving it are much less frequent in this country than in England, because almost every kind of interest in land is within the operation of the recording acts, and may be protected by a record. Most instances of *laches*, therefore, coming before our courts have arisen from a neglect to record an instrument, or to comply with the provisions of some statute analogous to that of recording.[1] [a] The ef-

v. Naish, 3 P. Wms. 307; Maundrell v. Maundrell, 10 Ves. 246, 271; Tildesley v. Lodge, 3 Smale & G. 543; Wigg v. Wigg, 1 Atk. 382, 384; Rayne v. Baker, 1 Giff. 241; Harrison v. Forth, Prec. Ch. 51; Ferrars v. Cherry, 2 Vern. 383; Mertins v. Jolliffe, Amb. 313; Lowther v. Carlton, 2 Atk. 242; Kennedy v. Daly, 1 Schoales & L. 355, 379; Merry v. Abney, 1 Cas. Ch. 38; Earl Brook v. Bulkeley, 2 Ves. Sen. 498; Taylor v. Stibbert, 2 Ves. 437; Daniels v. Davison, 16 Ves. 249; Van Meter v. McFaddin, 8 B. Mon. 435; School District v. Taylor, 19 Kan. 287 (recorded mortgage held subject to a prior unrecorded deed by reason of the absolute constructive notice from the open possession by the grantee, although the mortgagee had no actual knowledge of such possession); In re Sands Brewing Co., 3 Biss. 175 (effect of notice of a covenant in prior conveyance to a subsequent purchaser).

[1] See, as examples of fraud in a prior mortgage, Kelly v. Lenihan, 56 Ind. 448; Eggeman v. Eggeman, 37 Mich. 436. For examples of neglect, Fisher v. Knox, 13 Pa. St. 622; 53 Am. Dec. 503; Hendrickson's Appeal, 24 Pa. St.

(a) **Effects of Fraud.**— See Hooper v. Central Trust Co., 81 Md. 559, 32 Atl. 505, 29 L. R. A. 262, citing the text (where priority of one lien ob-

fects of negligence and want of diligence in postponing or even defeating the rights of an assignee of a thing in action, earlier in point of time, have already been described.[2] One instance which may be regarded as an example of fraud, although no *actual* fraudulent intent is essential, is, where a prior encumbrancer, upon inquiry being made by a person interested, denies the existence of his lien, or where the owner of the legal estate denies his title under like circumstances, or even keeps silent and does not announce his title to an innocent person who is making expenditures, or advancing money upon the supposed security of the property.[3]

363; Rider v. Johnson, 20 Pa. St. 190, 193; Campbell's Appeal, 29 Pa. St. 401; 72 Am. Dec. 641; Garland v. Harrison, 17 Mo. 282.

2 See *ante*, §§ 698–702.

3 These instances may undoubtedly be referred to the doctrine of equitable estoppel; but the notion of constructive fraud lies at the foundation of that doctrine. Examples of prior mortgagee losing his priority, by denying his own security, to an intended mortgagee, who makes inquiry and states that he is about to lend money on the same property: Ibboteson v. Rhodes, 2 Vern. 554; Berrisford v. Milward, 2 Atk. 49; see Stronge v. Hawkes, 4 De Gex, M. & G. 186; 4 De Gex & J. 632; Beckett v. Cordley, 1 Brown Ch. 353, 357; Pearson v. Morgan, 2 Brown Ch. 385, 388; Evans v. Bicknell, 6 Ves. 173, 182; Lee v. Munroe, 7 Cranch, 366, 368; Brinckerhoff v. Lansing, 4 Johns. Ch. 65; 8 Am. Dec. 538.[b] Examples of legal owner concealing his title, and suffering others to expend money, etc.: Storrs v. Barker, 6 Johns. Ch 166, 168; 10 Am. Dec. 316; Wendell v. Van Rensselaer, 1 Johns. Ch. 344; Bright v. Boyd, 1 Story, 478; see Eldridge v. Walker, 80 Ill. 270; see also Platt v. Squire, 12 Met. 494; Fay v. Valentine, 12 Pick. 40; 22 Am. Dec. 397; Marston

tained over another by fraudulent representations, first lien postponed to the other); *ante*, § 686, and notes.

Effects of Negligence.— Where a mortgage is fraudulently cancelled of record as result of the mortgagee's negligence in permitting the instrument to remain in the custody and control of the mortgagor, its priority is lost in favor of a subsequent *bona fide* purchaser: Heyder v. Excelsior B. & L. Ass'n, 42 N. J. Eq. 403, 8 Atl. 310, 59 Am. Rep. 49; City Council of Charleston v. Ryan, 22 S. C. 339, 53 Am. Rep. 713. Where the record of a mortgage was lost, the negligence of the mortgagee in failing for five years to cause the record to be restored, as authorized by statute, destroyed the lien of the mortgage as against a subsequent innocent purchaser from the mortgagor: Tolle v. Alley, 24 S. W. 113 (Kentucky). For the English cases, see *ante*, § 687, notes, and notes to the next paragraph.

(b) See also *ante*, § 686, and notes.

§ 732. Effect of Gross Negligence.[a]— It is now settled by the English decisions, after some fluctuation, that where a person has become entitled to the precedence because he has acquired the *prior* legal estate, or because, being subsequent in time, he has fortified his equity by obtaining the legal estate, he cannot lose such precedence and be postponed, unless by himself or by his agent he is chargeable with fraud or with gross negligence; mere neglect will not suffice.[1] Whether the same requirement of gross negli-

v. Brackett, 9 N. H. 336; Miller v. Bingham, 29 Vt. 82; Stafford v. Ballou, 17 Vt. 329; Broome v. Beers, 6 Conn. 198; Rice v. Dewey, 54 Barb. 455; L'Amoreux v. Vandenbergh, 7 Paige, 316; Paine v. French, 4 Ohio, 318; Chester v. Greer, 5 Humph. 26.[c]

[1] The cases furnish a great variety of instances and forms of fraud or neglect. The leading case is Hewitt v. Loosemore, 9 Hare, 449. See also Tourle v. Rand, 2 Brown Ch. 650; Barnett v. Weston, 12 Ves. 129; Colyer v. Finch, 5 H. L. Cas. 905; Espin v. Pemberton, 4 Drew. 333; 3 De Gex & J. 547; Hopgood v. Ernest, 3 De Gex, J. & S. 116; Ratcliffe v. Barnard, L. R. 6 Ch. 652.[b] The following cases are illustrations of negligence insufficient

(c) See also *post*, § 818, and notes.

(a) This paragraph is cited in Central Trust Co. v. West India Imp. Co., 169 N. Y. 314, 62 N. E. 387.

(b) The leading case on the subject in recent years is Northern Counties, etc., Co. v. Whipp, L. R. 26 Ch. Div. 482. In this case the question of what degree of negligence is sufficient to postpone a prior legal mortgage to a subsequent equitable mortgage is elaborately discussed, and the prior authorities reviewed. The conclusions reached were summed up as follows: "That the court will postpone the prior legal estate to a subsequent equitable estate, — 1. Where the owner of the legal estate has assisted in or connived at the fraud which has led to the creation of a subsequent equitable estate, without notice of the prior legal estate, of which assistance or connivance the omission to use ordinary care in inquiry after or keeping may be, and in some cases has been, held to be sufficient evidence, where such conduct cannot otherwise be explained; 2. Where the owner of the legal estate has constituted the mortgagor his agent with authority to raise money, and the estate thus created has by the fraud or misconduct of the agent been represented as being the first estate. But that the court will not postpone the prior legal estate to the subsequent equitable estate on the ground of any mere carelessness or want of prudence on the part of the legal owner." In the case of Manners v. Mew, L. R. 29 Ch. Div. 730, North, J., in quoting the foregoing, said: "Mere carelessness there includes, in my opinion, gross carelessness, if there is any distinction." In the opinions in these two cases the court was careful to say that the question there discussed referred to what conduct would postpone a prior legal estate, and not the

gence applies to successive interests which are all purely equitable, or whether mere negligence is sufficient to affect the priority, must be regarded as still unsettled by the decisions.[2] [e]

to affect the priority acquired by means of the legal estate: Dixon v. Muckleston, L. R. 8 Ch. 155; Ratcliffe v. Barnard, L. R. 6 Ch. 652; Cory v. Eyre, 1 De Gex, J. & S. 149, 163; Hunt v. Elmes, 2 De Gex, F. & J. 578; Roberts v. Crofts, 2 De Gex & J. 1; Hewitt v. Loosemore, 9 Hare, 449.[c] Examples of neglect sufficient to destroy a precedence otherwise existing: Worthington v. Morgan, 16 Sim. 547; Rice v. Rice, 2 Drew. 73; Briggs v. Jones, L. R. 10 Eq. 92; Hopgood v. Ernest, 3 De Gex, J. & S. 116; Perry Herrick v. Attwood, 2 De Gex & J. 21; Waldron v. Sloper, 1 Drew. 193; Carter v. Carter, 3 Kay & J. 617.[d] Examples of fraud: Hunter v. Walters, L. R. 7 Ch. 75; Sharpe v. Foy, L. R. 4 Ch. 35; Lloyd v. Attwood, 3 De Gex & J. 614. See further, as to the neglect in making proper inquiry, and the notice resulting therefrom, *ante*, § 612.

[2] See *supra*, note under § 687, where the recent English cases upon this question are cited.

question as to what circumstances would give priority as between two equitable estates. In the subsequent case of Farrand v. Yorkshire Banking Co., L. R. 40 Ch. Div. 182, the latter question was determined, and it was there held that negligence amounting to fraud on the part of the holder of the prior equitable estate was not necessary to be shown, in order to work a postponement.

(c) See, also, In re Ingham, [1893] 1 Ch. 352 (as between legal mortgagee and subsequent equitable mortgagee, by fraud of the mortgagor using title papers which came into his possession, the former has priority in the absence of his or his predecessor's fraud or negligence).

(d) See also, as to negligence displacing legal estate, Clarke v. Palmer, L. R. 21 Ch. Div. 124; Lloyd's Banking Co. v. Jones, L. R. 29 Ch. Div. 221, 227; Brocklesby v. Temperance Permanent Building Society, [1895] App. Cas. 173, affirming [1893] 3 Ch. 130; Oliver v. Hinton, [1899] 2 Ch. 264, 81 Law T. (N. S.) 212, 48 Wkly. Rep. 3.

(e) The case of Farrand v. Yorkshire Banking Co., L. R. 40 Ch. Div. 182, settled this question in England. It was there held that gross negligence amounting to fraud is not necessary, but that negligence such as an omission to obtain possession of or to make inquiries concerning the title deeds may be sufficient. See, also, National Provincial Bank v. Jackson, L. R. 33 Ch. Div. 1 (between two equitable claimants, carelessness or want of prudence is enough to postpone); Taylor v. London and County Banking Co., [1901] 2 Ch. 231, 260. The two following recent cases well illustrate the principle: Prior debenture holders (equitable mortgagees), who left the title deeds with the company so as to enable it to deal with its property as if it had not been encumbered, could not set up their prior charge against a subsequent equitable mortgage to a bank, which had not been guilty of negligence; In re Castell & Brown, [1898] 1 Ch. 315, 67 Law J. (Ch.) 169, 78 Law T. (N. S.) 109, 46 Wkly. Rep. 248; In re Valletort Sanitary

§ 733. Assignments of Mortgages — Rights of Priority Depending upon.— An assignment of a mortgage is, throughout this country, with the exception, perhaps, of a very few states, a mere transfer of a thing in action, and the assignee can acquire no higher rights as against the mortgagor than those possessed by the original mortgagee.[1] [a] Such assign-

[1] See *ante*, § 704; Wanzer v. Cary, 76 N. Y. 526.

Steam Laundry Co., Ltd., [1903] 2 Ch. 654. But in one important group of cases negligence is not imputed to the prior equitable mortgagee under such circumstances. "Where the relation between the equitable incumbrancer and the person in possession of the title deeds is not merely that of mortgagee and mortgagor, but is of a fiduciary nature (as, for example, that of a *cestui que trust* and trustee, or client and solicitor), there is a great body of authority to show that the equitable incumbrancer is not to be deprived of his priority by reason of the improper acts of the person entrusted with the deeds, so long, at all events, as the incumbrancer has no ground to suppose that there has been any want of good faith on the part of the custodian of the deeds": Taylor v. London and County Banking Co., [1901] 2 Ch. 231, 260ff., citing Cory v. Eyre, 1 De G. J. & S. 149; Shropshire Union Railways & Canal Co. v. Reg., L. R. 7 H. L. 496; In re Vernon, Ewens & Co., L. R. 33 Ch. Div. 402; Carritt v. Real & Personal Advance Co., L. R. 42 Ch. Div. 263.

(a) Assignment is Subject to Mortgagor's Equities.— See, also, Turner v. Smith, [1901] 1 Ch. 213; San José Ranch Co. v. San José L. & W. Co., 132 Cal. 582, 64 Pac. 1097; Meyer v. Webber, 133 Cal. 681, 65 Pac. 1110; Adams v. Hopkins, (Cal.) 69 Pac. 228, 73 Pac. 971; Beach v. Lattner, 101 Ga. 357, 28 S. E. 110 (usury); Chicago Title & Tr. Co. v. Aff, 183 Ill. 91, 55 N. E. 659 (no negligence on mortgagor's part); Shuey v. Latta, 90 Ind. 136; Tabor v. Foy, 56 Iowa, 539, 9 N. W. 897 (mortgage securing a forged negotiable note); Timms v. Shannon, 19 Md. 296, 81 Am. Dec. 632 (subject only to equities existing at time of assignment); Nichols v. Lee, 10 Mich. 526, 82 Am. Dec. 57; McKenna v. Kirkwood, 50 Mich. 544, 15 N. W. 898; Cooley v. Harris, 92 Mich. 126, 135, 52 N. W. 997; Walker v. Thompson, 108 Mich. 686, 66 N. W. 584; Redin v. Branhan, 43 Minn. 283, 45 N. W. 445 (mortgage paid before assignment); Robeson v. Robeson, (N. J. Eq.) 23 Atl. 612; Magie v. Reynolds, 51 N. J. Eq. 113, 26 Atl. 150 (assignment in the form of a conveyance of land); Hill v. Hoole, 116 N. Y. 302, 22 N. E. 547, 5 L. R. A. 620; Merchants' Bank v. Weill, 163 N. Y. 486, 79 Am. St. Rep. 605, 57 N. E. 749 (not subject to new equities arising or defenses accruing after the assignment); Rapps v. Gottlieb, 142 N. Y. 164, 36 N. E. 1052 (bond and mortgage delivered to mortgagee on understanding that they were not to be operative until the consideration therefor was paid; mortgagor not estopped); Reineman v. Robb, 98 Pa. St. 474; Earnest v. Hoskins, 100 Pa. St. 551; Theyken v. Howe Mach. Co., 109 Pa. St. 95; Stephens v. Weldon,

ments are generally within the operation of the recording statutes, either in express terms, or by a judicial interpretation of the statutory language, holding that an assignment is a species of conveyance.[2 b] The record of an assign-

[2] See 1 Jones on Mortgages, secs. 472–478, where the subject is fully discussed, and from which I have borrowed. In the recent and very carefully

151 Pa. St. 520, 25 Atl. 28 (set-off); Wilson v. Ott, 173 Pa. St. 253, 34 Atl. 23, 51 Am. St. Rep. 767; Myerstown Bank v. Roessler, 186 Pa. St. 431, 40 Atl. 963, 44 L. R. A. 442. In Moffett v. Parker, 71 Minn. 139, 70 Am. St. Rep. 319, 73 N. W. 850, the mortgagor was estopped by the fact that the mortgage was in fraud of his creditors from setting up against the assignee the defense of no consideration. In Merchants' Bank v. Weill, 163 N. Y. 486, 79 Am. St. Rep. 605, 57 N. E. 749, an important limitation was laid down to the rule as generally expressed; viz., that the rule does not apply to "new equities arising, or defenses accruing," after the assignment; that the defenses by the mortgagor to which the assignment is subject are only those "arising out of matters inherent in the contract by which the chose in action is evidenced and existing before it is assigned." In this case the mortgagor in a purchase-money mortgage attempted to exercise, after the assignment, an option conferred by a secret agreement to rescind the sale of the property and thus to be relieved of the obligation of the bond and mortgage.

Payment by Mortgagor to Mortgagee.— In the absence of notice of the assignment to the mortgagor, or of facts putting him on inquiry as to an assignment, he is protected in the payments subsequently made by him to the mortgagee. See *ante*, § 702; Towner v. McClelland, 110 Ill. 542; Bliss v. Young, 7 Kan. App. 728, 52 Pac. 577; Bull v. Sink, 8 Kan. App. 860, 57 Pac. 853; Foster v. Carson, 159 Pa. St. 477, 28 Atl. 356, 39 Am. St. Rep. 696. It is not usually necessary for the mortgagor's protection that he should require the production of the mortgage, or bond or other non-negotiable instrument secured thereby at the time of making payment: Vann v. Marbury, 100 Ala. 438, 14 South. 273, 46 Am. St. Rep. 70, 23 L. R. A. 325 (burden of proof on assignee to show notice to mortgagor); Olson v. Northwestern Guaranty Loan Co., 65 Minn. 475, 68 N. W. 100; Clinton Loan Assn. v. Merritt, 112 N. C. 243, 17 S. E. 296; Horstman v. Gerker, 49 Pa. St. 282, 88 Am. Dec. 501 (inconvenience of a rule that would require such production); but see Rodgers v. Peckham, 120 Cal. 238, 52 Pac. 483, *post*, in note (e), *infra;* but it has been held that failure to make inquiry as to the whereabouts of the bond and mortgage may constitute "gross negligence amounting to constructive notice:" Clinton Loan Assn. v. Merritt, 112 N. C. 243, 17 S. E. 296, following the analogy of the English equitable mortgage cases where no inquiry was made for the title deeds.

Assignment of Negotiable Note Secured by Mortgage, see *ante*, § 704, note.

(b) Assignments Usually Within the Recording Acts.— See, also, Williams v. Jackson, 107 U. S. 478, 2 Sup. Ct. 814 (District of Columbia);

ment, like that of any other instrument, does not operate as a notice retrospectively; it is not therefore a constructive

considered case of Westbrook v. Gleason, 79 N. Y. 23, it is held that an assignment is a "conveyance" within the general requirements of the recording act, and therefore when a second mortgagee, with notice of a prior unrecorded mortgage, assigns his mortgage to a *bona fide* purchaser for value, who has no notice, such assignee is entitled to preference only in case he records his assignment before the first mortgage is recorded; if the first mortgage is recorded before the assignment is put on record, that operates as a constructive notice to the assignee, and cuts off his priority. From this it appears that the effects of recording an assignment are not confined, as has sometimes been supposed, to the rights of successive assignees of the same mortgage. In illustration of the text, see Belden v. Meeker, 47 N. Y. 307; 2 Lans. 470; Campbell v. Vedder, 1 Abb. App. 295; Fort v. Burch, 5 Denio, 187; Vanderkemp v. Shelton, 11 Paige, 28; James v. Johnson, 6 Johns. Ch. 417; St. John v. Spalding, 1 Thomp. & C. 483; Byles v. Tome, 39 Md. 461;

Nashua Trust Co. v. W. S. Edwards Mfg. Co., 99 Iowa, 109, 68 N. W. 587, 61 Am. St. Rep. 226 (written assignment is an "instrument conveying real estate," under the recording acts); Swasey v. Emerson, 168 Mass. 118, 46 N. E. 426, 60 Am. St. Rep. 368; Higgins v. Jamesburg Mut. B. & L. Ass'n, (N. J. Eq.) 58 Atl. 1078 (by Rev. 1898, § 53; N. J. Laws 1898, p. 690); Henniges v. Paschke, 9 N. Dak. 489, 84 N. W. 350, 81 Am. St. Rep. 588; Merrill v. Luce, 6 S. Dak. 354, 61 N. W. 43, 55 Am. St. Rep. 844; Van Burkleo v. Southwestern Mfg. Co., (Tex. Civ. App.) 39 S. W. 1085; Donaldson v. Grant, 15 Utah, 231, 49 Pac. 779 (mortgage creates an "interest in real estate," the assignment of which must be recorded); and cases cited *infra* in the notes to this and the following paragraph. An unrecorded assignment is, of course, superior to the right of one who purchases the land with notice of the assignment: Passumpsic Sav. Bank v. Buck, 71 Vt. 190, 44 Atl. 93. An assignment being a conveyance under the recording act, and therefore, though unrecorded, good as against all persons except subsequent purchasers for value without notice (Iowa), has priority over subsequent judgment or mechanics' liens against the property: Nashua Trust Co. v. W. S. Edwards Manuf'g Co., 99 Iowa, 109, 61 Am. St. Rep. 226, 68 N. W. 587. By a recent statute in Kansas (Laws of 1897, c. 160) unrecorded assignments of mortgages cannot be received in evidence; for cases interpreting this statute, see Myers v. Wheelock, 60 Kan. 747, 57 Pac. 956 (its constitutionality affirmed); Burt v. Moore, 62 Kan. 536, 64 Pac. 57; Neosho Val. Inv. Co. v. Sharpless, 63 Kan. 885, 65 Pac. 667; Hulme v. Neosho Val. Inv. Co., 63 Kan. 886, 66 Pac. 239. In a few states, assignments of mortgages are held not to be within the operation of the recording acts: Hull v. Diehl, 21 Mont. 71, 76, 52 Pac. 782; Bamberger v. Geiser, 24 Oreg. 203, 33 Pac. 609; Howard v. Shaw, 10 Wash. 151, 38 Pac. 746; Fischer v. Woodruff, 25 Wash. 67, 64 Pac. 923, 87 Am. St. Rep. 742; that the record of the assignment in such case is a nullity, see *ante*, § 651, note.

notice of the assignee's interest to the mortgagor, so as to destroy the effect of payments made by him, without actual

Bowling v. Cook, 39 Iowa, 200; Bank of State of Indiana v. Anderson, 14 Iowa, 544; 83 Am. Dec. 390; Cornog v. Fuller, 30 Iowa, 212; McClure v. Burris, 16 Iowa, 591; Henderson v. Pilgrim, 22 Tex. 464. In Pennsylvania it is held, under a construction of the general statute, that a record of an assignment is notice to subsequent assignees, and also to subsequent mortgagees and purchasers of the same premises: Pepper's Appeal, 77 Pa. St. 373; Neide v. Pennypacker, 9 Phila. 86; Leech v. Bonsall, 9 Phila. 204; Philips v. Bank of Lewiston, 18 Pa. St. 394, 401. In Indiana it is held, upon a construction of the statute, that no provision is made for recording assignments, and therefore a record of them is not notice: Hasselman v. McKernan, 50 Ind. 441.[c] It necessarily follows that when a mortgage is assigned, and the assignment is not recorded, and the mortgagee afterwards satisfies the mortgage of record, the lien is thereby destroyed as against a *bona fide* purchaser or encumbrancer without notice of the premises: Bowling v. Cook, 39 Iowa, 200; Henderson v. Pilgrim, 22 Tex. 464; and see Warner v. Winslow, 1 Sand. Ch. 430; St. John v. Spalding, 1 Thomp. & C. 483.[d]

(c) By the express terms of the present statutes of Indiana they are recordable: Rev. St. 1881, 1897, §§ 1093, 1094; Rev. St. 1894, §§ 1107, 1108; Citizens' State Bank v. Julian, 153 Ind. 655, 55 N. E. 1007; Artz v. Yeager, 30 Ind. App. 677, 66 N. E. 917.

(d) Satisfaction by Mortgagee; Effect on Subsequent Bona Fide Purchasers or Incumbrancers.— See, also, the following cases: Williams v. Jackson, 107 U. S. 478, 483, 484, 2 Sup. Ct. 814; Livermore v. Maxwell, 87 Iowa, 705, 55 N. W. 37; Quincy v. Ginsbach, 92 Iowa, 144, 60 N. W. 511; Lewis v. Kirk, 28 Kan. 497, 42 Am. Rep. 173 (an instructive case); Harrison Nat. Bk. v. Pease, 8 Kan. App. 573, 54 Pac. 1038; Swasey v. Emerson, 168 Mass. 118, 46 N. E. 426, 60 Am. St. Rep. 368, and cases cited; Cram v. Cottrell, 48 Nebr. 646, 67 N. W. 452, 58 Am. St. Rep. 714; Porter v. Ourada, 51 Nebr. 510, 71 N. W. 52; Whitney v. Lowe, 59 Nebr. 87, 80 N. W. 266; Bacon v. Van Schoonhooven, 87 N. Y. 447; Henniges v. Paschke, 9 N. Dak. 489, 84 N. W. 350, 81 Am. St. Rep. 588; Merrill v. Luce, 6 S. Dak. 354, 61 N. W. 43, 55 Am. St. Rep. 844; Merrill v. Hurley, 6 S. Dak. 592, 62 N. W. 958, 55 Am. St. Rep. 859. Even when the note secured by the mortgage was negotiable, and was transferred before maturity to a *bona fide* purchaser, thus cutting off defenses between the parties to the mortgage (see *ante*, § 704, notes), a *bona fide* purchaser or incumbrancer of the mortgaged premises may rely on the recorded satisfaction by the mortgagee. The fact that the mortgage may show that the notes secured were negotiable and not yet payable does not put him on inquiry as to a possible transfer of the notes, since there is generally no person to whom he can apply for information save the mortgagor and mortgagee: Williams v. Jackson, 107 U. S. 478, 484, 2 Sup. Ct. 814; Lewis v. Kirk, 28 Kan. 497, 42 Am. Rep. 173; Harrison Nat. Bank v. Pease, 8 Kan. App. 573, 54 Pac. 1038; Henniges v. Paschke, 9 N. Dak. 489, 84 N. W. 350, 81 Am. St. Rep. 588; *contra*, Borgess Invest-

notice to the mortgagee;[e] but a mortgagor who obtains a discharge from the mortgagee *without any payment* is not protected as against the assignee.[3]

[3] New York Life Ins. & T. Co. v. Smith, 2 Barb. Ch. 82; Ely v. Scofield, 35 Barb. 330. This rule is held not to apply to a mortgage given to secure a negotiable note which is assigned before maturity: Jones v. Smith, 22 Mich. 360. The record of an assignment is, however, a constructive notice

ment Co. v. Vette, 142 Mo. 560, 44 S. W. 754, 64 Am. St. Rep. 567; Black v. Reno, 59 Fed. 917 (Missouri). The position of the *bona fide* purchaser, who deals with both the mortgagor and mortgagee, but not in reliance on any recorded satisfaction, is a matter of more uncertainty. Thus, it has been held that he is not bound to make any inquiry concerning the note secured, even though that is negotiable: Jenks v. Shaw, 99 Iowa, 604, 68 N. W. 900, 61 Am. St. Rep. 256; or that it is sufficient if he make inquiry of the mortgagee and of all persons who had owned the land since the date of the mortgage: Artz v. Yeager, 30 Ind. App. 677, 66 N. E. 917; while on the other hand it is held that such a purchaser, though he would be protected by a previous entry of satisfaction, in the absence thereof purchases at the peril that the negotiable note may have been assigned before maturity: Porter v. Ourada, 51 Nebr. 510, 71 N. W. 52. In some states where the recording statutes do not apply to the assignment of mortgages, the recorded satisfaction of the mortgage is no protection whatever to the subsequent *bona fide* purchaser from a previous transfer of the note and the mortgagee's rights; the purchaser must at his peril ascertain whether the mortgagee held the note at the time when he discharged the mortgage: Bamberger v. Geiser, 24 Oreg. 203, 33 Pac. 609; Howard v. Shaw, 10 Wash. 151, 38 Pac. 746; Fischer v. Woodruff, 25 Wash. 67, 64 Pac. 923, 87 Am. St. Rep. 742. Such a rule must be a great obstacle to the free alienation of property that has ever been the subject of a mortgage; its impolicy is conceded.

(e) **Record of Assignment not Notice to Mortgagor.**—Rodgers v. Parker, 136 Cal. 313, 68 Pac. 975; Murphy v. Barnard, 162 Mass. 72, 38 N. E. 29, 44 Am. St. Rep. 340 (rule no protection to mortgagor when the note secured is negotiable and assigned before maturity); Williams v. Keyes, 90 Mich. 290, 51 N. W. 520, 30 Am. St. Rep. 438 (same); Eggert v. Beyer, 43 Nebr. 711, 62 N. W. 57 (same); Stark v. Olson, 44 Nebr. 646, 63 N. W. 37 (same); Foster v. Carson, 159 Pa. St. 477, 28 Atl. 356, 39 Am. St. Rep. 696. *Contra*, Detwilder v. Heckenlaible, 63 Kan. 627, 66 Pac. 653 (opinion cites no authorities and ignores the established principle that the record is not notice to prior parties; *ante*, § 657). The California statute purports to protect the mortgagor who makes payments to the "*holder* of the note, bond, or other instrument;" if, therefore, the assignee has possession of the notes and mortgage, payments made to mortgagee are of no avail: Rodgers v. Peckham, 120 Cal. 238, 52 Pac. 483; though if the mortgagee has retained possession of the instruments, the mortgagor is not affected by the record of the assignment: Rodgers v.

§ 734. Unrecorded Assignment — Rights of the Assignee.— When a mortgage duly recorded is assigned, that original record continues to be constructive notice of the existence of the lien to all subsequent purchasers and encumbrancers of the same premises, and the assignee does not lose his precedence over such parties by a failure to record the

to a subsequent grantee of the mortgagor, and a subsequent discharge given to him by the mortgagee would be inoperative as against the assignee.[f] Also a discharge obtained by the mortgagor without any payment is ineffectual: Belden v. Meeker, 47 N. Y. 307; 2 Lans. 470; and see Westbrook v. Gleason, 79 N. Y. 23.[g]

The rule given in the text as to the effect of the record as notice to the mortgagor is expressly enacted by the statutes of several states.

California.— Civ. Code, secs. 2934, 2935.
Indiana.— 2 Gavin and Hord's Stats. 356.
Kansas.— Dassler's Stats., c. 68, sec. 3.
Michigan.— Comp. Laws, 1347.
Minnesota.— Rev. Stats. 1866, p. 331.
Nebraska.— Gen. Stats., c. 61, sec. 39.
New York.— 1 Fay's Dig. of Laws, 585.
Oregon.— Gen. Laws, 651.
Wisconsin.— Rev. Stats. 1149.

Parker, 136 Cal. 313, 68 Pac. 975. The effect of this interpretation of the statute is not only to nullify its purpose of facilitating payments by the mortgagor, but even to impose upon him an onerous duty that did not exist before the statute, of ascertaining at his peril the whereabouts of the instruments at the time of each payment. See *supra*, note a.

(f) Record of the Assignment is Notice to subsequent purchasers and incumbrancers of the mortgaged premises: Woodward v. Brown, 119 Cal. 283, 303, 63 Am. St. Rep. 108, 52 Pac. 2, 542; Robbins v. Larson, 69 Minn. 436, 72 N. W. 456, 65 Am. St. Rep. 572 (to second mortgagee and his assignee); Higgins v. Jamesburg Mut. B. & L. Ass'n, (N. J. Eq.) 58 Atl. 1078 (although the prior mortgage was left in the mortgagor's hands by the assignee thereof).

(g) Discharge Without Payment. — See, also, Larned v. Donovan, 155 N. Y. 341, 49 N. E. 942. This results from the terms of the statute (1 Rev. St. 763, § 41), which provides that the recording of an assignment is not in itself notice to the mortgagor so as to invalidate any *payment* made by him to the mortgagee. Such discharge, made after a second mortgage is given, will not avail the second mortgagee, if he has not parted with value or otherwise changed his position on the faith of such discharge: Spicer v. First Nat. Bank, 66 N. Y. Suppl. 902, 55 App. Div. 172, affirmed, 170 N. Y. 562, 62 N. E. 1100.

assignment.[1] [a] A conveyance of the mortgaged premises to the mortgagee after he had assigned the mortgage would not work a merger, but the rights of the assignee would remain unaffected.[2] If the mortgagee, having thus acquired title after the assignment, should in turn convey the mortgaged premises to a third person without knowledge nor actual notice of the assignment, it is held that such grantee would be charged with constructive notice and would take subject to the rights of the assignee, because the records would give him notice of the facts sufficient to put a reasonable man upon an inquiry, and a due inquiry would necessarily lead to a discovery of the real situation.[3] [b] If a second mortgagee, with notice of a prior unrecorded mortgage, assigns to a *bona fide* purchaser without notice, but the prior mortgage is recorded before the assignment, the assignee would fail to secure a precedence.[4] [c] Since a mortgage is a thing in action, an assignee, even without

1 Campbell v. Vedder, 3 Keyes, 174; 1 Abb. App. 295.

2 Purdy v. Huntington, 42 N. Y. 334; 1 Am. Rep. 532; Campbell v. Vedder, 3 Keyes, 174; 1 Abb. App. 295.

3 Purdy v. Huntington, 42 N. Y. 334; 1 Am. Rep. 532; overruling 46 Barb. 389; Gillig v. Maass, 28 N. Y. 191; Warren v. Winslow, 1 Sand. Ch. 430; Van Keuren v. Corkins, 4 Hun, 129; 6 Thomp. & C. 355.

4 Westbrook v. Gleason, 79 N. Y. 23; Fort v. Burch, 5 Denio. 187. The same would be true where, a junior mortgage being assigned, the elder mortgage was

(a) See, also, Zehner v. Johnston, 22 Ind. App. 452, 53 N. E. 1080; Babcock v. Young, 117 Mich. 155, 75 N. W. 302; Wilson v. Campbell, 110 Mich. 580, 68 N. W. 278, 35 L. R. A. 544; Curtis v. Moore, 152 N. Y. 159, 46 N. E. 168, 57 Am. St. Rep. 506; Spicer v. First Nat. Bank, 66 N. Y. Suppl. 902, 55 App. Div. 172, affirmed, 170 N. Y. 562, 62 N. E. 1100.

(b) See, also, Demuth v. Old Town Bank, 85 Md. 315, 37 Atl. 266, 60 Am. St. Rep. 322. *Contra*, Ames v. Miller, (Nebr.) 91 N. W. 250.

(c) See, also, County Bank of San Luis Obispo v. Fox, 119 Cal. 61, 51 Pac. 11 (citing Mahoney v. Middleton, 41 Cal. 41); Rumery v. Soy, 61 Nebr. 755, 86 N. W. 478 (Comp. St. Nebr., 1899, c. 73, §§ 39, 46); Butler v. Bank of Mazeppa, 94 Wis. 351, 68 N. W. 998. But if the assignment of the second mortgage is recorded *before* the first mortgage is recorded, the assignee is protected as a "subsequent purchaser" under the recording acts: Decker v. Boice, 83 N. Y. 215, distinguishing Westbrook v. Gleason, 79 N. Y. 23.

notice, will be subject to all outstanding equities and claims in favor of third persons which were existing and available against the assignor, wherever the general doctrine prevails that all assignments of things in action are subject to such latent equities.[5] [e] Questions of priority might arise between successive assignees of the same mortgage from the same assignor. If an assignment is perfected by an actual delivery of the mortgage itself and of the bond,

recorded before the assignment was given, although after the recording of the junior mortgage assigned: Ibid.[d]

5 See *ante*, §§ 708, 709, 714, and cases cited; Conover v. Van Mater, 18 N. J. Eq. 481; *per contra*, see *ante*, § 715, and cases cited; Sumner v. Waugh, 56 Ill. 531.

(d) See, also, Hoagland v. Shampanore, 37 N. J. Eq. 592.

(e) Assignment, Whether Subject to Equities of Third Persons.— See, also, Owen v. Evans, 134 N. Y. 514, 31 N. E. 999; David Stevenson Brewing Co. v. Iba, 155 N. Y. 224, 49 N. E. 677 (assignment of chattel mortgage is subject to agreement between the mortgagee and another mortgagee that the latter's mortgage is to have priority); Kernohan v. Durham, 48 Ohio St. 1, 26 N. E. 982, 12 L. R. A. 41 (assignee of mortgage note charged with equities of one to whom mortgagee had previously assigned the mortgage); Patterson v. Rabb, 38 S. C. 138, 17 S. E. 463, 19 L. R. A. 831 (subject to latent equity of third person in the mortgaged premises). But the doctrine has its exceptions. It does not apply as against a purchaser in good faith and for value of a real estate mortgage executed by one in possession of and holding the legal title to land, whose conveyance was procured by fraud on the grantor. "It would lead to great inconvenience and great insecurity if persons taking or purchasing mortgages were obliged to go back of the mortgagor who owned the land and had the record title thereto, and at their peril ascertain whether any fraud had been perpetrated upon some prior owner of the land"; Simpson v. Del Hoyo, 94 N. Y. 189; Sweetzer v. Atterbury, 100 Pa. St. 18 (assignee takes free from equity of mortgagor's grantor to have his deed declared a mortgage).

Contra, in states where the assignment is free from latent equities: Dulin v. Hunter, 98 Ala. 539, 13 South. 301; Mullanphy Sav. Bank v. Schott, 135 Ill. 655, 26 N. E. 640, 25 Am. St. Rep. 401 (but assignee takes subject to equities of which he had notice at the time of the assignment); Himrod v. Gilman, 147 Ill. 293, 35 N. E. 373, affirming 44 Ill. App. 516; Humble v. Curtis, 160 Ill. 193, 43 N. E. 749, affirming 57 Ill. App. 513 (free from equities in favor of mortgagor's grantor); Schultz v. Stroelowitz, 191 Ill. 249, 61 N. E. 92, reversing 86 Ill. App. 344 (free from equity of mortgagor's grantee who has made payments to the wrong party); Vredenburgh v. Burnet, 31 N. J. Eq. 229 (but assignee is put on inquiry as to latent equities); Davis

note, or other evidence of debt secured, even though it be not recorded, a subsequent assignee would necessarily be put upon an inquiry, and chargeable with constructive notice, and could obtain no precedence even by a first record.[6 f] In other instances where the assignments are equal, made for a valuable consideration and without notice, if all were unrecorded, the earliest in order of time prevails; the assignee for value and without notice who first obtains a record secures thereby the title; a record when made is a constructive notice to all subsequent assignees of the same mortgage.[7 g]

6 Kellogg v. Smith, 26 N. Y. 18; Brown v. Blydenburgh, 7 N. Y. 141; 57 Am. Dec. 506.

7 Purdy v. Huntington, 42 N. Y. 334; 1 Am. Rep. 532; 46 Barb. 389; Westbrook v. Gleason, 79 N. Y. 23; Campbell v. Vedder, 3 Keyes, 174; 1 Abb. App. 295; Pickett v. Barron, 29 Barb. 505.

v. Piggott, 57 N. J. Eq. 619, 39 Atl. 698; Tate v. Security Trust Co., 63 N. J. Eq. 559, 52 Atl. 313 (must be assignee for value in order to have protection); Sweetzer v. Atterbury, 100 Pa. St. 18 (free from equity of mortgagor's grantor to have the deed declared a mortgage); Van Burkleo v. Southwestern Mfg. Co., (Tex. Civ. App.) 39 S. W. 1085; Congregational Ch. Bldg. Soc. v. Scandinavian Free Church, 24 Wash. 433, 64 Pac. 750.

(f) See, also, Miller Brewing Co. v. Manasse, 99 Wis. 99, 67 Am. St. Rep. 854, 74 N. W. 535 (negotiable note indorsed before maturity to A. and mortgage delivered; mortgage afterward assigned to B.; fact that mortgagee did not have note in his possession was sufficient notice); Kernohan v. Durham, 48 Ohio St. 1, 26 N. E. 982, 12 L. R. A. 41 (mortgagee made written assignment of note and mortgage to K.; he then forged a note and gave it with the genuine mortgage to K.; later, he transferred the genuine note after maturity to C., promising to deliver the mortgage. Held, K. has priority; K. holds equitable title to the genuine note, while C. lacked diligence in taking the note without the mortgage).

(g) See, also, Breed v. National Bank of Auburn, 68 N. Y. Suppl. 68, 57 App. Div. 468, affirmed, 171 N. Y. 648, 63 N. E. 1115 (where neither assignment recorded, first in time has priority); Murphy v. Barnard, 162 Mass. 72, 44 Am. St. Rep. 340, 38 N. E. 29 (recorded assignment is notice to subsequent assignee from the mortgagee); Himrod v. Gilman, 147 Ill. 293, 35 N. E. 373, affirming 44 Ill. App. 516 (mortgagee assigned forged note and, later, the genuine note; held, not a case of equal equities, since the first assignee obtained no interest, legal or equitable, but only a right of action against the mortgagee personally).

SECTION VII.

CONCERNING BONA FIDE PURCHASE FOR A VALUABLE CONSIDERATION AND WITHOUT NOTICE

ANALYSIS.

§ 735. General meaning and scope of the doctrine.
§ 736. General effect of the recording acts.
§§ 737–744. *First.* *Rationale* of the doctrine.
§ 738. Its purely equitable origin, nature, and operation.
§ 739. It is not a rule of property or of title.
§§ 740, 741. General extent and limits; kinds of estates protected.
§§ 742, 743. Phillips v. Phillips; formula of Lord Westbury.
§§ 745–762. *Second.* What constitutes a *bona fide* purchase.
§§ 746–751. I. The valuable consideration.
§ 747. 1. What is a valuable consideration; illustrations.
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§§ 752–761. II. Absence of notice.
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§ 754. Second purchase *without* notice from first purchaser *with*, also second purchaser *with* from first purchaser *without* notice.
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§ 770. Purchaser acquires the legal estate from a trustee.
§§ 771–773. This rule is applied in the United States.
§ 774. Other instances; purchase at execution sale; purchase of things in action.

§§ 775–778. III. Suits by holders of an "equity."
§ 776. For relief against accident or mistake.
§§ 777, 778. For relief from fraud, upon creditors, or between parties.
§§ 779–783. *Fourth.* Affirmative relief to a *bona fide* purchaser.
§ 779. General rule.
§§ 780–782. Illustrations.
§ 783. Removing a cloud from title.
§§ 784, 785. *Fifth.* Mode and form of the defense.
§ 784. The pleadings.
§ 785. Necessary allegations and proofs.

§ 735. **General Meaning, Scope, and Limitations of the Doctrine.**[a]— This section will deal with the equitable doctrine of *bona fide* purchase for a valuable consideration and without notice. The doctrine in its original form was exclusively equitable. Questions of priority cannot, as has already been stated, arise between successive adverse estates which are purely legal, and therefore cannot, independently of statutory permission, come before courts of law for settlement; such estates must stand or fall upon their own intrinsic merits and validity.[1] A contest concerning priority or precedence properly so called can only exist where one of the two claimants holds a legal and the other an equitable title, or where both hold equitable titles, and must therefore belong to the original exclusive jurisdiction of equity. Courts of equity do not have jurisdiction of suits brought merely to establish one purely legal title against another and conflicting legal title.[2][b] In the United States these elementary notions seem to have been sometimes overlooked, and the courts sometimes seem to have extended the doctrine of *bona fide* purchase farther

1 See *supra*, § 679.

2 Such suits are often called "ejectment bills." See vol. 1, §§ 176–178. Equity has *concurrent* jurisdiction in certain classes of suits dealing with legal titles alone, as suits for dower. In regard to them the doctrine of *bona fide* purchase is applied in a special and peculiar manner.

(a) This chapter is cited, generally, in Hill v. Moore, 62 Tex. 610; Williams v. Rand, 9 Tex. Civ. App. 631, 30 S. W. 509.

(b) The text is cited and followed in Cole v. Mette, 65 Ark. 503, 47 S. W. 407, 67 Am. St. Rep. 945.

than the acknowledged principles of equity would warrant. The tendency is marked and strong in the courts of many states, even when acting as tribunals of law, to make the doctrine a legal *rule of property,* and to apply it alike to persons who have acquired either a legal or an equitable title to chattels and things in action, as well as to those who have acquired any legal or equitable interest in land. A *subsequent* holder, even for a valuable consideration and without notice, has certainly no higher right than a prior holder equally innocent and with an equally meritorious ownership. American courts seem sometimes to have acted upon exactly the opposite notion, and to have assumed that a *subsequent* title was necessarily the better one. When the original legal owner has done or omitted something by which it was made possible that his property should come into the hands of a *bona fide* holder by an apparently valid title, it may be just to regard him as estopped from asserting his ownership, and thus to protect the subsequent purchaser. But when the prior legal owner is wholly innocent, has done and omitted nothing, it certainly transcends, even if it does not violate, the principles of equity to sustain the claims of a subsequent and even *bona fide* purchaser.[c]

§ 736. **Effects of the Recording Acts.**— The most extensive and important change, however, in the United States has been produced by the recording acts. They have extended the doctrine of *bona fide* purchase to all conveyances and mortgages, and often to executory contracts, and to every instrument which can create, transfer, or affect legal estates or equitable interests, liens, and encumbrances, and have therefore brought it within the cognizance of the courts of law as a rule for determining the validity of legal titles. The greatest diversity is found in the statutory provisions of the various states, and a consequent

(c) The text is quoted in MacGregor v. Thompson, 7 Tex. Civ. App. 32, 26 S. W. 649.

diversity prevails among the local rules which define the resulting rights of the *bona fide* purchaser. In some they are conferred upon judgment creditors, upon all purchasers at execution sales, and even upon those who have secured the first record although charged with notice. It would be impossible, within any reasonable limits, to state all the results of these statutes, and to formulate all the special rules which have been derived from them in the different states. So far as the doctrine of *bona fide* purchase has been made a rule of *law,* either by the operation of the recording acts or by the independent action of the courts, it does not properly come within the scope of a treatise upon equity jurisprudence. I shall therefore explain the principles of the equitable doctrine as established in the United States and in England, and describe the general applications and modifications made necessary by the common American system of registration. The minute effects growing out of the differing types of legislation must be passed over, except so far as they have been mentioned in the foregoing sections upon notice and priorities. The subject will be discussed under the following heads: 1. *Rationale* of the doctrine; 2. What constitutes a *bona fide* purchase; 3. Effects of the doctrine as a defense; 4. Cases in which courts of equity give affirmative relief; 5. How the *bona fide* purchaser must avail himself of his position.

§ 737. First. Rationale of the Doctrine.— I purpose to explain, in this division, the essential nature, foundation, and reasons of the doctrine, the general extent and limits of its operation, and the kinds of relief which it furnishes. A correct notion concerning this fundamental theory is necessary to any proper understanding of the practical rules which flow from it. It is sometimes said, in the most unlimited terms, that a purchase for a valuable consideration and without notice of any kind of interest is a defense under all circumstances, which constitutes a complete and

absolute bar to every proceeding in which it is sought to establish any species of adverse claim, legal or equitable, or to obtain any species of relief. There are *dicta* of the ablest judges, which, taken literally, without limitation, would go far to sustain this view.[1] These citations well show how misleading general statements may be when separated from their context. Such modes of declaring the doctrine plainly need some limitation and restriction. Taken in their literal and unqualified form, they are opposed to conclusions established by an overwhelming weight of judicial authority, and to the settled practice of the courts of equity.

§ 738. **Equitable Origin, Nature, and Operation of the Doctrine.**— The protection given to the *bona fide* purchaser had its origin exclusively in equity, and is based entirely upon the fact that the jurisdiction of equity is ancillary and supplemental to that of the law, and upon the conception that a court of chancery acts solely upon the *conscience* of litigant parties, by compelling the defendant to do what, and only what, *in foro conscientiæ* he is bound to do. If

[1] The following are examples of such judicial language: In Attorney-General v. Wilkins, 17 Beav. 285, 293, Lord Romilly said: "My opinion is, that when once you establish that a person is a purchaser for value without notice, this court *will give no assistance against him,* but the right must be enforced at law." In Bowen v. Evans, 1 Jones & L. 178, 264, Chancellor Sugden (Lord St. Leonards) said: "In my opinion, whether the purchaser has the legal estate, or only an equitable interest, he may, by way of defense, avail himself of the character of a purchaser without notice, and is entitled to have the bill dismissed against him, though the next hour he may be turned out of possession by the legal title" (i. e., by ejectment). An earlier and most able chancellor, Lord Northington, said, in Stanhope v. Earl Verney, 2 Eden, 81, 85: "A purchase without notice for a valuable consideration is a bar to the jurisdiction of the court." Lord Loughborough said, in the often-quoted case of Jerrard v. Saunders, 2 Ves. 454, 458: "I think it has been decided that against a purchaser for valuable consideration without notice the court *will not take the least step imaginable.*" In other cases the same judge used more guarded language, in Strode v. Blackburne, 3 Ves. 222. In the celebrated case of Wallwyn v. Lee, 9 Ves. 24, 34, Lord Eldon expressed himself in the following cautious terms: "I am not sure *that* follows as a principle of sound equity; *if the principle of the court is,* that against a purchaser for valuable consideration without notice, *this court gives no assistance.*"

the relations between the two contestants standing before the court of chancery are such that, in equity and good conscience, the plaintiff ought to obtain the aid which he asks, and the defendant ought to do or suffer what is demanded of him, then the court will interfere and grant the relief; if the relations are not of this character, then the court will withhold its hand, and will leave the parties to the operation of strict legal rules, and to the remedies conferred by the legal tribunals. All equitable principles and doctrines *had their origin in this conception,* however much it may sometimes be overlooked by courts at present in the administration of the doctrines which have been thus established. The protection given to the *bona fide* purchaser simply means, therefore, that from the relations subsisting between the two parties, especially that which is involved in the innocent position of the purchaser, equity refuses to interfere and to aid the plaintiff in what he is seeking to obtain, because it would be unconscientious and inequitable to do so, and the parties must be left to their pure legal rights, liabilities, and remedies; the court will not aid either against the other. That this is the true *rationale* is shown by an overwhelming weight of authority.[1] In the vast majority of cases the protection is only given to a defendant, and as a consequence the doctrine itself is commonly spoken of, and ordinarily treated, as essentially

[1] Thus in Boone v. Chiles, 10 Pet. 177, 210, the supreme court, adopting the language of Lord St. Leonards in his treatise on vendors, said: "A court of equity acts only on the conscience of the party; and if he has done nothing that taints it, no demand can attach upon it so as to give jurisdiction." In the case of Jerrard v. Saunders, 2 Ves. 454, 457, Lord Loughborough said: "Against a purchaser for a valuable consideration this court has no jurisdiction. You *cannot attach upon the conscience* of the party any demand whatever, where he stands as a purchaser having paid his money, and denies all notice of the circumstances set up by the bill." I would remark, in passing, that the expression above, "the court has no jurisdiction," like so many similar modes of statement, is open to criticism. The court certainly *has* jurisdiction in all such cases, since the interest of one, or perhaps of both, of the litigants is equitable. The real meaning is, that the court, under these circumstances and according to its settled principles, *will not exercise its jurisdiction.*

a matter of defense. The very few instances in which affirmative relief is granted to the *bona fide* purchaser are exceptional; they rest upon their special facts, and arise from the fraud of the defendant against whom the relief is awarded.[2]

§ 739. The Doctrine is not a Rule of Property or of Title.— In applying the doctrine of *bona fide* purchase — and this is the very *essence* of the doctrine — equity does not intend *to pass upon and decide the merits of the two litigant parties;* it does not decide that the title of the defendant is valid, and therefore intrinsically the better and superior to that of the plaintiff. On the contrary, the protection given by way of defense theoretically assumes *that the title of the purchaser is really defective* as against that of his opponent; at all events, the court of equity wholly ignores the question of validity, declines to examine into the intrinsic merits of the two claims, and bases its action upon entirely different considerations.[1] If a plaintiff, holding

2 See *infra,* §§ 779–783.

1 This truth, so fundamental, and yet so often overlooked, was well stated by Lord Eldon in the celebrated case of Wallwyn v. Lee, 9 Ves. 24, 33, 34. The suit was by the holder of the legal title, who was in actual possession of the land, and who was seeking discovery and a delivery up of the title deeds against a mortgagee, who set up the defense of *bona fide* purchaser. The chancellor said: "Is it not worth consideration, *whether every plea* of purchase for a valuable consideration without notice *does not admit that the defendant has no title.* If he has a good title, why not discover? I apprehend there is a sufficient ground for saying a man who has honestly dealt for valuable consideration without notice shall not be called upon, by confessions wrung from his conscience, to say he has missed his object in the extent in which he meant to acquire it." Every one who is familiar with Lord Eldon's judgments knows that it was his invariable practice to express his most settled opinions in the form of inquiries, or suggestion, or suppositions. In another passage, while speaking of the plaintiff's legal rights and the defendant's corresponding legal liabilities, he doubts "whether, upon the argument of this plea, the court has any right to discuss that question," and adds: "Is it not worth consideration, whether the very principle of the plea is not this: I have honestly and *bona fide* paid for this, in order to make myself the owner of it, and you shall have no information from me as to the perfection or imperfection of my title, until you deliver me from the peril in which you state I have placed myself in the article of purchasing *bona fide?*"

some equitable interest of right, sues to enforce it against a defendant who has in good faith obtained the legal estate, the court simply refuses to interfere and do an unconscientious act by depriving him of the advantage accompanying such an innocent acquisition of the legal title. On the other hand, if the plaintiff is the legal owner, and sues to obtain some equitable relief against a defendant who is the innocent holder of some equitable estate or interest, the court in like manner simply refuses to do an unconscientious act by giving any aid to the plaintiff, but, without at all deciding or even examining the intrinsic merits of their claims, leaves him to whatever rights would be recognized and whatever reliefs granted by a court of law. It is thus seen that the doctrine of *bona fide* purchaser as administered by equity *is not in any sense a rule of property.*[a] Whenever the relations between the litigants are of such a nature, and the suit is of such a kind, that a court of equity is called upon to decide, and must decide, the merits of the controversy, and determine the validity and sufficiency of the opposing titles or claims, then it does not admit the defense of *bona fide* purchase as effectual and conclusive. The foregoing description shows that it is wholly unwarranted by the settled principles of equity for a court to sustain and enforce the *subsequent* legal estate acquired by A in any kind of property or thing in action, merely because he is a *bona fide* purchaser for a valuable consideration without notice, against the prior legal and equally innocent owner, B, or even to sustain A's defense as a *bona fide* purchaser in a suit brought by B.

§ 740. **General Extent and Limits — Kinds of Estates Protected.**— Such being the *rationale* of the doctrine, it remains to consider the general extent and limits of its operation;

(a) This portion of the text is quoted in Sengfelder v. Hill, 21 Wash. 371, 58 Pac. 250; § 739 is cited and paraphrased in Knoblock v. Mueller, 123 Ill. 554, 17 N. E. 696; and cited, generally, in United States v. Detroit Timber & L. Co. (C. C. A.), 131 Fed. 668, 678.

and this chiefly involves the question, To what kinds of estates held by the *bona fide* purchaser will it be applied? It has never been doubted that the protection will be extended to the defendant in a suit brought by the holder of a prior equitable estate or interest against the subsequent *bona fide* purchaser of a legal estate, who acquired such estate at the time of and by means of his original purchase.[1] [a] It is also generally extended, in the similar suit by the holder of a prior equitable interest, to a defendant who, having originally been the *bona fide* purchaser of a subsequent equity, has afterwards obtained an outstanding legal estate.[2] The vital question is, whether the defense will also avail on behalf of a defendant who has acquired an *equitable* interest merely, against a plaintiff who holds a prior legal estate; and upon this question, decisions and judicial *dicta,* especially the earlier ones, are in direct conflict. Some cases have expressly held, and *dicta* have stated, that the protection of *bona fide* purchase is confined to defendants who have obtained and hold a legal title against plaintiffs who have only a prior equitable interest, and that it is never granted, where the situation of the parties is reversed, to *bona fide* purchasers of a mere equitable interest defending against relief sought by plaintiffs holding a prior legal estate.[3] [b] It is proper

1 See *post,* §§ 767, 774, and cases there cited; Demarest v. Wynkoop, 3 Johns. Ch. 129, 147; 8 Am. Dec. 467; Varick v. Briggs, 6 Paige, 323; Dickerson v. Tillinghast, 4 Paige, 215: 25 Am. Dec. 528; Woodruff v. Cook, 2 Edw. Ch. 259; Zollman v. Moore, 21 Gratt. 311; Carter v. Allan. 21 Gratt. 241; Mundine v. Pitts, 14 Ala. 84; Boyd v. Beck, 29 Ala. 703; Wells v. Morrow, 38 Ala. 125; Sumner v. Waugh, 56 Ill. 531.

2 See *post,* §§ 768–773, and cases cited.

3 Rogers v. Seale, Freem. Ch. 84, per Lord Nottingham; Williams v. Lambe, 3 Brown Ch. 264, per Lord Thurlow; Strode v. Blackburne, 3 Ves. 222, per

(a) The text is quoted in Sengfelder v. Hill, 21 Wash. 371, 58 Pac. 250; cited, in Robbins v. Moore, 129 Ill. 30, 21 N. E. 934; Home Sav. & State Bank v. Peoria Agricultural & Trotting Soc., 206 Ill. 9, 69 N. E. 17, 99 Am. St. Rep. 132.

(b) See, also, Butler v. Douglas, 3 Fed. 612 (defense not available to vendee of vendee against the original

to remark here, although somewhat in anticipation, that there are certain kinds of suits by the holder of a prior legal estate seeking certain special reliefs, in which it is settled that the defendant having only an equitable interest cannot rely upon his position as a *bona fide* purchaser by way of defense.[4 c] On the other hand, there are numerous cases, early and recent, English and American, in which the defense has been permitted to prevail in favor of one holding a mere equitable interest against a plaintiff suing for some equitable relief upon his legal title, sometimes even when such plaintiff was in possession, and this conclusion must be regarded as settled by the great weight of authority.[5 d] In some of these cases, the judicial expres-

Lord Rosslyn; Collins v. Archer, 1 Russ. & M. 284, per Sir John Leach; Snelgrove v. Snelgrove, 4 Desaus. Eq. 274; Blake v. Heyward, 1 Bail. Eq. 208, Brown v. Wood. 6 Rich. Eq. 155; Jenkins v. Bodley, 1 Smedes & M. Eq. 338; Wailes v. Cooper, 24 Miss. 208; Larrowe v. Beam, 10 Ohio, 498.

4 Williams v. Lambe, 3 Brown Ch. 264 (a suit for dower); Collins v. Archer, 1 Russ. & M. 284 (a suit concerning tithes).

5 Basset v. Nosworthy, Cas. t. Finch, 102; 2 Lead. Cas. Eq. 1; Burlace v. Cooke, Freem. Ch. 24, per Lord Nottingham; Parker v. Blythmore, Prec. Ch. 58, per Sir John Trevor, M. R.; Jerrard v. Saunders, 2 Ves. 454, per Lord Rosslyn; Wallwyn v. Lee, 9 Ves. 24, per Lord Eldon; Joyce v. De Moleyns, 2 Jones & L. 374, per Chancellor Sugden; Bowen v. Evans, 1 Jones & L. 178, 264, per Chancellor Sugden; Finch v. Shaw, 19 Beav. 500, per Lord Romilly; Collyer v. Finch, 5 H. L. Cas. 905, per Lord Cranworth; Attorney-General v. Wilkins, 17 Beav. 285; Lane v. Jackson, 20 Beav. 535; Hope v. Lyddell, 21 Beav. 183; Penny v. Watts, 1 Macn. & G. 150; Flagg v. Mann, 2 Sum. 486, per Story, J.; Union Canal Co. v. Young, 1 Whart. 410, 431; 30 Am. Dec. 212, per Rogers, J.

vendor, who retained the legal title and seeks to foreclose his lien); Sandley v. Caldwell, 28 S. C. 583, 6 S. E. 818 (does not avail a mortgagee against the claim of dower by the widow of his mortgagor's prior grantee by an unrecorded deed); Sweetman v. Edmunds, 28 S. C. 58, 5 S. E. 165 (an absurd misapplication of the rule; the equitable ownership of the plaintiffs, heirs of a deceased vendee who had never received a deed, treated as the "legal title" in a suit against a later grantee of the vendor!)

(c) In Mitchell v. Farrish, 69 Md. 235, 14 Atl. 712, it was held that the defense of a *bona fide purchase* for value and without notice was no defense, even in equity, as against a legal claim to dower. See, also, Sandley v. Caldwell, 28 S. C. 583, 6 S. E. 818; and *post*, § 765.

(d) See *post*, §§ 764, 765, and cases cited.

sions of opinion have been so broad and unlimited, that, taken literally, they would allow the protection of *bona fide* purchase by way of defense to one having only an equitable interest, in every kind of suit brought to obtain any species of relief, and against any plaintiff, whether holding a legal or an equitable estate.[6 e] Relying upon these *dicta,* some writers and judges have announced the doctrine in a form wholly unlimited and universal.

§ 741. Same — When the Doctrine does not Apply.— Such a method of statement is clearly inaccurate. Notwithstanding the numerous authorities referred to in the preceding paragraph, and the sweeping expressions of judicial opinion, it is certain that the doctrine is subject to limitation; it is settled that in some classes of suits a defendant having only an equitable interest cannot be protected by his

6 As illustrations, in Joyce v. De Moleyns, 2 Jones & L. 374, Chancellor Sugden said: "I apprehend that the purchase for value without notice *is a shield as well against a legal as an equitable title.* There has been a considerable difference of opinion upon the subject among judges. I have always considered the true rule to be that which I have stated. Therefore, I think that the mere circumstance that this is a legal right is not a bar to the defense set up, if in other respects it is a good defense. That it is a good defense cannot be denied." The same learned judge, in Bowen v. Evans, 1 Jones & L. 178, 264, said: "In my opinion, whether the purchaser has the legal estate or only an equitable interest, he may by way of defense avail himself of the character of a purchaser without notice, and is entitled to have the bill dismissed against him, though the next hour he may be turned out of possession by the legal title" (i. e., by an action of ejectment). In Colyer v. Finch, 5 H. L. Cas. 905, 921, Lord Chancellor Cranworth said: "The principle on which the court protects a purchaser for valuable consideration without notice *is wholly regardless of what estate he has.* It may be that he has not the legal estate, but that will be quite unimportant as to a court of equity interfering or refusing to interfere. His equity depends on this, that he stands equitably in at least as favorable a position as his opponent, and therefore the court will not interfere against him." This language, especially of Lord Cranworth, has been relied upon as sustaining the doctrine in the broadest manner, that *bona fide* purchasers of mere equities will always be protected. And yet the chancellor and house of lords decided in that very case that the defendant before them, who held an equitable interest, could not maintain the defense of a *bona fide* purchase against the plaintiff who had the legal estate.

(e) See, also, Bausman v. Kelley, 38 Minn. 197, 36 N. W. 333, 8 Am. St. Rep. 661, citing, but plainly misunderstanding, the text.

position as a *bona fide* purchaser. Thus in an action for foreclosure brought by a prior legal mortgagee, holding, of course, the legal estate, against a subsequent equitable mortgagee, the fact that the latter acquired his equitable interest in good faith for a valuable consideration and without notice is no defense.[1] [a] It is also a well-established and even familiar rule that in the numerous cases between the holders of successive and equal equities, where the holder of a prior equitable interest is seeking to establish or enforce his right, the defense of *bona fide* purchase will not avail for the holder of a subsequent equity against whom the suit is brought.[2]

§ 742. **Phillips v. Phillips — Formula of Lord Westbury.**— Amidst this apparent conflict and real uncertainty, various judges had attempted to find a mode of reconcilement, and to formulate a rule which should furnish a universal criterion.[1] It remained, however, for Lord Westbury to bring order out of the confusion, and by his remarkable grasp of principles and wonderful power of generalization to re-

§ 741, [1] Finch v. Shaw, 19 Beav. 500; affirmed *sub nom.* Colyer v. Finch, 5 H. L. Cas. 905.

§ 741, [2] Phillips v. Phillips, 4 De Gex, F. & J. 208, 215, 216, per Lord Westbury. See *ante*, §§ 414, note, 682.

§ 742, [1] For example, in Finch v. Shaw, 19 Beav. 500, Sir John Romilly, M. R., after remarking that there were cases requiring nice distinctions in order to reconcile them, and mentioning in particular Williams v. Lambe, 3 Brown Ch. 264, and Collins v. Archer, 1 Russ. & M. 284, said: "The distinction I apprehend to be this: if the suit be for the enforcement of a legal claim for the establishment of a legal right, then, although this court may have jurisdiction in the matter, it will not interfere against a purchaser for valuable consideration without notice, but will leave the parties to the law. If, on the other hand, the legal title is perfectly clear, and attached to that legal title there is an equitable remedy, or an equitable right, *which can only be enforced in this court*, I have not found any case, nor am I aware of any, where this court will refuse to enforce the equitable remedy which is incidental to the legal title." This was applied, as has been stated, to a *legal* mortgagee foreclosing his mortgage against a subsequent *bona fide* equitable mortgagee without notice. The learned master of rolls plainly apprehended the true distinction, and came very near to a full and sufficient statement of it.

(a) See *post*, § 765.

duce the doctrine into a universal formula, so accurate and comprehensive that it has been taken by most subsequent text-writers as the basis of their discussions, and has been accepted by subsequent judges almost without exception.[2] [a]

[2] Phillips v. Phillips, 4 De Gex, F. & J. 208. Lord Westbury's opinion is so concise as well as clear that I quote that part of it entire which deals with the matters contained in the text. After showing (pp. 215, 216) that the doctrine does not apply as between successive holders of purely equitable estates or interests which are equal in their nature, in the passage quoted *ante*, vol. 1, § 414, note, he proceeds (p. 216): "The defense of a purchaser for valuable consideration is a creature of a court of equity, and it can never be used in any manner in variance with the elementary rules which have already been stated. There appear to be three cases in which the use of this defense is most familiar: 1. Where an application is made to an auxiliary jurisdiction of the court by the possessor of a legal title, as by an heir at law for a discovery (which was the case in Basset v. Nosworthy, Cas. t. Finch, 102), or by a tenant for life for the delivery of title deeds (which was the case of Wallwyn v. Lee, 9 Ves. 24), and the defendant pleads that he is a *bona fide* purchaser for valuable consideration without notice. In such a case the defense is good, and the reason given is, that as against a purchaser for valuable consideration without notice the court gives no assistance,— that is, no assistance to the legal title. But this rule does not apply where the court exercises a *legal* jurisdiction concurrently with courts of law. Thus it was decided by Lord Thurlow, in Williams v. Lambe, 3 Brown Ch. 264, that the defense could not be pleaded to a bill for dower; and by Sir John Leach, in Collins v. Archer, 1 Russ. & M. 284, that it was no answer to a bill for tithes. In those cases the court of equity was not asked to give the plaintiff any equitable as distinguished from legal relief. 2. The second class of cases is the ordinary one of several purchasers or encumbrancers, each claiming in equity, and one who is later and last in time succeeds in obtaining an outstanding legal estate not held upon existing trusts, or a judgment, or any other legal advantage the possession of which may be a protection to himself or an embarrassment to other claimants. He will not be deprived of this advantage by a court of equity. To a bill filed against him for this purpose by a prior purchaser or encumbrancer, the defendant may maintain the plea of purchase for valuable consideration without notice; for the principle is, that a court of equity will not disarm a purchaser, — that is, will not take from him the shield of any legal advantage. This is the common doctrine of the *tabula in naufragio*. 3. Where there are circumstances which give rise to an equity as distinguished from an equitable estate,—as, for example, an equity to set aside a deed for fraud, or to correct it, for mistake,— and the purchaser under the instrument maintains the plea of purchase for valuable consideration without notice, the court will not interfere." [b]

(a) The text is cited, as to the authority of Lord Westbury's opinion, in Knoblock v. Mueller, 123 Ill. 554, 17 N. E. 696.

(b) This sentence of the opinion is quoted in Knoblock v. Mueller, 123 Ill. 554, 17 N. E. 696.

This formula groups the cases in which the protection of a *bona fide* purchaser is given to defendants into the three following classes: 1. Where an application is made to the *auxiliary* jurisdiction of the court by the possessor of a *legal* title; as against a purchaser for value without notice, a court of equity *gives no assistance to the legal title.* The term " auxiliary jurisdiction " is here used in a sense somewhat broader than that commonly given to it by text-writers. To this first rule there are, however, certain most important exceptions. It does not apply to suits in which the court exercises a *legal* jurisdiction concurrently with courts of law, nor to suits in which the court gives to a holder of the legal title some equitable remedy belonging

The chancellor concludes by referring to some recent decisions (p. 219). He does not agree with some remarks of Sir John Romilly in Attorney-General v. Wilkins, 17 Beav. 285, but entirely concurs in and accepts the views as stated by the same judge in Finch v. Shaw, 19 Beav. 500. Lord St. Leonards has dissented from some portions of this celebrated judgment, in a late edition of his work on vendors. It is proper to say, in explanation, and the same observation has often been made, that Lord St. Leonards always appeared extremely unwilling to accept any opinion, or even any decision, which differed from what had been before stated in his treatises, and he exhibited a marked prejudice against certain judges who, like Lord Brougham and Lord Westbury, were distinguished for their advocacy of legal reforms. I will add that the exception so distinctly made by Lord Westbury of successive holders of purely equitable interests which are equal in their nature is most clearly in harmony with the elementary principles and maxims of equity. If the legal owner of land has executed a contract for its sale and conveyance to A, who has paid the stipulated price, and he afterwards gives a similar contract to B, who takes it and pays the price in full without any notice of the prior agreement, there is no reason why B should be preferred to A, and should be allowed to compel a conveyance to himself. On the contrary, between two such equal claimants. A's priority in time clearly gives him a priority of right: See Peabody v. Fenton, 3 Barb. Ch. 451, 464. The same would be true of successive mortgages given on the same land to different mortgagees, if they were regarded as creating equitable interests only, and there was no recording statute to modify the application of equitable doctrines. Where both mortgagees were equally meritorious, each having advanced money, the first, of course, without any notice of the second, and the second without any notice of the first, the second would not obtain any *intrinsic* superiority to the first, and consequently the maxim would control, and the priority in time would turn the scale in equity as well as it would at law between successive legal interests. These examples will serve to explain a principle which has been fully discussed in the preceding section.

to its *exclusive general* jurisdiction.[c] 2. Where the plaintiff, holding an *equitable* estate or interest, is seeking to enforce it against a purchaser of the legal title, including those cases where there are several successive purchasers or encumbrancers, all equitable, and the defendant who is later in time has obtained an outstanding legal estate, or some other legal advantage, often called the "*tabula in naufragio.*"[d] 3. Where the plaintiff is seeking to enforce some "equity" as distinguished from an equitable estate, as the reformation of a deed on account of mistake, or the setting it aside on the ground of fraud.[e]

§ 743. Summary of Conclusions.— The following conclusions must be drawn from the foregoing discussion: Wherever one or the other of the parties has a legal estate over which a court of law can exercise jurisdiction, then in an equity suit between them, as a general rule, the defense of a *bona fide* purchase for valuable consideration will avail as against the plaintiff, whether he has a legal or an equitable estate, in either case the court of equity simply withholding its hand and remitting the parties to a court of law.[a] If the plaintiff has a legal estate, he is left to the remedies which a court of law can give, without any aid from equity; if the defendant has a legal estate, the court does not deprive him, even as against a plaintiff clothed with an equitable interest, of the advantage which the law confers upon the holder of such estate, and which it secures through the instrumentality of a legal tribunal. If the suit concerns legal interests, and is one of which a court of equity has jurisdiction concurrently with the courts of law, the defense will not prevail. For even stronger reasons must this be true where the suit belongs to the *exclusive general* jurisdiction of equity, and

(c) See *post*, §§ 764, 765.

(d) See *post*, §§ 766–774.

(e) See *post*, §§ 775–778.

(a) This passage of the text was cited and followed in Verner v. Betz, 46 N. J. Eq. 256, 19 Atl. 206, 19 Am. St. Rep. 387, 7 L. R. A. 630 (purchase of house removed from mortgaged land).

not only is the defendant's interest equitable, but the plaintiff's right or remedy is also equitable, and must be administered, if at all, by a court of equity. Bearing in mind that, independently of statute, the doctrine of protection to a *bona fide* purchaser is confined to courts of equity, and the most important truth that it is *in no respect a rule of property,* but merely *a rule of inaction,* these conclusions are seen to be equally plain and just. In the first-mentioned class of cases, where equity has concurrent jurisdiction, the defense is not allowed, for otherwise the parties would be put to unnecessary delay and expense, since the plaintiff would be driven to a second action at law, in which he would, of course, obtain the relief. In the second class of cases, where equity has an exclusive jurisdiction, to allow the defense would simply be a complete denial of justice, since no other tribunal could adjudicate upon the conflicting claims, and the plaintiff might thus be deprived of prior and vested rights without any act or default on his own part.[1]

§ 744. The explanation which I have thus endeavored to give of the true theory of the doctrine concerning *bona fide* purchase seemed to be necessary to any accurate understanding of its applications and effects. This original equitable theory has, however, been modified in some important features by the statutory system of registration which prevails in all the American states. Before proceeding to describe the applications and effects of the doctrine, it is proper to ascertain who the *bona fide* purchaser for valuable consideration is.

§ 745. Second. What Constitutes a Bona Fide Purchase.— Under this head I shall state those essential elements which enter into the equitable conception and determine the peculiar position of a *bona fide* purchaser, so that he may come within the operation of the doctrine. The nature

[1] See 2 Lead. Cas. Eq., 4th Am. ed., 22, notes to Basset v. Nosworthy, where these conclusions are fully adopted by the English editor.

of the thing purchased, whether land, chattels, or securities, and of the estate acquired, whether absolute or qualified, legal or equitable, is not a part of *this* conception; it belongs wholly to the effects — the protection — produced by the purchase. The doctrine in its most general form is, that a purchaser in good faith for a valuable consideration and without notice of the prior adverse claims is protected against certain suits brought by the holders of such claims.[1] [a] The essential elements which constitute a *bona fide* purchase are therefore three,— a valuable consideration, the absence of notice, and the presence of good faith.[b] It will be practically the more convenient and advantageous to examine these three elements separately and in the order named, although in strict theory the presence of notice may perhaps be regarded as only an indication of the want of good faith. If a person goes on and purchases after notice of another's rights, he may be considered as acting in bad faith, and this is undoubtedly the basis upon which the whole doctrine of notice and its effects was rested by the early decisions.[2] Practically, however, notice, especially as affected by the recording acts, is an independent element, and should be discussed by itself.

§ 746. I. The Valuable Consideration.— The discussion of this subject involves two inquiries, which are entirely distinct, and which should not be confounded: 1. What is a valuable consideration; and 2. Its payment. These two

[1] For a statement of what constitutes a *bona fide* purchase in general, see Willoughby v. Willoughby, 1 Term Rep. 763, 767, per Lord Hardwicke; also *ante*, vol. 1, cases cited in notes under § 200; Basset v. Nosworthy, 2 Lead. Cas. Eq., 4th Am. ed., 33–42, 73–96; Kinney v. Consolidated etc. Min. Co., 4 Saw. 382; Fed. Cas. No. 7,827; Hardin v. Harrington, 11 Bush, 367; Briscoe v. Ashby, 24 Gratt. 454; Hamman v. Keigwin, 39 Tex. 34.

[2] See *ante*, § 592.

(a) This paragraph of the text is cited in The Elmbank, 72 Fed. 610; Martin v. Bowen, 51 N. J. Eq. 452, 26 Atl. 823; Sweatman v. City of Deadwood, 9 S. Dak. 380, 69 N. W. 582.

(b) The text is quoted in United States v. California & O. Land Co., 148 U. S. 31, 13 Sup. Ct. 458; cited, in Citizens' Bank v. Shaw, 14 S. Dak. 197, 84 N. W. 779; Knoblock v. Mueller, 123 Ill. 554, 17 N. E. 696.

questions are to be examined, not at all in their general and abstract meaning, but wholly as they affect the condition of a *bona fide* purchaser. The first has no relation to the general law of contracts and binding promises; the second, in like manner, deals with the act and time of payment only in connection with the doctrine of *bona fide* purchase.

§ 747. 1. **What is Valuable Consideration.**— What constitutes a valuable consideration within the meaning of the doctrine which gives protection to a *bona fide* purchaser? No person who has acquired title as a mere volunteer, whether by gift, devise, inheritance, post-nuptial settlement on wife or child, or otherwise, can thereby be a *bona fide* purchaser.[1] [a] Valuable consideration means, and necessarily requires under every form and kind of purchase, something of actual value, capable, in estimation of the law, of pecuniary measurement,— parting with money or money's worth, or an actual change of the purchaser's legal position for the worse.[2] [b] The amount of the purchase, if

[1] Roseman v. Miller, 84 Ill. 297; Bowen v. Prout, 52 Ill. 354 (inheritance); Everts v. Agnes, 4 Wis. 343; 65 Am. Dec. 314; Upshaw v. Hargrove, 6 Smedes & M. 286, 292; Boon v. Barnes, 23 Miss. 136; Swan v. Ligan, 1 McCord Eq. 227; Patten v. Moore, 32 N. H. 382; Frost v. Beekman, 1 Johns. Ch. 288; Aubuchon v. Bender, 44 Mo. 560; Bishop v. Schneider, 46 Mo. 472; 2 Am. Rep. 533.

[2] Id.; Tourville v. Naish, 3 P. Wms. 316; Story v. Lord Windsor, 2 Atk. 630; Hardingham v. Nicholls, 3 Atk. 304; Webster v. Van Steenbergh, 46 Barb. 211; Pickett v. Barron, 29 Barb. 505; Dickerson v. Tillinghast, 4 Paige, 215; 25 Am. Dec. 528; Penfield v. Dunbar, 64 Barb. 239; Weaver v. Barden, 49 N. Y. 286; Delancey v. Stearns, 66 N. Y. 157; Westbrook v. Gleason, 79 N. Y. 23, 28; Williams v. Shelly, 37 N. Y. 375; Lawrence v. Clark, 36 N. Y.

(a) See, also, Baker v. Lever, 67 N. Y. 304, 23 Am. Rep. 117; Ten Eyck v. Whitbeck, 135 N. Y. 40, 31 N. E. 994, 31 Am. St. Rep. 809; Carothers v. Sims, 194 Pa. St. 386, 45 Atl. 47; First Nat. Bank v. Randall, 20 R. I. 319, 78 Am. St. Rep. 867, 38 Atl. 1055; Hudnal v. Wilder, 4 McCord, 294, 17 Am. Dec. 744; Toole v. Toole, 107 Ga. 472, 33 S. E. 686 (quoting the text); Fisk v. Osgood, 58 Nebr. 486, 78 N. W. 924; Withers v. Little, 56 Cal. 370; Hughes v. Berrien, 70 Ga. 273; Pearce v. Jackson, 61 Tex. 642; Brown v. Texas Cactus Hedge Co., 64 Tex. 396; Petry v. Ambrosher, 100 Ind. 510; Bird v. Jones, 37 Ark. 195.

(b) The text is quoted in The Elmbank, 72 Fed. 610, and cited in Ellison v. Torpin, 44 W. Va. 414, 30

otherwise in good faith, is not generally material.[3] As examples of what clearly amount to valuable consideration are the following: A contemporaneous advance or loan of

128; Reed v. Gannon, 3 Daly, 414; Munn v. McDonald, 10 Watts, 270; Union Canal Co. v. Young, 1 Whart. 410, 432; 30 Am. Dec. 212; Roxborough v. Messick, 6 Ohio St. 448; 67 Am. Dec. 346; Palmer v. Williams, 24 Mich. 328; Brown v. Welch, 18 Ill. 343; 68 Am. Dec. 549; Keys v. Test, 33 Ill. 316; McLeod v. Nat. Bank, 42 Miss. 99; Haughwout v. Murphy, 21 N. J. Eq. 118; Aubuchon v. Bender, 44 Mo. 560; Spurlock v. Sullivan, 36 Tex. 511.

[3] If there is an actual value properly paid, the amount is not material if the transaction is otherwise in good faith: Wood v. Chapin, 13 N. Y. 509; 67 Am. Dec. 62; Cary v. White, 52 N. Y. 138, 142; Pickett v. Barron, 29 Barb. 505; Seward v. Jackson, 8 Cow. 406, 430; Westbrook v. Gleason, 79 N. Y. 23, 36, per Rapallo, J.[c] The amount if grossly small and inadequate would not be a valuable consideration so as to protect the purchaser, because it would show bad faith: Worthy v. Caddell, 76 N. C. 82.[d] It has been held

S. E. 183; §§ 745–747 are cited in Harney v. First Nat. Bank, 52 N. J. Eq. 697, 29 Atl. 221. See, also, Ten Eyck v. Whitbeck, 135 N. Y. 40, 31 N. E. 994, 31 Am. St. Rep. 809. No merely moral consideration is sufficient: Peek v. Peek, 77 Cal. 106, 19 Pac. 227, 11 Am. St. Rep. 244, 1 L. R. A. 185.

(c) See, also, Skerrett v. Presbyterian Soc., 41 Ohio St. 606 (where a consideration of one dollar, that being the value of the premises, was held to constitute the grantee a purchaser for value): Emonds v. Termehr, 60 Iowa, 92, 14 N. W. 197; Two Rivers Mfg. Co. v. Beyer, 74 Wis. 210, 42 N. W. 232, 17 Am. St. Rep. 131.

(d) As to great inadequacy of price putting the purchaser on inquiry, see *ante*, § 600, and cases cited. See, also, Dunn v. Barnum, 2 C. C. A. 265, 269, 51 Fed. 355, 359; Mackay v. Gabel, 117 Fed. 873; Ten Eyck v. Witbeck, 135 N. Y. 40, 31 N. E. 994, 31 Am. St. Rep. 809; Cox v. Collis, 109 Iowa, 270, 80 N. W. 343; Sewell v. Nelson, 23 Ky. Law Rep. 2438, 67 S. W. 985; Stewart v. Crosby, (Tex. Civ. App.) 26 S. W. 138 ($55 paid for property worth $11,000); Hanrick v. Gurley, (Tex. Civ. App.) 48 S. W. 994 ($1,000 paid for property worth $500,000); Huff v. Maroney, 23 Tex. Civ. App. 465, 56 S. W. 754; Carpenter v. Anderson, (Tex. Civ. App.) 77 S. W. 291 ($53 paid for property worth $2,500). In Ten Eyck v. Witbeck, 135 N. Y. 40, 31 N. E. 994, 31 Am. St. Rep. 809, a father conveyed to a daughter a farm worth $20,000 in consideration of $10, which was paid, and of her undertaking to pay the net proceeds of the place to him during his life, and after his death a certain portion thereof to his wife and other daughter. Held, that the deed did not render her a purchaser for a valuable consideration under the recording act, as against a prior unrecorded conveyance by the father. The undertakings in the deed were not a valuable consideration, since they had no binding force apart from the deed; and in a transaction which was in all essentials a gift, "a small sum, inserted and paid, perhaps because of a popular belief that some slight money consideration is necessary to render the deed valid,

money, or a sale, transfer, or exchange of property, made at the time of the purchase or execution of the instrument;[4e] the surrender or relinquishment of an existing legal right, or the assumption of a new legal obligation which is in its

that paying a purchase price in confederate money was not valuable consideration within the rule: Sutton v. Sutton, 39 Tex. 549; Willis v. Johnson, 38 Tex. 303.

[4] Gerson v. Pool, 31 Ark. 85 (loaning money on the security of a trust deed); Bowen v. Prout, 52 Ill. 354 (exchange of lands); Munn v. McDonald, 10 Watts, 270; Martin v. Jackson, 27 Pa. St. 504, 509; 67 Am. Dec. 489; Roxborough v. Messick, 6 Ohio St. 448; 67 Am. Dec. 346; Keirsted v. Avery, 4 Paige, 9; Conard v. Atlantic Ins. Co., 1 Pet. 386. And where the price of a conveyance consisted in part of money actually paid, and the residue of antecedent debt satisfied, the whole has been held to constitute a valuable consideration: Curtis v. Leavitt, 15 N. Y. 11, 179; Glidden v. Hunt, 24 Pick. 221; Baggarly v. Gaither, 2 Jones Eq. 80.

will not, of itself, satisfy the terms of the statute, where it appears upon the face of the conveyance or by other competent evidence that it was not the actual consideration." In Dunn v. Barnum, 51 Fed. 355, 360, land worth $30,000, and rapidly increasing in value, was bought for $100. Caldwell, Cir. J., says, in part, "In the judgment of all mankind — and there is no surer guide to the right than the universal *consensus* of opinion among men — such a transaction, unexplained, implies a bad title or bad faith. . . . . Such a conveyance passes the legal title, and may be good between the parties as a gift, or as a conveyance to remove a cloud from the title, or as a sale of a confessedly doubtful and disputed title, and for such like purposes; but when it is set up and relied on under the registration laws of the state as a means of taking lands from the real owner, because, and only because, his deed was not recorded, it will not be accepted as sufficient evidence that the vendee paid a valuable consideration and purchased without notice, either actual or constructive, or a well-grounded suspicion that his vendor had no title. . . . . The enormous discrepancy between the consideration expressed in this deed and the value of the land compels the conclusion that the grantee knew, or, what is the same thing in legal effect, had good reason to believe, there was a fatal infirmity in the title he was acquiring, and so was not a purchaser in good faith."

(e) For other illustrations see Aden v. City of Vallejo, 139 Cal. 165, 72 Pac. 905 (reservation in deed held to be sufficient); Rivers v. Rivers, 38 Fla. 65, 20 South. 807 (joining in deed by wife is sufficient consideration for deed to her); Lane v. Logue, 80 Tenn. (12 Lea) 681 (surrender of rights under contract of sale and title bond sufficient); Swenson v. Seale, (Tex. Civ. App.) 28 S. W. 143 (surrender of note of third person is a sufficient consideration); Halbert v. De Bode, (Tex. Civ. App.) 40 S. W. 1011 (relinquishment of interest in land and in notes and accounts against others than vendor is sufficient).

nature irrevocable.[5 f] Whether this species of valuable consideration embraces the discharge, or the extension of the time of payment, of an antecedent debt, is a question upon which the authorities are conflicting, and its examination is postponed to the succeeding paragraphs. In general, however, it is requisite that the money be paid or advanced, the property transferred, the right surrendered, or the obligation assumed, at the time of the conveyance, and as a part of the transaction, in order that it may be the valuable consideration which can protect the purchaser.

§ 748. **Antecedent Debts.**— Whether an antecedent debt can *ever* be a valuable consideration has been denied by able courts; but this general subject has been further complicated by the various modes in which such a debt may be dealt with,— secured, discharged, postponed, and the like,— and the various questions thence arising which have caused the greatest conflict of judicial opinion. In very many, and perhaps a majority, of the states it is settled that the transferee of negotiable paper as security for an antecedent debt may be a *bona fide* holder by the law merchant; but this rule

[5] In Westbrook v. Gleason, 79 N. Y. 23, 36, a vendee under a land contract was in open possession, having made improvements. While he was thus in possession a mortgage was given upon the land by his vendor, which was unrecorded. Afterwards, and before this mortgage was recorded, he took a deed of conveyance of the land from his vendor and gave back a bond and mortgage to secure the whole price. This deed he put on record before the first-named mortgage was recorded. The only question was, whether he could claim the benefit of his earliest record, by being a purchaser for a valuable consideration, although he had not paid any of the price. The court said "that if by accepting the deed he parted with his equitable title to the land, which had precedence of the plaintiff's mortgage [and thereby lost the priority], and with his right to the improvements, etc., then he was, within all the cases, a purchaser for value." See Williams v. Shelly, 37 N. Y. 375; Reed v. Gannon, 3 Daly, 414; McLeod v. Nat. Bank, 42 Miss. 99. For examples of giving up or canceling a security, see Youngs v. Lee, 12 N. Y. 551; Meads v. Merchants' Bank, 25 N. Y. 143; 82 Am. Dec. 331; Padgett v. Lawrence, 10 Paige, 170; 40 Am. Dec. 232; Struthers v. Kendall, 41 Pa. St. 214, 218; 80 Am. Dec. 610; Goodman v. Simonds, 20 How. 343, 371.

(f) The text is cited in Jones v. Hudson, 23 S. C. 494, to the effect that the assumption of an irrevocable liability is a valuable consideration.

cannot be a precedent in determining the meaning of valuable consideration within the equitable doctrine of *bona fide* purchase.[1 a]

§ 749. **Security for or Satisfaction of an Antecedent Debt.**—A conveyance of real or personal property as security for an antecedent debt does not, upon principle, render the transferee a *bona fide* purchaser, since the creditor parts with no value, surrenders no right, and places himself in no worse legal position than before. The rule has been settled, therefore, in very many of the states, that such a transfer is not made upon a valuable consideration, within the meaning of the doctrine of *bona fide* purchase.[1 a] In some states, on the

§ 748, [1] The rule concerning the transfer of negotiable instruments has been thus settled avowedly in the interests of commerce and mercantile business; these reasons do not apply to the purchase of land and chattels and non-negotiable securities. In some of the states, therefore, where it has been applied to negotiable paper, it has been rejected with respect to other conveyances and transfers.

§ 749, [1] Alexander v. Caldwell, 55 Ala. 517 (mortgage for a pre-existing debt); Short v. Battle, 52 Ala. 456; Gafford v. Stearns, 51 Ala. 434; Johnson v. Graves, 27 Ark. 557; Cary v. White, 52 N. Y. 138; Hart v. Bank, 33 Vt. 252; Poor v. Woodburn, 25 Vt. 235; Hodgeden v. Hubbard, 18 Vt. 504; 46 Am. Dec. 167; Clark v. Flint, 22 Pick. 231; 33 Am. Dec. 733; Buffington v. Gerrish, 15 Mass. 156; 8 Am. Dec. 97; Mingus v. Condit, 23 N. J. Eq. 313; Wheeler v. Kirtland, 24 N. J. Eq. 552; Ashton's Appeal, 73 Pa. St. 153, 162; Garrard v. Pittsburgh etc. R. R., 29 Pa. St. 154, 159; Prentice v. Zane, 2 Gratt. 262; Halstead v. Bank of Ky., 4 J. J. Marsh. 554; Manning v. McClure, 36 Ill. 490; Boon v. Barnes, 23 Miss. 136; Upshaw v. Hargrove, 6 Smedes & M. 286, 292; Haynsworth v. Bischoff. 6 Rich. 159; Spurlock v. Sullivan, 36 Tex. 511; Pancoast v. Duval, 26 N. J. Eq. 445; Van Heusen v. Radcliff, 17 N. Y. 580; 72 Am. Dec. 480; Weaver v. Barden, 49 N. Y. 286; Manhattan Co. v. Evertson, 6 Paige, 457; Padgett v. Lawrence, 10 Paige, 170; 40 Am. Dec. 232; Dickerson v. Tillinghast, 4 Paige, 215; 25 Am. Dec. 528; Zorn v. R. R. Co., 5 S. C. 90; Morse v. Godfrey, 3 Story, 364, 389; Fed. Cas. No. 9,856; Metropolitan Bank v. Godfrey, 23 Ill. 579; but see Doolittle v. Cook, 75 Ill. 354.

§ 748, (a) This paragraph of the text is cited in Martin v. Bowen, 51 N. J. Eq. 452, 26 Atl. 823.

§ 749, (a) The text is quoted in Marsh v. Ramsey, 57 S. C. 121, 35 S.E. 433; The Elmbank, 72 Fed. 610, citing cases. The text is cited in Missouri Broom Mfg. Co. v. Guymon, 115 Fed. 112 (Missouri); Petry v. Ambrosher, 100 Ind. 510; Goodwin v. Massachusetts L., etc., Co., 152 Mass. 189, 25 N. E. 100 (pledge of chattels; but see Merchants' Ins. Co. v. Abbott, 131 Mass. 397); Adams v. Vander-

contrary, even the securing a pre-existing debt is held to be a valuable consideration.[2 b] Whether the complete satisfaction or discharge or the definite forbearance of an antecedent debt, without the surrender or cancellation of any written security by the creditor, will be a valuable consideration is a question to which the courts of different states have

[2] Babcock v. Jordan, 24 Ind. 14; Frey v. Clifford, 44 Cal. 335.

beck, 148 Ind. 92, 45 N. E. 645, 47 N. E. 24, 62 Am. St. Rep. 497. See, also, People's Sav. Bank v. Batts, 120 U. S. 556, 7 Sup. Ct. 679; Gest v. Packwood, 34 Fed. 368 (Oregon); Hill v. Hitey, 79 Fed. 826; Randolph v. Webb, 116 Ala. 135, 22 South. 550; Banks v. Long, 79 Ala. 319; Busenbarke v. Ramey, 53 Ind. 499; Gilchrist v. Gough, 63 Ind. 576, 30 Am. Rep. 250; Davis v. Newcomb, 72 Ind. 413; Hewitt v. Powers, 84 Ind. 295; Louthain v. Miller, 85 Ind. 161; Boling v. Howell, 93 Ind. 329; Wert v. Naylor, 93 Ind. 431; First Nat. Bank v. Connecticut Mut. Life Ins. Co., 129 Ind. 241, 28 N. E. 695; Warford v. Hankins, 150 Ind. 489, 50 N. E. 468; Port v. Embree, 54 Iowa, 14, 6 N. W. 83; Phelps v. Fockler, 61 Iowa, 340, 14 N. W. 729; Koon v. Tramel, 71 Iowa, 137, 32 N. W. 243; Smith v. Moore, 112 Iowa, 60, 83 N. W. 813; Holmes v. Stix, 104 Ky. 351, 47 S. W. 243; Bronson Electric Co. v. Rheubottom, 122 Mich. 608, 81 N. W. 563; Lamb v. Lamb, (N. J. Eq.) 23 Atl. 1009; Reeves v. Evans, (N. J. Eq.) 34 Atl. 477; Protection B. & L. Ass'n v. Chickering, 54 N. J. Eq. 519, 34 Atl. 1083; Young v. Guy, 87 N. Y. 462; Seymour v. McKinstry, 106 N. Y. 238, 12 N. E. 348, 14 N. E. 94; Breed v. Nat. Bank of Auburn, 68 N. Y. Suppl. 68, 57 App. Div. 468, affirmed, 171 N. Y. 648, 63 N. E. 1115, and cases cited; Donaldson v. State Bank, 16 N. C. 103, 18 Am. Dec. 577; Southerland v. Fremont, 107 N. C. 565, 12 S. E. 237; Harris v. Horner, 21 N. C. (1 Dev. & B. Eq.) 455, 30 Am. Dec. 182; Union Nat. Bank v. Oium, 3 N. Dak. 193, 54 N. W. 1034, 44 Am. St. Rep. 533; Adamson v. Souder, 205 Pa. St. 498, 55 Atl. 182; Egan v. Raynor, (S. C.) 27 S. E. 475; Summers v. Brice, 36 S. C. 204, 15 S. E. 374; Gibson v. Hutchins, 43 S. C. 287, 21 S. E. 250; Steffian v. Milmo Nat. Bank, 69 Tex. 513, 6 S. W. 823; Miller v. Vernoy, 2 Tex. Civ. App. 675, 22 S. W. 64; Watts v. Corner, 8 Tex. Civ. App. 588, 27 S. W. 1087; Ingenhuett v. Hunt, 15 Tex. Civ. App. 248, 39 S. W. 310; Pride v. Whitfield, (Tex. Civ. App.) 51 S. W. 1100; Goetzinger v. Rosenfeld, 16 Wash. 392, 47 Pac. 882, 38 L. R. A. 257; Funk v. Paul, 64 Wis. 35, 24 N. W. 419, 54 Am. Rep. 576.

(b) See, also, Turner v. Killian, 12 Neb. 580, 12 N. W. 101; Henry v. Vliet, 36 Neb. 138, 54 N. W. 122, 19 L. R. A. 590; Chaffee v. Lumber Co., 43 Neb. 224, 61 N. W. 637, 47 Am. St. Rep. 753; Dorr v. Meyer, 51 Neb. 94, 70 N. W. 543; Longfellow v. Barnard, 58 Neb. 612, 76 Am. St. Rep. 117, 79 N. W. 255; Moore v. Fuller, 6 Or. 272, 25 Am. Rep. 524; Norwood v. Norwood, 36 S. C. 331, 15 S. E. 382, 31 Am. St. Rep. 875; Gilbert Bros. & Co. v. Lawrence Bros., (W. Va.) 49 S. E. 155. The earlier Indiana cases have been overruled: see West v. Naylor, 93 Ind. 431.

given conflicting answers; but the affirmative seems to be supported by the numerical weight of authority.[3] [c] Some legal rules ought to be settled in accordance with the results of experience and the dictates of policy, rather than by a compliance with the deductions of a strict logic. To hold that a conveyance as *security* for an antecedent debt is made without, but that one in *satisfaction* of such a debt is made

3 Satisfaction and discharge merely of an antecedent debt is a valuable consideration: Soule v. Shotwell, 52 Miss. 236 (the settled rule in Mississippi); Ruth v. Ford, 9 Kan. 17; Love v. Taylor, 26 Miss. 567; Saffold v. Wade's Ex'r, 51 Ala. 214; Ohio Life Ins. etc. Co. v. Ledyard, 8 Ala. 866; Bank v. Godfrey, 23 Ill. 579, 606; Donaldson v. Bank of Cape Fear, 1 Dev. Eq. 103; 18 Am. Dec. 577. Whether and how far, a definite forbearance, or agreement to extend the time of payment of an antecedent debt for a definite time, is a

(c) The text is cited in West v. Naylor, 93 Ind. 431; Petry v. Ambrosher, 100 Ind. 510; Adams v. Vanderbeck, 148 Ind. 92, 45 N. E. 645, 62 Am. St. Rep. 497; Sipley v. Wass, 49 N. J. Eq. 463, 24 Atl. 233, citing cases; State Bank v. Frame, 112 Mo. 502, 20 S. W. 620. To the effect that an absolute discharge or payment of an antecedent debt is a sufficient consideration, see Schluter v. Harvey, 65 Cal. 158, 3 Pac. 659; Saunderson v. Broadwell, 82 Cal. 132, 23 Pac. 36; Bunn v. Schnellbacher, 163 Ill. 328, 45 N. E. 227 (affirming 59 Ill. App. 222); West v. Naylor, 93 Ind. 431, citing and relying on the text; Murray v. First Nat. Bank, 5 Kan. App. 456, 49 Pac. 326; Hanold v. Kays, 64 Mich. 439, 31 N. W. 420, 8 Am. St. Rep. 835; Lane v. Logue, 12 Lea, 681. In State Bank v. Frame, 112 Mo. 502, 20 S. W. 620, this section of the text was cited, and the court said: "We think the rule deducible from these authorities is that a deed made in consideration of the absolute discharge of a pre-existing debt of the grantor, or an adequate portion of it, will constitute the grantee a purchaser for value, so as to protect him against a previous unrecorded deed of the same grantor. By the satisfaction of the debt the creditor divests himself of the right of an action, or of securing the original liability, and places himself in a worse condition than he would have done by a definite forbearance of the debt." But see *contra*, Petry v. Ambrosher, 100 Ind. 510, citing the text; Lillibridge v. Allen, 100 Iowa, 582, 69 N. W. 1031; Swift v. Williams, 68 Md. 236, 11 Atl. 835; Sleeper v. Davis, 64 N. H. 59, 6 Atl. 201, 10 Am. St. Rep. 377; De Lancey v. Stearns, 66 N. Y. 161; Howells v. Hettrick, 160 N. Y. 308, 54 N. E. 677; Perkins v. McCullough, 31 Or. 69, 49 Pac. 861; Grotenkemper v. Carver, 9 Lea (77 Tenn.) 280; Golson v. Fielder, 2 Tex. Civ. App. 400, 21 S. W. 173; Swenson v. Seale, (Tex. Civ. App.) 28 S. W. 143; Caviness v. Black, (Tex. Civ. App.) 33 S. W. 712; Hirsch v. Jones, (Tex. Civ. App.) 42 S. W. 604; Marshall v. Marshall, (Tex. Civ. App.) 42 S. W. 353; Huff v. Maroney, 23 Tex. Civ. App. 465, 56 S. W. 754; Overstreet v. Manning, 67 Tex. 657, 4 S. W. 248.

with, a valuable consideration, when the fact of satisfaction is not evidenced by any act of the creditor, but depends upon mere verbal testimony, is opening the door wide for the easy admission of fraud. It leaves the rights of third persons to depend upon the coloring given to a past transaction by the verbal testimony of witnesses, after the event has disclosed to the creditor the form and nature in which it is

sufficient consideration within the doctrine, see cases last cited, and also Atkinson v. Brooks, 26 Vt. 569; 62 Am. Dec. 592; Griswold v. Davis, 31 Vt. 390, 394; Railroad Co. v. Barker, 29 Pa. St. 160, 162; Lonsdale v. Brown, 4 Wash. C. C. 148, 151; Fed. Cas. No. 8,494.[d] It has been decided in New York that extending time by a valid agreement is a valuable consideration sufficient to support a mortgage; but that the mere taking collateral security on time without any additional agreement is not: Cary v. White, 52 N. Y. 138; reversing 7 Lans. 1, and disapproving of *dictum* in Pratt v. Coman, 37 N. Y. 440. See also Wood v. Robinson, 22 N. Y. 564.[e] See also, on the effect of satisfaction or giving time, Van Heusen v. Radcliff, 17 N. Y. 580; 72 Am. Dec. 480; Lawrence v. Clark, 36 N. Y. 128; Dickerson v. Tillinghast, 4 Paige, 215; 25 Am. Dec. 528; Evertson v. Evertson, 5 Paige, 644; Bay v. Coddington, 20 Johns. 637; 5 Johns. Ch. 54; 9 Am. Dec. 268; Mingus v. Condit, 23 N. J. Eq. 313; Pancoast v. Duval, 26 N. J. Eq. 445; Ingram v. Morgan, 4 Humph. 66; 40 Am. Dec. 626; Wormley v. Lowry, 1 Humph. 468; Clark v. Flint, 22 Pick. 231; 33 Am. Dec. 733; Sargent v. Sturm, 23 Cal. 359; 83 Am. Dec. 118.[f] If, however, the creditor actually surrenders up or cancels some written security, such act becomes a valuable consideration, and makes him a *bona fide*

(d) To the effect that an extension of time is a sufficient consideration, see Alston v. Marshall, 112 Ala. 638, 20 South. 850; Randolph v. Webb, 116 Ala. 135, 22 South. 550; Hill v. Yarbrough, 62 Ark. 320, 35 S. W. 433; Gilchrist v. Gough, 63 Ind. 576, 30 Am. Rep. 250; Davis v. Lutkeiweiz, 72 Iowa, 254, 33 N. W. 670; De Mey v. Defer, 103 Mich. 239, 61 N. W. 524; Atkinson v. Greaves, (Miss.), 11 South. 688; First Nat. Bank v. Lamont, 5 N. Dak. 393, 67 N. W. 145; Steffian v. Milmo Nat. Bank, 69 Tex. 513, 6 S. W. 823; Watts v. Corner, 8 Tex. Civ. App. 588, 27 S. W. 1087; Halbert v. Paddleford, (Tex. Civ. App.) 33 S. W. 592; Farmers' Nat. Bank v. James, 13 Tex. Civ. App. 550, 36 S. W. 288; but see Missouri Broom Mfg. Co. v. Guymon, 115 Fed. 112, where the extension of time of payment was merely colorable.

(e) Ingenhuett v. Hunt, (Tex. Civ. App.), 39 S. W. 310; Southerland v. Fremont, 107 N. C. 565, 12 S. E. 237; Sweeney v. Bixler, 69 Ala. 539.

(f) See, also, Price v. Gray, (N. J. Eq.) 34 Atl. 678, and cases cited (abandonment of a right of action and extension of time of payment constitute a valuable consideration); Mobile Life Ins. Co. v. Randall, 71 Ala. 220 (taking note, payable in twelve months, secured by mortgage, thereby suspending right of action on the debt and effecting a release of sureties, is a valuable consideration).

for his interest to picture the transaction. A rule which renders it so easy for an interested party to defeat the rights of others is clearly impolitic.[h] It sometimes happens that rules which are the most logically correct are the ones which most readily admit the possibility of fraud and injustice. It is very generally settled, in accordance with principle, that an assignment made by a debtor in trust for the benefit of his creditors is not a conveyance upon valuable consideration, and neither the assignee nor the creditors thereby become *bona fide* purchasers.[4 i] The questions

purchaser:[g] Youngs v. Lee, 12 N. Y. 551; Meads v. Merchants' Bank, 25 N. Y. 143; 82 Am. Dec. 331; Padgett v. Lawrence, 10 Paige, 170; 40 Am. Dec. 232; Struthers v. Kendall, 41 Pa. St. 214, 218; 80 Am. Dec. 610; Goodman v. Simonds, 20 How. 343, 371; and see Thompson v. Blanchard, 4 N. Y. 303; Penfield v. Dunbar, 64 Barb. 239.

[4] Clark v. Flint, 22 Pick. 231; 33 Am. Dec. 733; Holland v. Cruft, 20 Pick. 321; Griffin v. Marquardt, 17 N. Y. 28; Van Heusen v. Radcliff, 17 N. Y. 580; 72 Am. Dec. 480; Joslin v. Cowee, 60 Barb. 48; Haggerty v. Palmer, 6 Johns. Ch. 437; Mellon's Appeal, 32 Pa. St. 121; Spackman v. Ott, 65 Pa. St. 131; In re Fulton's Estate, 51 Pa. St. 204, 211; Twelves v. Williams, 3 Whart. 485; 31 Am. Dec. 542; Ludwig v. Highley, 5 Pa. St. 132, 140; Willis v. Henderson, 4 Scam. 13; 38 Am. Dec. 120.

(g) See, also, Franklin Sav. Bank v. Taylor, 53 Fed. 854, 4 C. C. A. 55, 9 U. S. App. 406, and cases cited (release of old security and extension of time of payment); Thompson Nat. Bank v. Corwine, 89 Fed. 774, affirmed, 95 Fed. 54 (surrender of obligation of third person). But in Howells v. Hettrick, 160 N. Y. 308, 54 N. E. 677, it was held that a creditor who recovered judgment for a loan which had remained uncollected for many years, and then surrendered the judgment to the judgment debtor in payment for a deed of land, was not a purchaser for value. In Texas, the surrender of a note is treated as a valuable consideration if afterwards and at the time when the purchaser's title is assailed a suit on the note would be barred by the statute of limitations: Alstin v. Cundiff, 52 Tex. 465; Dunlap v. Green, 60 Fed. 242, 8 C. C. A. 600.

(h) This passage of the text is quoted with approval in Gest v. Packwood, 34 Fed. 368.

(i) The text is cited in Martin v. Bowen, 51 N. J. Eq. 452, 26 Atl. 823, carefully reviewing the New Jersey and New York decisions, and holding that the legislation regulating such assignments has not affected their character as voluntary trusts. See, also, Stewart v. Platt, 101 U. S. 731; Sayre v. Weil, 94 Ala. 466, 10 South. 546, 15 L. R. A. 544; Bridgeford v. Adams, 45 Ark. 136; Shad v. Livingston, 31 Fla. 89, 12 South. 646; Lockett v. Robinson, 31 Fla. 134, 12 South. 649, 20 L. R. A. 67; Seay v. Bank of Rome, 66 Ga. 609; Jack v. Weienmett, 115 Ill. 105, 3 N. E. 445, 56 Am. Rep. 129; Wetherell v. Thirty-

concerning judgment creditors and purchasers at execution sales upon judgments have already been examined in the preceding section.[5] [j]

§ 750. 2. Payment of the Consideration.— Not only must there be a valuable consideration in fact, but it must be paid before notice of the prior claim. Notice after the agree-

[5] See *supra*, §§ 721–724.

first St. B. & L. Assn., 153 Ill. 361, 39 N. E. 143; Walker v. Walker's Assignee, 19 Ky. Law Rep. 626, 41 S. W. 315; Exchange, etc., Bank v. Stone, 80 Ky. 109 (assignee in bankruptcy); Bridgford v. Barbour, 80 Ky. 529; Tyler v. Abergh, 65 Md. 18, 3 Atl. 904 (although the creditors, in consideration of the assignment, have executed a general release of all claims and demands against the debtor); G. Ober & Sons Co. v. Keating, 77 Md. 100, 26 Atl. 501; Paine v. Sykes, 72 Miss. 351, 16 South. 903; Merchants' Nat. Bank v. Greenhood, 16 Mont. 395, 41 Pac. 250, 851; Salladin v. Mitchell, 42 Neb. 859, 61 N. W. 127; Peterborough Sav. Bank v. Hartshorn, 67 N. H. 156, 33 Atl. 729; Ocean Beach Assn. v. Trenton Trust & S. D. Co., (N. J. Eq.) 48 Atl. 559; Wallace v. Cohen, 111 N. C. 103, 15 S. E. 892; Helms v. Gilroy, 20 Or. 517, 26 Pac. 851; O'Connell v. Hansen, 29 Or. 173, 44 Pac. 387; Knowles v. Lord, 4 Whart. 500, 34 Am. Dec. 525; Pierce v. McKeehan, 3 Pa. St. (3 Barr) 136, 45 Am. Dec. 635; Wilson v. Esten, 14 R. I. 621 (citing Williams v. Winsor, 12 R. I. 9; Gardner v. Commercial Nat. Bank, 13 R. I. 155, 173; Housel v. Cremer, 13 Nebr. 298; Heinrichs v. Woods, 7 Mo. App. 236; and holding an unrecorded chattel mortgage valid against the assignee); Stainback v. Junk Bros. L. & M. Co., (Tenn. Ch. App.) 39 S. W. 530; Nashville Trust Co. v. Fourth Nat. Bank, 91 Tenn. 336, 18 S. W. 822, 15 L. R. A. 710; Christian v. Hughes, 12 Tex. Civ. App. 622, 36 S. W. 298. That the same rule applies to assignees in bankruptcy, see Exchange, etc., Bank v. Stone, 80 Ky. 109; Brown v. Brabb, 67 Mich. 17, 34 N. W. 403, 11 Am. St. Rep. 549 (citing Mitford v. Mitford, 9 Ves. Jr. 87; Sherrington v. Yates, 12 Mees. & W. 855; Brown v. Heathcote, 1 Atk. 160, 162; Yeatman v. Savings Inst., 95 U. S. 764; Adams v. Collier, 122 U. S. 382, 7 Sup. Ct. 1208, and other cases; and holding that an unrecorded chattel mortgage is superior, as against the assignee, so far as he represents creditors who became such prior to the making of the mortgage). *Contra*, in Virginia: Chapman v. Chapman, 91 Va. 397, 21 S. E. 813, 50 Am. St. Rep. 846; West Virginia; Douglas Mdse. Co. v. Laird, 37 W. Va. 687, 17 S. E. 188. See, also, Newtown Sav. Bank v. Lawrence, (Conn.), 41 Atl. 1054 (assignment superior to prior unrecorded mortgage, since that is inferior to rights of subsequent attaching creditors, and the right of creditors to attach is suspended by the assignment).

(j) That a judgment creditor who, without releasing the lien of his judgment, takes a deed from his debtor and credits it on the judgment is not a purchaser for value, in Texas, see Bonner v. Grigsby, 84 Tex. 330, 19 S. W. 511, 31 Am. St. Rep. 48.

ment for the purchase is made, but before any payment, will destroy the character of *bona fide* purchaser.[1] [a] The rule is settled in England that the entire price or consideration must have been paid before any notice, and the same completeness of payment is required by some American decisions.[2] [b] Since the modes of transferring and dealing with real property in this country are so different from those which prevail in England, the same equitable principles which guided the English judges have led the courts in many of the states, under a change of circumstances, to adopt a necessary modification of this rule; otherwise great injustice might be wrought. These courts have held that where a part only of the price or consideration has been

1 Hardingham v. Nicholls, 3 Atk. 304; Maitland v. Wilson, 3 Atk. 814; Molony v. Kernan, 2 Dru. & War. 31; Wood v. Mann, 1 Sum. 506, 578; Fed. Cas. Nos. 17,951, 17,952; Flagg v. Mann, 2 Sum. 486; Fed. Cas. No. 4,847; Penfield v. Dunbar, 64 Barb. 239; Palmer v. Williams, 24 Mich. 328; Kitteridge v. Chapman, 36 Iowa, 348; Baldwin v. Sager, 70 Ill. 503. See further, *supra*, § 691.

2 See cases in last note; also Tourville v. Naish, 3 P. Wms. 307; Story v. Lord Windsor, 2 Atk. 630; More v. Mayhow, 1 Cas. Ch. 34; Wood v. Mann, 1 Sum. 506, 578; Flagg v. Mann, 2 Sum. 486; Jewett v. Palmer, 7 Johns. Ch. 65; 11 Am. Dec. 401; Losey v. Simpson, 11 N. J. Eq. 246.

(a) This portion of the text is quoted in Hayden v. Charter Oak Driving Park, 63 Conn. 142, 27 Atl. 232. See, also, Balfour v. Parkinson, 84 Fed. 855, citing §§ 750 and 751 of the text; Trice v. Comstock, 121 Fed. 620, 61 L. R. A. 176, and cases cited; Lakin v. Sierra B. G. M. Co., 25 Fed. 337; Cline v. Osborn, 24 Ky. Law Rep. 511, 68 S. W. 1083, citing §§ 750–752 of the text; Combination Land Co. v. Morgan, 95 Cal. 548, 30 Pac. 1102; Beattie v. Crewdson, 124 Cal. 577, 57 Pac. 463; California Cured Fruit Assn. v. Stelling, 141 Cal. 713, 75 Pac. 320; Garmire v. Willy, 36 Neb. 340, 54 N. W. 562; Tecumseh Nat. Bank v. Russell, 50 Neb. 277, 69 N. W. 673; Bender v. Kingman, 64 Neb. 766, 90 N. W. 886; Lindsay v. Freeman, 83 Tex. 259, 18 S. W. 727; Keyser v. Angle, 40 N. J. Eq. 481, 4 Atl. 641; Gibson v. Currier, (Miss.) 35 South. 315; Richards v. Snyder, 11 Oreg. 501, 6 Pac. 186; Wood v. Rayburn, 18 Or. 3, 22 Pac. 521; Ellis v. Young, 31 S. C. 322, 9 S. E. 955; Peay v. Seigler, (S. C.) 26 S. E. 885; Evans v. Templeton, 69 Tex. 375, 6 S. W. 843, 5 Am. St. Rep. 71; Morton v. Lowell, 56 Tex. 643; Kiefer v. Rogers, 19 Minn. 32; Wallace v. Wilson, 30 Mo. 335; Bremer v. Case, 60 Tex. 151; Houston & T. C. R. R. Co. v. Chaffin, 60 Tex. 555; Lamar v. Hale, 79 Va. 147.

(b) See, also, Dugan v. Vattier, 3 Blackf. (Ind.) 245, 25 Am. Dec. 105, and cases cited *post*, note to § 755.

paid before notice, either the defendant should be entitled to the position and protection of a *bona fide* purchaser *pro tanto;* or that the plaintiff should be permitted to enforce his claim to the whole land only upon condition of his doing equity by refunding to the defendant the amount already paid before receiving the notice;[c] or even, when the plaintiff has been guilty of laches, or the defendant has perhaps made valuable improvements, that the land itself should remain free from any claim on the plaintiff's part, and his remedy should be confined to a recovery of the portion of purchase-money which was still unpaid when notice was given.[3] [d]

[3] In many of the cases where this American rule has been applied, the land was contracted to be sold by its owner to a first vendee, A, who did not take possession, and was afterwards contracted to be sold to a second vendee, B, who took possession, made improvements, and paid a part of the price before notice of A's right, and who took a deed from his vendor after such notice. If A had delayed in enforcing his rights, and especially if he had neglected to record his contract in states where he was permitted by statute so to do, the equities of the second vendee, B, have been regarded by the courts as very strong, even if not absolutely the superior: Baldwin v. Sager, 70 Ill. 503 (where a part of the price has been paid before notice of a prior lien, such lien can be enforced to the extent of the unpaid portion); Kitteridge v. Chapman, 36 Iowa, 348 (protection *pro tanto*); Haughwout v. Murphy, 21 N. J. Eq. 118; Paul v. Fulton, 25 Mo. 156; Fraim v. Frederick, 32 Tex. 294; Frost v. Beekman, 1 Johns. Ch. 288; Farmers' Loan Co. v. Maltby, 8 Paige, 361; Doswell v. Buchanan's Ex'rs, 3 Leigh, 365; 23 Am. Dec. 280; Everts v. Agnes, 4 Wis. 343; 65 Am. Dec. 314; Youst v. Martin, 3 Serg. & R. 423; Union etc. Co. v. Young, 1 Whart. 410, 431; 30 Am. Dec. 212; Juvenal v. Jackson, 14 Pa. St. 519, 524; Beck v. Uhrich, 13 Pa. St. 636, 639; 53 Am. Dec. 507; 16 Pa. St. 499; Kunkle v. Wolfersberger, 6 Watts, 126; Bellas v. McCarty, 10 Watts, 13; Boggs v. Varner, 6 Watts & S. 469, 472; Dufphey v. Frenaye, 5 Stew. & P. 215. In Haughwout v. Murphy, 21 N. J. Eq. 118, the court, while recognizing the general rule that a purchaser claiming to be *bona fide* must have paid the full price before notice, held that a plaintiff who by his own laches had misled the purchaser would not be permitted to enforce this rule, but would be confined to a recovery of the price which remained unpaid when notice of his claim was received. In Youst v. Martin, 3 Serg. & R. 423, the reasons of the American modification are clearly stated by Tilghman, C. J.

(c) The text is quoted and followed in Davis v. Ward, 109 Cal. 186, 41 Pac. 1010, 50 Am. St. Rep. 29.

(d) To the effect that a purchaser is protected to the extent of the amount paid before notice, see Free-

§ 751. Payment must be Actual.— It is further settled that there must be *actual payment* before any notice, or, what in law is tantamount to actual payment, a transfer of property or things in action, or an absolute change of the purchaser's legal position for the worse, or the assumption by him of some new, irrevocable legal obligation. It follows, therefore, that his own promise, contract, bond, covenant, bond and mortgage, or other non-negotiable security for the price, will not render the party a *bona fide* purchaser, nor entitle him to protection; for upon failure of the consideration he can be relieved from such obligations in equity even if not at law.[1] [a] Payment of actual cash, however, is not

[1] See English cases cited under last paragraph. Roseman v. Miller, 84 Ill. 297; Kitteridge v. Chapman, 36 Iowa, 348; Hutchins v. Chapman, 37 Tex. 612; Spicer v. Waters, 65 Barb. 227; Haughwout v. Murphy, 21 N. J. Eq. 118; Dickerson v. Tillinghast, 4 Paige, 215; 25 Am. Dec. 528; Ells v. Tousley, 1 Paige, 280; Whittick v. Kane, 1 Paige, 200, 208; Jewett v. Palmer, man v. Pullen, 130 Ala. 653, 31 South. 451; Mackey v. Bowles, 98 Ga. 730, 25 S. E. 834; Spiers v. Whitesell, 27 Ind. App. 204, 61 N. E. 28 (citing this section of the text); Work v. Coverdale, 47 Kan. 207, 27 Pac. 984; Lain v. Morton, 23 Ky. Law Rep. 438, 63 S. W. 286; Riddell v. Munro, 49 Minn. 532, 52 N. W. 141; Fluegel v. Henschel, 7 N. Dak. 276, 66 Am. St. Rep. 642, 74 N. W. 996; Bullock v. Sprowls, 93 Tex. 188, 54 S. W. 657, 661, 77 Am. St. Rep. 849, 47 L. R. A. 326; Vance Shoe Co. v. Haught, 41 W. Va. 275, 23 S. E. 553. In the following cases the defendant was held entitled to be reimbursed to the extent of the payments made before notice: Marchbanks v. Banks, 44 Ark. 48; Hedrick v. Strauss, 42 Neb. 485, 60 N. W. 928; Yarnell v. Brown, 170 Ill. 362, 48 N. E. 909, 62 Am. St. Rep. 380 (amount paid made a lien on the land); Macaulay v. Smith, 132 N. Y. 524, 30 N. E. 997; Webb v. Bailey, 41 W. Va. 463, 23 S. E. 644. In Durst v. Daugherty, 81 Tex. 650, 17 S. W. 388. this section of the text was cited, and the court held that in order to ascertain which rule should be applied to protect a purchaser who has paid part of the consideration before notice, it is necessary to ascertain the equities of the respective parties. See the opinion in this case for a statement of the motives which should influence the court in deciding between these competing rules. In Mitchell v. Dawson, 23 W. Va. 86, a purchaser of the legal title of a tract of land, who had no notice of a prior vendor's lien until he had paid all the purchase-money except twenty-five dollars, was held to take the land discharged of the lien, but to be liable to the holder of the lien for twenty-five dollars. See, also, Culbertson v. H. Witbeck Co., 92 Mich. 469, 52 N. W. 993.

(a) This portion of the text is quoted in Hayden v. Charter Oak Driving Park, 63 Conn. 142, 27 Atl.

indispensable. The assumption of an irrevocable obligation, from which the purchaser could not be relieved even by a failure of the consideration arising from the title being invalid, may be sufficient.[2] The absolute transfer of notes, bonds, or other securities made by a third person will have the same effect.[3]

§ 752. II. Absence of Notice.—The nature of notice, its various forms, and its general effects have been considered in the preceding sections. The present inquiry only concerns its special effects upon a *bona fide* purchase, the time when it must be received in order that these effects may be

7 Johns. Ch. 65, 68; 11 Am. Dec. 401; De Mott v. Starkey, 3 Barb. Ch. 403; Webster v. Van Steenbergh, 46 Barb. 211; Weaver v. Barden, 49 N. Y. 286; Cary v. White, 52 N. Y. 138; Delancey v. Stearns, 66 N. Y. 157; Westbrook v. Gleason, 79 N. Y. 23, 28; Beck v. Uhrich, 13 Pa. St. 636, 639; 53 Am. Dec. 507; 16 Pa. St. 499; Kunkle v. Wolfersberger, 6 Watts, 126.

2 There are many forms of such obligation: 1. One of these occurs where the purchaser has given his own negotiable notes for the whole or a part of the price. Some of the cases seem to require that the note so given to the vendor should have been actually negotiated by him so as to cut off the maker's defense of a failure of the consideration;[b] by others, it seems to be sufficient that such notes are given by the purchaser to the vendor, so that they *may* be negotiated and the defense cut off: Baldwin v. Sager, 70 Ill. 503 (notes given and negotiated); Partridge v. Chapman, 81 Ill. 137 (note given for a part of the price and negotiated by the payee); Williams v. Beard, 1 S. C. 309 (a note of a third person guaranteed by the purchaser, given for a part of the price); Freeman v. Deming, 3 Sand. Ch. 327; Frost v. Beekman, 1 Johns. Ch. 288.[c] 2. Another form would be the undertaking by the purchaser to pay a debt due from the vendor to a third person, in such a manner that he was absolutely substituted as the debtor in the place of his vendor:[d] Jackson v. Winslow, 9 Cow. 13; Frost v. Beekman, 1 Johns. Ch. 288.

3 Williams v. Beard, 1 S. C. 309; Murray v. Ballou, 1 Johns. Ch. 566; Heatley v. Finster, 2 Johns. Ch. 159; Jewett v. Palmer, 7 Johns. Ch. 65; 11 Am. Dec. 401; Christie v. Bishop, 1 Barb. Ch. 105; Harris v. Norton, 16 Barb. 264; Patten v. Moore, 32 N. H. 382; High v. Batte, 10 Yerg. 186; McBee v. Loftis, 1 Strob. Eq. 90.

232; and in Cleveland v. Butts, 13 Tex. Civ. App. 272. 35 S. W. 804; cited, in Wyeth v. Renz-Bowles Co., 66 S. W. 825 (Kentucky). See, also, Marchbanks v. Banks, 44 Ark. 48.

(b) Davis v. Ward, 109 Cal. 186, 41 Pac. 1010, 50 Am. St. Rep. 29, citing this note and paragraph of the text; Rush v. Mitchell, 71 Iowa, 333, 32 N. W. 367.

(c) See, also, Citizens' Bank v. Shaw, (N. Dak.) 84 N. W. 779.

(d) See, also, Warren v. Wilder, 114 N. Y. 215, 21 N. E. 159; Watkins v. Reynolds, 123 N. Y. 211, 25 N. E. 322.

produced, and the modifications and additions introduced by the recording acts. Since the doctrine of *bona fide* purchase requires the absence of notice,— a purchase for a valuable consideration and without notice,— the discussion of this negative element must chiefly consist of an affirmative statement of the consequences flowing from the presence of notice.

§ 753. 1. Effects of Notice.— The rule is universal and elementary, that if a purchaser in any form receives notice of prior adverse rights in and to the same subject-matter, before he has completely acquired or perfected his own interests under the purchase, his position as *bona fide* purchaser is thereby destroyed, even though he may have paid a valuable consideration; on the other hand, notice given after his interests have been completely acquired or perfected produces no injurious effect.[1] [a] Notice sufficient to prevent the purchase from being *bona fide* may inhere in the very form and kind of the conveyance itself. On this ground it is held by one group of authorities that a grantee *taking* or *holding* under a *quitclaim* deed cannot be a *bona fide* purchaser; but this conclusion is rejected by other decisions.[2] [b]

[1] See cases cited *ante*, vol. 1, under § 200; also under § 740; Virgin v. Wingfield, 54 Ga. 451; Hardin v. Harrington, 11 Bush, 367; Hull v. Swarthout, 29 Mich. 249 (when a purchaser is not bound to make inquiries from his own vendor); Hamman v. Keigwin, 39 Tex. 34; Batts v. Scott, 37 Tex. 59 (in Texas, under the recording acts, one who intentionally purchases an equitable title may be a *bona fide* purchaser, as much as one who purchases the legal estate); Kearney v. Vaughan, 50 Mo. 284 (information obtained by a grantee from his own grantor); Hoyt v. Jones, 31 Wis. 389; Wormley v. Wormley, 8 Wheat. 421; Frost v. Beekman, 1 Johns. Ch. 288; Murray v. Finster, 2 Johns. Ch. 155; Losey v. Simpson, 11 N. J. Eq. 246; Beck v. Uhrich, 13 Pa. St. 636; 53 Am. Dec. 507; Jewett v. Palmer, 7 Johns. Ch. 64; 11 Am. Dec. 401.

[2] Cases which hold that a grantee taking or deriving title under a quitclaim deed cannot be *bona fide* purchasers; that such a deed is *ipso facto*

(a) For very numerous cases illustrating the general rule that a party taking with notice of an equity takes subject to that equity, see notes to § 688, *ante*.

(b) The text is cited in United States v. California & O. Land Co., 49 Fed. 496, 503, 7 U. S. App. 128, 1 C. C. A. 330; Gest v. Packwood, 34 Fed. 368; C. Aultman & Co. v. Utsey,

§ 754. Second Purchaser without Notice from First Purchaser with Notice — Second Purchaser with Notice from First Purchaser without.—There are two special rules on the subject

notice of all defects in the title: Munn v. Best, 62 Mo. 491; Kearney v. Vaughan, 50 Mo. 284; Ridgeway v. Holliday, 59 Mo. 444; Oliver v. Piatt, 3 How. 333; May v. Le Claire, 11 Wall. 217; Bragg v. Paulk, 42 Me. 502;

34 S. C. 559, 13 S. E. 848; Parker v. Randolph, 5 S. Dak. 549, 59 N. W. 722, 29 L. R. A. 33; Tate v. Kramer, 1 Tex. Civ. App. 427, 23 S. W. 255.

Whether Quitclaim Grantee Can be a Bona Fide Purchaser.—No question in the law of *bona fide* purchaser has been more productive of judicial discussion in this country. Possibly the majority of the adjudicated cases still support the view that a quitclaim deed is *ipso facto* notice, and that a grantee thereunder cannot claim to be a *bona fide* purchaser: See May v. Le Claire, 78 U. S. (11 Wall.) 217; Dickerson v. Colgrove, 100 U. S. 578; Baker v. Humphrey, 101 U. S. 499; O'Neal v. Seixas, 85 Ala. 80, 4 South. 745; Wood v. Holly Mfg. Co., 100 Ala. 326, 13 South. 948, 46 Am. St. Rep. 56; Clemmons v. Cox, 114 Ala. 350, 21 South. 426; Wimbish v. Montgomery, etc., Assn., 69 Ala. 575; Derrick v. Brown, 66 Ala. 162; Snow v. Lake, 20 Fla. 656, 51 Am. Rep. 625; Fries v. Griffin, 35 Fla. 212, 17 South. 66; Leland v. Isenbeck, 1 Idaho, 469; Wrightman v. Spofford, 56 Iowa, 145, 8 N. W. 680 (deed a quitclaim though it contains the words "bargain and sell"); Raymond v. Morrison, 59 Iowa, 371, 13 N. W. 332; Laraway v. Larue, 63 Iowa, 407, 19 N. W. 242; Fogg v. Holcomb, 64 Iowa, 621, 21 N. W. 111; Postel v. Palmer, 71 Iowa, 157, 32 N. W. 257; Steele v. Sioux Valley Bank, 79 Iowa, 343, 44 N. W. 564 (reviewing cases); Rogers v. Chase, 89 Iowa, 468, 56 N. W. 537; Wickham v. Henthorn, 91 Iowa, 242, 59 N. W. 276; Hannan v. Seidentopf, 113 Iowa, 659, 86 N. W. 44; Young v. Charnquist, 114 Iowa, 116, 86 N. W. 205; Minneapolis & St. L. R. Co. v. Chicago, M. & St. P. R. Co., 116 Iowa, 681, 88 N. W. 1082; Peters v. Cartier, 80 Mich. 124, 45 N. W. 73, 20 Am. St. Rep. 508; Messenger v. Peter, 129 Mich. 93, 88 N. W. 209; Beakley v. Robert, 120 Mich. 209, 79 N. W. 193; Martin v. Brown, 4 Minn. 282 (Gil. 201); Hope v. Stone, 10 Minn. 141 (Gil. 114); Everest v. Ferris, 16 Minn. 26 (Gil. 14); Marshall v. Roberts, 18 Minn. 405 (Gil. 365), 10 Am. Rep. 201; Dunn v. Barnum, 51 Fed. 355, 2 C. C. A. 265, 10 U. S. App. 86 (Minnesota; the rule in that state was changed by statute in 1875); McAdow v. Black, 6 Mont. 601, 13 Pac. 377; Wetzstein v. Largey, 27 Mont. 212, 70 Pac. 717; Hastings v. Nissen, 31 Fed. 597 (Nebraska); Richards v. Snyder, 11 Oreg. 501, 6 Pac. 186; Baker v. Woodward, 12 Oreg. 3, 6 Pac. 173; American Mortgage Co. v. Hutchinson, 19 Oreg. 334, 24 Pac. 515; Gest v. Packwood, 34 Fed. 368 (Oregon); Advance Thresher Co. v. Esteb, 41 Oreg. 469, 69 Pac. 447 (deed is not a quitclaim merely because it contains no covenants of warranty); Raymond v. Flavel, 27 Oreg. 219, 40 Pac. 158 (deed is not quitclaim merely because it contains no covenants of warranty); Parker v. Randolph, 5 S. Dak. 549, 59 N. W. 772, 29 L. R. A.

which have been settled since an early day; one being a

Smith v. Dutton, 42 Iowa, 48; Watson v. Phelps, 40 Iowa, 482. Cases which hold the contrary, viz., that there is no difference between holding a quitclaim deed and any other species of conveyance: Chapman v. Sims, 53 Miss. 33; Hows v. Butterworth, (Tenn. Ch. App.) 62 S. W. 1114; and the very numerous Texas cases cited in the latter part of this note. The following extracts from recent opinions may serve to explain the policy of this rule: "Under the cloak of quitclaim deeds, schemers and speculators close their eyes to honest and reasonable inquiries, and traffic in apparent imperfections in titles. The usual methods of conveying a good title — one in which the grantor has confidence — is by warranty deed. The usual method of conveying a doubtful title is by quitclaim deed": Peters v. Cartier, 80 Mich. 124, 45 N. W. 73, 20 Am. St. Rep. 508. "It would be absurd for a grantee under a mere quitclaim deed to undertake to claim that he took title to the property freed from the previous acts of the grantor affecting that title. There is nothing in the nature of that character of conveyance which assures the grantee indemnity from such acts. He has no reason to believe that he has purchased a clear title to the property or anything more than what the terms of his deed indicate;" and, "The quitclaim deed, . . . purports to convey only such right as A. may actually have. It may be something or nothing; and the recording act, it is suggested, will not give to an instrument of record any greater force or larger meaning than that expressed by its words": American Mortgage Co. v. Hutchinson, 19 Oreg. 334, 24 Pac. 515. The opinion of Thayer, C. J., in this case is a most vigorous presentation of this view of the question.

On the other hand, in a number of jurisdictions it is held that there is no distinction, in respect to the quality of imparting notice of defects in title, between a quitclaim deed and any other form of conveyance: McDonald v. Belding, 145 U. S. 492, 12 Sup. Ct. 892 (Arkansas); Moelle v. Sherwood, 148 U. S. 21, 13 Sup. Ct. 426; Bradbury v. Davis, 5 Colo. 265; Brown v. Banner Coal & Oil Co., 97 Ill. 214, 37 Am. Rep. 105; Smith v. McClain, 146 Ind. 77, 45 N. E. 41 (by statute, quitclaim equivalent to bargain and sale deed); Strong v. Lynn, 38 Minn. 315, 37 N. W. 448 (by statute; see *supra* for earlier cases *contra*); Wilhelm v. Wilken, 149 N. Y. 447, 44 N. E. 82, 52 Am. St. Rep. 743, 32 L. R. A. 370 (affirming 27 N. Y. Supp. 853); Raymond v. Flavel, 27 Or. 219, 40 Pac. 158; Babcock v. Wells, (R. I.) 54 Atl. 596; Virginia & T. Coal & Iron Co. v. Fields, 94 Va. 102, 26 S. E. 426; Cutler v. James, 64 Wis. 173, 54 Am. Rep. 603, 24 N. W. 874. "Some of the ablest text-writers and jurists of this country hold to the view that a grantor cannot by any form of deed do more than convey all his right, title, and interest; that a quitclaim will convey a perfect fee-simple title, just as effectually as a warranty deed, if in fact the grantor at the time of executing the deed has such a title; that a quitclaim deed no more implies that the grantor doubts the goodness of his title than a warranty deed implies that the grantee considers the title unsafe without the support of covenants and assurances involving personal liability for damages; and

mere application of the general doctrine, and the other a

154; Corbin v. Sullivan, 47 Ind. 356; and see Hutchinson v. Harttmann, 15 Kan. 133. Cases involving the more general rule that the form of conveyance or the nature of the interest acquired may *ipso facto* be notice: Bertram

that a purchaser who relies upon the public records showing a clear title in the grantor, even though he takes a quitclaim deed, cannot be denied the character of a *bona fide* purchaser without robbing the recording acts of their virtue": United States v. California & O. Land Co., 49 Fed. 496, 504, 7 U. S. App. 128, 1 C. C. A. 330, opinion (dissenting on a question of construction of the deed) of Hanford, D. J. This view has received the sanction of the supreme court of the United States: Moelle v. Sherwood, 148 U. S. 21, 13 Sup. Ct. 426. The opinion of Field, J., makes no allusion to the very numerous and often quoted *dicta* to the contrary to which the court had given utterance in previous cases, but says, in part: "The doctrine expressed in many cases, that the grantee in a quitclaim deed cannot be treated as a *bona fide* purchaser does not seem to rest upon any sound principle. . . . . There may be many reasons why the holder of property may refuse to accompany his conveyance of it with an express warranty of the soundness of its title, or its freedom from the claims of others, or to execute a conveyance in such form as to imply a warranty of any kind, even when the title is known to be perfect. . . . . In many parts of the country a quitclaim, or a simple conveyance of the grantor's interest, is the common form in which the transfer of real estate is made. A deed in that form is in such cases as effectual to divest and transfer a complete title as any other form of conveyance. . . . . Covenants of warranty do not constitute any operative part of the instrument in transferring the title. That passes independently of them. They are separate contracts, intended only as guaranties against future contingencies. The character of *bona fide* purchaser must depend upon attending circumstances or proof as to the transaction, and does not arise, as often, though, we think, inadvertently, said, either from the form of the conveyance, or the presence or the absence of any accompanying warranty." In Babcock v. Wells, (R. I.) 54 Atl. 596, Stiness, C. J., inquires "How can a court say, as a matter either of law or fact, that a quitclaim implies that the grantor has reason to believe his title is defective, because he does not warrant it, when an equally reasonable inference may be that he wants the purchaser to satisfy himself as to the title from the records or otherwise, and that he is unwilling to burden his estate, by covenants running into the future, against defects of which he has no more knowledge than the purchaser?"

A third view of the subject is well expressed in an opinion from which we have already quoted: "Between these two extremes the true doctrine is to be found, and the trend of opinion in this country, as may be gathered from the most recent decisions and the latest contributions from American law-writers, is in the direction of greater liberality, and to regard with favor the more reasonable rule by which the actual good faith of the purchaser is made the test of his right in equity; and the

necessary inference from it. The first is, that if a second

v. Cook, 32 Mich. 518 (assignee of the vendee in a land contract); Stout v. Hyatt, 13 Kan. 232 (purchaser of a mere equitable title); Edmonds v. Torrence, 48 Ala. 38 (assignee from vendee under a land contract); Lewis v.

question of actual good faith is chiefly one of fact. So that there is no such thing as a conclusive presumption of *mala fides* from the mere acceptance of a quitclaim deed. A purchaser who makes diligent and candid inquiry with intent to ascertain the truth concerning his grantor's title, and who, after such inquiry, pays a fair price for property in the honest belief that the title is perfect, ought to have protection against adverse rights which, notwithstanding his efforts to discover them, remained concealed from him, although he receives only a quitclaim deed. . . . . This is the common sense of the matter, and the only just rule. Nevertheless it is a true and self-evident proposition that by a quitclaim deed the grantee is necessarily warned. By agreeing to accept that form of conveyance, he avowedly assumes all risk of a bad title as between himself and his grantor, and he may be fairly presumed to have made a timely and sufficient examination of the title. From this it follows that he may be conclusively presumed to have become informed of all facts which could have been discovered by an intelligent and earnest effort, and to have acted in the light of all such facts in making the purchase": United States v. California & O. Land Co., 49 Fed. 496, 505, 506, 7 U. S. App. 128, 1 C. C. A. 330, opinion of Hanford, D. J. (dissenting only on the question of construction of the deeds). It is accordingly held, in a considerable group of states, that the effect of a quitclaim deed is to put the purchaser upon inquiry: Johnson v. Williams, 37 Kan. 179, 14 Pac. 537, 1 Am. St. Rep. 243 (a much cited case); Merrill v. Hutchinson, 45 Kan. 59, 25 Pac. 215, 23 Am. St. Rep. 713; Schott v. Dosh, 49 Nebr. 187, 68 N. W. 346, 59 Am. St. Rep. 531 (a careful review of many cases); Dodge v. Briggs, 27 Fed. 161; Goddard v. Donaha, 42 Kan. 754, 22 Pac. 708, 16 Am. St. Rep. 510; Smith v. Rudd, 48 Kan. 296, 29 Pac. 310; Ferguson v. Tarbox, 3 Kan. App. 656, 44 Pac. 905; Kelly v. McBlaine, 6 Kan. App. 523, 50 Pac. 963; Miller v. Fraley, 23 Ark. 735; C. Aultman & Co. v. Utsey, 34 S. C. 559, 13 S. E. 848 (citing text); or that it is a circumstance bearing upon the question of *bona fides:* Bragg v. Paulk, 42 Me. 502; Nash v. Bean, 74 Me. 340; Peaks v. Blethen, 77 Me. 510, 1 Atl. 451; Knapp v. Bailey, 79 Me. 195, 205, 1 Am. St. Rep. 295, 9 Atl. 122; Bradley v. Merrill, 88 Me. 319, 34 Atl. 160; White v. McGarry, 47 Fed. 420.

A large number of decisions, while adhering to the rule that a quitclaim deed implies notice to the grantee, seek to free the rule from the odium of technicality that is sometimes attributed to it, by making the "quitclaim" character of the deed depend not upon the presence or absence of technical words, but on the nature of the transaction as disclosed by a construction of the instrument as a whole. If, from all the terms of the instrument, it is evident that it purports to convey a "chance of title," or the "speculative right, title and interest" of the grantor, as distinguished from the land itself, it is

purchaser for value and without notice purchases from a

Boskins, 27 Ark. 61; Peay v. Capps, 27 Ark. 160 (vendee in possession under a land contract buying a better title than his vendors cannot become thereby

a quitclaim. In support of this view, see Prentice v. Duluth Storage & F. Co., 58 Fed. 437, 448, 7 C. C. A. 293 (Minnesota: not a quitclaim); United States v. California & O. Land Co., 49 Fed. 496, 7 U. S. App. 128, 1 C. C. A. 330, affirmed, 148 U. S. 31, 46, 47, 13 Sup. Ct. 458 (not a quitclaim); Gest v. Packwood, 34 Fed. 368 (Oregon: quitclaim); Wilhelm v. Wilken, 149 N. Y. 447, 44 N. E. 82, 52 Am. St. Rep. 743, 32 L. R. A. 370 (possibly). This distinction has found expression in a long series of Texas cases, the conclusions of which have been thus summarized: "It does not matter that the instrument uses the word 'quitclaim,' if it conveys to the grantee the land itself, it is not such a deed as will charge him with notice of prior unregistered instruments, secret liens, or equities; and, on the other hand, although it may contain a clause of warranty, it will have the effect to so charge him with notice, if it purports to convey no more than the right and title of the grantor to the land": Threadgill v. Bickerstaff, 87 Tex. 520, 24 S. W. 757; citing Richardson v. Levi, 67 Tex. 364, 3 S. W. 444; Harrison v. Boring, 44 Tex. 255; Taylor v. Harrison, 47 Tex. 461, 26 Am. Rep. 304, and Carleton v. Lombardi, 81 Tex. 357, 16 S. W. 1081. See, also, Kempner v. Beaumont Lumber Co., 20 Tex. Civ. App. 307, 49 S. W. 412 (partition deed, intended to convey the land itself, though in form a quitclaim); Hanrick v. Gurley, (Tex. Civ. App.) 48 S. W. 994; White v. Frank, 91 Tex. 70, 40 S. W. 964; Dupree v. Frank, (Tex. Civ. App.) 39 S. W. 988; Calmeil v. Borroum, 13 Tex. Civ. App. 452, 35 S. W. 942 (use of the words "bargain and sell" does not alter the character of the instrument as a quitclaim); Laughlin v. Tips, 8 Tex. Civ. App. 649, 28 S. W. 551; Cantrell v. Dyer, 6 Tex. Civ. App. 551, 25 S. W. 1098; Finch v. Trent, 3 Tex. Civ. App. 568, 24 S. W. 679; Garrett v. Christopher, 74 Tex. 454, 12 S. W. 67, 15 Am. St. Rep. 850; Tram Lumber Co. v. Hancock, 70 Tex. 314, 7 S. W. 724; Richardson v. Levi, 67 Tex. 359, 3 S. W. 444 (conveyance of the land itself intended, though the word "quitclaim" was used); Thorn v. Newsom, 64 Tex. 161, 53 Am. Rep. 747; Baylor v. Scottish-Am. Mortgage Co., 66 Fed. 631, 13 C. C. A. 659 (Texas); Rodgers v. Burchard, 34 Tex. 441, 7 Am. Rep. 283; Green v. Willis, (Tex. Civ. App.) 81 S. W. 1185; Lumpkins v. Adams, 74 Tex. 97, 11 S. W. 1070; Stanley v. Hamilton, (Tex. Civ. App.) 33 S. W. 601; Huff v. Crawford, 89 Tex. 214, 34 S. W. 606; Hill v. Grant, (Tex. Civ. App.) 44 S. W. 1016. It is evident that the question of construction raised by this Texas rule is often one of no little difficulty, and it is intimated that the solution must sometimes be reached by a resort to extrinsic evidence. "If, from the whole instrument, there be doubt as to whether or not the grantor intended to convey the land, or his right to it, it becomes a question of fact to be determined from all the attending circumstances": Threadgill v. Bickerstaff, 87 Tex. 520, 29 S. W. 757, citing Harrison v. Boring, 44 Tex. 255; including the adequacy of the price paid; Moore v. Swift, (Tex. Civ. App.) 67 S. W. 1065. In Tate v.

first purchaser who is charged with notice, he thereby be-

a *bona fide* purchaser as against his vendor); McNary v. Southworth, 58 Ill. 473 (where a trustee purchased at his own trust sale, a remote purchaser

Kramer, 1 Tex. Civ. App. 427, 23 S. W. 255, it was held that the fact that the purchaser agreed to take a quitclaim deed was sufficient to give notice, although the deed taken was not a quitclaim in form. This section of the text was cited. A deed from an assignee for creditors is not necessarily a quitclaim: Cantrell v. Dyer, 6 Tex. Civ. App. 551, 25 S. W. 1098.

Finally, in a few states, while it results from the operation of the recording acts that a *bona fide* purchaser by quitclaim deed is protected against prior unrecorded deeds or other recordable instruments whereby the title may be affected, "equities which arise from transactions or a state of facts which may not be required to be in writing or recorded, if in writing, are not to be cut off by a quitclaim deed. As to them it only has an operation, co-extensive with its terms, of releasing such rights and interests as the grantor has at the time of the conveyance": Hope v. Blair, 105 Mo. 85, 16 S. W. 595, 24 Am. St. Rep. 366; Eoff v. Irvine, 108 Mo. 378, 18 S.W. 907, 32 Am. St. Rep. 609 (subject to constructive trust); Munson v. Ensor, 94 Mo. 506, and cases cited; Mann v. Best, 62 Mo. 497; Stoffel v. Schroeder, 62 Mo. 147; Ridgeway v. Holliday, 59 Mo. 444; Fox v. Hall, 74 Mo. 315, 41 Am. Rep. 316; Willingham v. Hardin, 75 Mo. 429; Elliott v. Buffington, 149 Mo. 663, 51 S. W. 408; Graff v. Middleton, 43 Cal. 341; Frey v. Clifford, 44 Cal. 335; Allison v. Thomas, 72 Cal. 562, 1 Am. St. Rep. 89; Nidever v. Ayres, 83 Cal. 39, 23 Pac. 192. For a trenchant criticism upon this view, see the opinion of Thayer, C. J., in American Mortgage Co. v. Hutchinson, 19 Oreg. 334, 24 Pac. 515, 517. Apart from the practical objections there urged, it is difficult to see how it can be reconciled with generally accepted principles. If a quitclaim deed is a conveyance of the legal estate, it can be subject to a prior unrecorded equitable interest only through the operation of the notice inherent in its character. How can the mere act of spreading it upon the records free it from this inherent vice, and render its holder, for certain purposes, a purchaser *without notice*, so as to be entitled to the benefit of a prior record?

It is generally held that the quitclaim deed affects with notice only the grantee therein; one who receives a warranty deed is not affected by the fact that his grantor or some more remote person in his chain of title held by a quitclaim deed: United States v. California & O. Land Co., 148 U. S. 31, 46, 47, 13 Sup. Ct. 458; Stanley v. Schwalby, 162 U. S. 255, 16 Sup. Ct. 754 (Texas); Meikel v. Borders, 129 Ind. 529, 29 N. E. 29; Rinehardt v. Reifers, 158 Ind. 675, 64 N. E. 459; Hannan v. Seidentopf, 113 Iowa, 659, 86 N. W. 44; Huber v. Bossart, 70 Iowa, 718, 29 N. W. 608; Culbertson v. H. Witbeck Co., 92 Mich. 469, 52 N. W. 993; Snowden v. Tyler, 21 Neb. 215, 31 N. W. 661; Finch v. Trent, 3 Tex. Civ. App. 568, 22 S. W. 132, 24 S. W. 679; but see American Mortgage Co. v. Hutchinson, 19 Oreg. 334, 24 Pac. 515, where all the deeds in the chain of title, except the last, were quitclaims: C. Aultman & Co. v. Utsey, 34 S. C. 559, 13 S. E. 848.

comes a *bona fide* purchaser, and is entitled to protection.[a] This statement may be generalized. If the title to land, having passed through successive grantees, and subject in the hands of each to prior outstanding equities, comes to a purchaser for value and without notice, it is at once freed from these equities; he obtains a valid title, and, with a single exception, the full power of disposition.[1 b] This ex-

deriving title under him may be a *bona fide* purchaser).[c] In Conover v. Van Mater, 18 N. J. Eq. 481, it was held that the assignee of a mortgage, even without notice, takes it subject to all equities, it being only a *chose in action* and a mere equitable lien. The contrary is held in Massachusetts, where the mortgage creates a true legal estate: Welch v. Priest, 8 Allen, 165.

1 Paris v. Lewis, 85 Ill. 597; Hardin v. Harrington, 11 Bush, 367; Pringle v. Dunn, 37 Wis. 449; 19 Am. Rep. 772; Price v. Martin, 46 Miss. 489; Demarest v. Wynkoop, 3 Johns. Ch. 129, 147; 8 Am. Dec. 467; Varick v. Briggs, 6 Paige, 323; Glidden v. Hunt, 24 Pick. 221; Tompkins v. Powell, 6 Leigh, 576.

The same rule applies under the recording acts. If A, without notice of a prior unrecorded deed or encumbrance, purchases from B, who had notice,

(c) See, also, Branch v. Griffin, 99 N. C. 173, 5 S. E. 393, 398; but see *ante*, § 655, note. That the purchaser of a tax-title is not a *bona fide* purchaser, see Brown v. Cohn, 95 Wis. 90, 69 N. W. 71, 60 Am. St. Rep. 83.

(a) The text is quoted in Arnett's Committee v. Owens, 65 S. W. 151 (Kentucky); Jones v. Hudson, 23 S. C. 494; London v. Youmans, 31 S. C. 150, 9 S. E. 775, 17 Am. St. Rep. 17. §§ 754–756 are cited in Tate v. Kramer, 1 Tex. Civ. App. 427, 23 S. W. 255.

(b) See, also, Fish v. Benson, 71 Cal. 429, 12 Pac. 454; Hewlett v. Pilcher, 85 Cal. 542, 24 Pac. 781; King v. Cabaness, 81 Ga. 661, 7 S. E. 620; Latham v. Inman, 88 Ga. 505, 15 S. E. 8; Halverson v. Brown, 75 Iowa, 702, 38 N. W. 123; Jackson v. Reid, 30 Kan. 10, 1 Pac. 308; Arnett's Committee v. Owens, 65 S. W. 151 (Kentucky); Simpson v. Del Hoyo, 94 N. Y. 189; Zoeller v. Riley, 100 N. Y. 108, 2 N. E. 388, 53 Am. Rep. 157; Valentine v. Lunt, 115 N. Y. 496, 22 N. E. 209; Branch v. Griffin, 99 N. C. 173, 5 S. E. 393, 398; Saunders v. Lee, 101 N. C. 3, 7 S. E. 590; Odom v. Riddick, 104 N. C. 515, 10 S. E. 609, 17 Am. St. Rep. 686, 7 L. R. A. 118; Sweetzer v. Atterbury, 100 Pa. St. 18; Jones v. Hudson, 23 S. C. 494; London v. Youmans, 31 S. C. 150, 9 S. E. 775, 17 Am. St. Rep. 17; Gordon v. Cox, (Tenn.) 75 S. W. 925; Holmes v. Buckner, 67 Tex. 107, 2 S. W. 452; Martin v. Robinson, 67 Tex. 368, 3 S. W. 550; Bergen v. Producers' Marble Yard, 72 Tex. 53, 11 S. W. 1027; Cantrell v. Dyer, (Tex. Civ. App.) 25 S. W. 1098 (purchaser without notice from assignee for creditors). In Odom v. Riddick, 104 N. C. 515, 10 S. E. 609, 17 Am. St. Rep. 686, 7 L. R. A. 118, and Arnett's Committee v. Owens, 65 S. W. 151 (Kentucky), the *bona fide* purchaser from an insane person's grantee was protected by this rule; but see *post*, § 946, note.

ception is, that such a title cannot be conveyed, free from the prior equities, back to a former owner who was charged with notice. If A, holding a title affected with notice, conveys to B, a *bona fide* purchaser, and afterwards takes a reconveyance to himself, all the equities revive and attach to the land in his hands, since the doctrine requires not only valuable consideration and absence of notice, but also *good faith.*[2] [e] The second rule is, that if a second purchaser with notice acquires title from a first purchaser who was without notice, and *bona fide,* he succeeds to all the rights of his immediate grantor. In fact, when land once comes, freed from equities, into the hands of a *bona fide* purchaser, he obtains a complete *jus disponendi,* with the exception last above

his title is free, and may be made perfect by an earlier record:[c] See Varick v. Briggs, 6 Paige, 323; Jackson v. Valkenburgh, 8 Cow. 260; Knox v. Silloway, 10 Me. 201, 221; Connecticut v. Bradish, 14 Mass. 296; Fallass v. Pierce, 30 Wis. 443; Mallory v. Stodder, 6 Ala. 801; Truluck v. Peeples, 3 Ga. 446.

For the same reason, a purchaser for value and without notice from a vendor who had himself acquired his title through fraud becomes *bona fide* free from the effects of the fraud:[d] Wood v. Mann, 1 Sum. 506; Galatian v. Erwin, Hopk. Ch. 48; Somes v. Brewer, 2 Pick. 184; 13 Am. Dec. 406; see *post,* § 777.

[2] Kennedy v. Daly, 1 Schoales & L. 355, 379; Bumpus v. Platner, 1 Johns. Ch. 213, 219; Schutt v. Large, 6 Barb. 373; Ashton's Appeal, 73 Pa. St. 153; Church v. Ruland, 64 Pa. St. 432, 444; Church v. Church, 25 Pa. St. 278; Troy City Bank v. Wilcox, 24 Wis. 671.

(c) This note is quoted in London v. Youmans, 31 S. C. 150, 9 S. E. 775, 17 Am. St. Rep. 17. Compare § 760, *post.*

(d) See, also, Fish v. Benson, 71 Cal. 429, 12 Pac. 454; Hewlett v. Pilcher, 85 Cal. 542, 24 Pac. 781; King v. Cabaness, 81 Ga. 661, 7 S. E. 620; Halverson v. Brown, 75 Iowa, 702, 38 N. W. 123; Simpson v. Del Hoyo, 94 N. Y. 189 (assignee of mortgage protected, though mortgagor's title procured by fraud); Zoeller v. Riley, 100 N. Y. 108, 2 N. E. 388, 53 Am. Rep. 157; Valentine v. Lunt, 115 N. Y. 496, 22 N. E. 209; Saunders v. Lee, 101 N. C. 3, 7 S. E. 590; Martin v. Robinson, 67 Tex. 368, 3 S. W. 550.

(e) The text is quoted in Trentman v. Eldridge, 98 Ind. 525; Clark v. McNeal, 114 N. Y. 295, 21 N. E. 405, 11 Am. St. Rep. 638; and cited in Johnson v. Gibson, 116 Ill. 294, 6 N. E. 205; Bridgewater Roller Mills Co. v. Receivers of Baltimore B. & L. Ass'n, 124 Fed. 718. See, also, Rogers v. Lindsey, 13 How. (54 U. S.) 441.

mentioned, and may transfer a perfect title even to volunteers.[3 f]

§ 755. 2. Time of Giving Notice.—We have seen that if notice is not given until after the purchaser has fully paid the consideration, received a conveyance, and completed his title, he is not in the least affected by it. If the notice is given before any or all of these steps have been taken, its consequences may be different, and are to be considered.

[3] Allison v. Hagan, 12 Nev. 38; Pringle v. Dunn, 37 Wis. 449; 19 Am. Rep. 772; McShirley v. Birt, 44 Ind. 382; Moore v. Curry, 36 Tex. 668; Fletcher v. Peck, 6 Cranch, 87; Alexander v. Pendleton, 8 Cranch, 462; Vattier v. Hinde, 7 Pet. 252; Boone v. Chiles, 10 Pet. 177; Bumpus v. Platner, 1 Johns. Ch. 213; Demarest v. Wynkoop, 3 Johns. Ch. 129, 147; 8 Am. Dec. 467; Galatian v. Erwin, Hopk. Ch. 48; Varick v. Briggs, 6 Paige, 323, 329; Griffith v. Griffith, 9 Paige, 315; Webster v. Van Steenbergh, 46 Barb. 211; Dana v. Newhall, 13 Mass. 498; Trull v. Bigelow, 16 Mass. 406; 8 Am. Dec. 144; Boynton v. Rees, 8 Pick. 329; 19 Am. Dec. 326; Rutgers v. Kingsland, 7 N. J. Eq. 178, 658; Holmes v. Stout, 4 N. J. Eq. 492; Bracken v. Miller, 4 Watts & S. 102; Mott v. Clark, 9 Pa. St. 399; 49 Am. Dec. 566; Church v. Church, 25 Pa. St. 278; Filby v. Miller, 25 Pa. St. 264; Curtis v. Lunn, 6 Munf. 42; Lacy v. Wilson, 4 Munf. 313; City Council v. Page, Speers Eq. 159; Lindsey v. Rankin, 4 Bibb, 482; Halstead v. Bank of Kentucky, 4 J. J. Marsh. 554; Blight's Heirs v. Banks, 6 T. B. Mon. 192, 198; 17 Am. Dec. 136.

The rule was first settled in the early case of Harrison v. Forth, Prec. Ch. 51, and followed in Brandlyn v. Ord, 1 Atk. 571; Lowther v. Carlton, 2 Atk. 242; Sweet v. Southcote, 2 Brown Ch. 66; Ferrars v. Cherry, 2 Vern. 383; McQueen v. Farquhar, 11 Ves. 467, 477. Like the first rule, it also applies to cases of unrecorded instruments under the recording acts: Webster v. Van Steenbergh, 46 Barb. 211; Lacy v. Wilson, 4 Munf. 313; Mott v. Clark, 9 Pa. St. 399; 49 Am. Dec. 566; Boynton v. Rees, 8 Pick. 329; 19 Am. Dec. 326.

The rule, however, will not apply, under special circumstances, where its enforcement would violate other settled doctrines. In Johns v. Sewell, 33 Ind. 1, a second purchaser, B, bought with notice from a first purchaser, A, who had acquired without notice; but since A was a mere volunteer, and therefore did not hold the land free from equities, B took it subject to the same equities. In Blatchley v. Osborn, 33 Conn. 226, it was held that a tenant in common with notice cannot get a clear title from his co-tenant without notice by partition.

(f) This portion of the text is quoted in Peterson v. McCauley, (Tex. Civ. App.) 25 S. W. 826; and cited in Klinger v. Lemler, 137 Ind. 77, 34 N. E. 698; Mast v. Henry, 65 Iowa, 193, 21 N. W. 559; Roll v. Rea, 50 N. J. Law 264, 12 Atl. 905; Hayes v. Nourse, 114 N. Y. 606, 22 N. E. 40,

The general rule is settled in England, that a *bona fide* purchase requires both the payment of all the price and the execution and delivery of the conveyance before the receipt of notice by the purchaser. In other words, if the party has received the conveyance before notice and paid the price after, or has paid the price before and received the conveyance after, in either instance the *bona fides* of the purchase is destroyed.[1] The American decisions are all agreed that

[1] Wigg v. Wigg, 1 Atk. 382, 384; Story v. Lord Windsor, 2 Atk. 630; Tourville v. Naish, 3 P. Wms. 307; Jones v. Stanley, 2 Eq. Cas. Abr. 685, pl. 9; More v. Mayhow, 1 Cas. Ch. 34; Rayne v. Baker, 1 Giff. 241; Tildesly v. Lodge, 3 Smale & G. 543; Collinson v. Lister, 7 De Gex, M. & G. 634; 20 Beav. 356; Sharpe v. Foy, L. R. 4 Ch. 35, 37. The true meaning of this rule should not be misapprehended. If A purchases in the first instance a legal estate, the rule, of course, applies to him. If he purchases or acquires in the first instance an equitable estate, the rule also applies, *so far as that purchase is concerned.* For example, if A receives a first mortgage, which conveys the legal estate, and B takes a second mortgage of the same form, purporting to convey the land, but which is, nevertheless, only an equitable conveyance, the rule requires that B should both have advanced the money and obtained the instrument before receiving notice, in order to be a *bona fide* purchaser. This rule, however, does not prevent a person who has thus acquired an equitable estate by conveyance in good faith, and who afterwards receives notice of a prior equity, from obtaining a conveyance of the outstanding legal estate and thus protecting himself from such equity. This latter power is recognized by an overwhelming array of English authority, and in fact forms one of the most frequent occasions for applying the doctrine of *bona fide* purchase.

11 Am. St. Rep. 700; Gulf, C. & S. F. Ry. Co. v. Gill, 5 Tex. Civ. App. 496, 23 S. W. 142; Thornburg v. Bowen, 37 W. Va. 538, 16 S. E. 825. See, also, Ryan v. Staples, 23 C. C. A. 551, 78 Fed. 563; Whitfield v. Riddle, 78 Ala. 99; Fargason v. Edrington, 49 Ark. 207, 4 S. W. 763; Walp v. Lamkin v. Foster, (Conn.) 57 Atl. 277; Ashmore v. Whatley, 99 Ga. 150, 24 S. E. 941; English v. Lindley, 194 Ill. 181, 62 N. E. 522 (aff. 89 Ill. App. 538); Arnold v. Smith, 80 Ind. 417, 423; Old Nat. Bank v. Findley, 131 Ind. 225, 31 N. E. 62; Brown v. Cody, 115 Ind. 488, 18 N. E. 9; Buck v. Foster, 146 Ind. 530, 46 N. E. 920, 62 Am. St. Rep. 427; East v. Pugh, 71 Iowa, 162, 32 N. W. 309; Hill v. McNicholl, 76 Me. 314; La Fleur v. Chace, 171 Mass. 59, 50 N. E. 456; Equitable Sureties Co. v. Sheppard, 78 Miss. 217, 28 South. 842; Funkhousen v. Lay, 78 Mo. 458; Craig v. Zimmerman, 87 Mo. 478, 56 Am. Rep. 466; Van Syckel v. Beam, 110 Mo. 589, 19 S. W. 946; Gorland v. Wells, 15 Neb. 298, 18 N. W. 132; Paul v. Kerswell, 60 N. J. Law 273, 37 Atl. 1102; Landigan v. Mayer, 32 Oreg. 245, 67 Am. St. Rep. 521, 51 Pac. 649 (assignee, with notice, of *bona fide* mortgagee, protected); Brown v. Elmendorf, (Tex. Civ. App.) 25 S. W. 145; Goddard v. Reagan, 8 Tex. Civ. App. 272, 28 S.

a notice received before any of the purchase price has been paid, as well after the deed of conveyance has been delivered as before, will destroy the *bona fides* of the purchase, and many of the decisions, following the English rule, attribute the same effect to a notice after a payment of part, but before the whole is paid.[2] Such a payment is, by some authorities, a protection *pro tanto*.[3] Finally, the case of notice received after payment made, but before the deed of conveyance delivered, has given rise to a direct conflict of judicial opinion. One group of decisions adopts and lays down the English rule, that the purchase, under these circumstances, is not *bona fide*.[4] Another line of cases holds in the most positive and general manner that where the purchaser has paid the consideration without notice of any prior claim,

2 Baldwin v. Sager, 70 Ill. 503; Palmer v. Williams, 24 Mich. 328; Penfield v. Dunbar, 64 Barb. 239; and see cases *supra*, under § 691; Wormley v. Wormley, 8 Wheat. 421, 449, 450; Frost v. Beekman, 1 Johns. Ch. 288; Murray v. Finster, 2 Johns. Ch. 155; Jewett v. Palmer, 7 Johns. Ch. 65; 11 Am. Dec. 401; Losey v. Simpson, 11 N. J. Eq. 246; Beck v. Uhrich, 13 Pa. St. 633, 639; 53 Am. Dec. 507; Bennett v. Titherington, 6 Bush, 192; Wells v. Morrow, 38 Ala. 125 (must have paid the whole price); Moore v. Clay, 7 Ala. 742; Duncan v. Johnson, 13 Ark. 190; Simms v. Richardson, 2 Litt. 274; Blair v. Owles, 1 Munf. 38; Doswell v. Buchanan, 3 Leigh, 365; Blight's Heirs v. Banks, 6 T. B. Mon. 192; 17 Am. Dec. 136; Halstead v. Bank of Kentucky, 4 J. J. Marsh. 554; Pillow v. Shannon, 3 Yerg. 508; Zollman v. Moore, 21 Gratt. 313; and see Wilson v. Hunter, 30 Ind. 466, 471.

3 See *ante*, § 750.

4 Peabody v. Fenton, 3 Barb. Ch. 451, 464, 465; Grimstone v. Carter, 3 Paige, 421, 437; 24 Am. Dec. 230; Fash v. Ravesies, 32 Ala. 451; Moore v. Clay, 7 Ala. 742; Wells v. Morrow, 38 Ala. 125; Duncan v. Johnson, 13 Ark. 190; Osborn v. Carr, 12 Conn. 195, 198; Bennett v. Titherington, 6 Bush, 192; Simms v. Richardson, 2 Litt. 274; Blair v. Owles, 1 Munf. 38; Doswell v. Buchanan, 3 Leigh, 365; 23 Am. Dec. 280; Blight v. Banks, 6 T. B. Mon. 192; 17 Am. Dec. 136; Halstead v. Bank of Kentucky, 4 J. J. Marsh. 554; Pillow v. Shannon, 3 Yerg. 508.

W. 352; Hickman v. Hoffman, 11 Tex. Civ. App. 605, 33 S. W. 257; Long v. Fields, (Tex. Civ. App.) 71 S. W. 774; Garner v. Boyle, (Tex. Civ. App.) 77 S. W. 987; Cox v. Wayt, 26 W. Va. 807. In Bergen v. Producers' Marble Yard, 72 Tex. 53, 11 S. W. 1027, this rule was applied for the protection of a purchaser at the foreclosure sale under a mortgage, who had notice of the fraudulent intent of the mortgagor, because the mortgagee acted in good faith.

and after receiving notice he obtains a conveyance of the legal estate, he becomes to all intents a *bona fide* purchaser, and is entitled to all the protection belonging to that position. And this result seems to be applied without limitation to the acquisition of every kind of equitable estate, interest, or right.[5] [a]

§ 756. **Effect of Notice on the Bona Fide Purchase of Equitable Interests.**—An attempt to reconcile these conflicting authorities would be vain. I can only state what seem to be the necessary conclusions from well-established equitable principles. In the first place, the rule last stated cannot be extended to all equitable interests without violating elementary principles. Between two successive equal equities, the order of time controls, without regard to the fact of consideration or notice; the one subsequent in time obtains no preference by paying consideration without notice.[a] Equities are thus equal where both parties are equally innocent and equally diligent. If an owner of land gives an agreement to convey it to A, who pays all or part of the price, and afterwards gives a second agreement to convey to B, who enters into the contract and pays all or part of the price without any notice of the prior claim of A, clearly B would have obtained no equitable advantage from the fact of his contract and payment without notice; A's interest would be of the same character and extent, and his priority of time would give him priority of right. To say that B, being thus

[5] Carroll v. Johnston, 2 Jones Eq. 120; Baggarly v. Gaither, 2 Jones Eq. 80; Leach v. Ansbacher, 55 Pa. St. 85; Gibler v. Trimble, 14 Ohio, 323; Mut. Ass. Soc. v. Stone, 3 Leigh, 218; Wheaton v. Dyer, 15 Conn. 307, 310; and see Phelps v. Morrison, 24 N. J. Eq. 195. In Carroll v. Johnston, 2 Jones Eq. 120, the question was presented very sharply. Plaintiff held under a prior vendee, A; defendant was a subsequent vendee, who had paid part of the price before notice of A's claim; after receiving notice he obtained a conveyance from the original vendor, and was held to be a *bona fide* purchaser and protected. Certainly there is nothing in the settled principles of the doctrine concerning *bona fide* purchase which can sustain such a conclusion.

§ 755, (a) See, also, on this subject, § 691, *ante*.

§ 756, (a) See *ante*, § 683, notes, and cases cited.

inferior in equitable right, may, upon receiving notice of A's contract, obtain a conveyance from the owner, and thus establish a precedence over A, is to misapply the doctrine of *bona fide* purchase, and to ignore a familiar principle of equity that one who acquires a title with notice of a prior equity takes it subject to that equity.[b] The same is true of all subsequent equitable interests, liens, and claims not arising from conveyances or instruments which purport to be conveyances of the entire estate. This conclusion is fully sustained by the ablest authorities, English and American.[1]

[1] It is one of the fundamental positions established by Lord Westbury in the celebrated case of Phillips v. Phillips, 4 De Gex, F. & J. 208; *ante*, §§ 414, note, 742. In Peabody v. Fenton, 3 Barb. Ch. 451, 464, 465, A obtained an assignment of a bond and mortgage from the owner by gross fraud, and assigned it to B, who had no actual notice, and who parted with value, although, as the court held, under suspicious circumstances which ought to have put him on the inquiry, and which of themselves showed the absence of good faith. Chancellor Walworth also held that B's title was worthless, upon another ground, as follows: "Again, to protect a party as a *bona fide* purchaser without notice, he must have acquired the legal title, as well as an equitable right to the property." He refers to the case of a conveyance of land obtained by fraud, which is voidable at the election of the grantor, but where the fraudulent grantee has the power to transfer a valid title to a *bona fide* purchaser without notice of the fraud, and continues: "But if such *bona fide* purchaser has not obtained the legal title by an actual and valid conveyance, he cannot protect himself against the prior equity of the original owner to rescind the conveyance to the fraudulent grantee, although such *bona fide* purchaser *has a contract for conveyance, and has actually paid for the land.*" If A has, through fraudulent representations, conveyed land to B, so that the conveyance might be set aside at A's suit, and while B thus held the apparent legal title, he should create an equitable lien upon the land in favor of C, by means of contract as security for money loaned, the money being advanced without notice of the fraudulent defect in B's title; or B should give a contract of sale of the land to C, the price being paid without notice of the fraud,— C's equitable interest in either case would be clearly subordinate to A's prior, and therefore superior, equity. A could in one suit set aside the conveyance to B, and cut off the equitable lien which had attached in favor of C. If C, after learning of the fraud, and A's right resulting from it, should obtain a conveyance of the legal estate from B, he would clearly be in no better position; he could not, upon principle, claim the protection given to a *bona fide* purchaser; he would certainly come under the operation

(b) The text is quoted in Louisville & N. R. Co. v. Boykin, 76 Ala. 560. The facts of this case are precisely those of the author's hypothetical case.

In the second place, the English decisions are numerous to the effect that when one has purchased an equitable *estate,* and has received the instrument conveying the same and paid the entire consideration without notice of a prior conflicting claim, he may, upon receiving notice thereof, procure a transfer of the outstanding legal title, and thereby obtain protection. This mode of *bona fide* purchase, it will be found, is strictly confined to cases in which the purchaser acquires an *estate,* although equitable, and therefore acquires and holds through an instrument which purports to be and operates as a conveyance of the land. The most common example is that of a subsequent mortgagee of land, through a mortgage in the ordinary form of a legal conveyance, where his estate is necessarily equitable, since the legal estate has been conveyed to and is outstanding in the first mortgagee. The true force and effect of these English decisions have sometimes, I think, been misapprehended by American courts.[2] The only conclusions consistent with

of the doctrine that one who takes even a legal title with notice of a prior equity takes and holds subject to that equity, and barred by its obligations. These illustrations may appear trite and elementary, but they will serve to explain some judicial *dicta*, which, in all their generality of expression, would be misleading. In Grimstone v. Carter, 3 Paige, 421, 437, Chancellor Walworth stated the doctrine most clearly and accurately: "This court will not permit the party having the *subsequent equity* to protect himself by obtaining a conveyance of the legal title, after he has either actual or constructive notice of the prior equity. To protect a party, therefore, and to enable him to defend himself as a *bona fide* purchaser for a valuable consideration, he must aver in his plea or state in his answer not only that there was an equal equity in himself by reason of his having actually paid the purchase-money, but that he had also clothed his equity with the legal title *before he had notice of the prior equity.*" (c) The contrary decisions illustrate the very remarkable tendency exhibited by some of the state courts to go far beyond the established principles of equity, and to deal with mere equitable interests as though they had all the features and incidents of legal estates, while in other matters the same courts may fail or refuse to adopt principles equally well settled, which define the equitable jurisdiction, or which recognize the existence of equitable rights.

2 An opinion contrary to these conclusions has been maintained by a recent able text-writer (see 1 Jones on Mortgages, sec. 581), and a *dictum* of Lord

(c) See, also, Fash v. Ravesies, 32 Ala. 451; Louisville & N. R. Co. v. Boykin, 76 Ala. 560.

settled principles are the following. It is only where a party has acquired an equitable *estate* by means of a conveyance which purported to convey the land itself, and has received the instrument and paid the consideration without notice of a prior claim, that he can, after notice, procure the legal title and with it the protection of a *bona fide* purchaser. Where a party has acquired only an equitable lien or interest, not by conveyance, and has advanced the consideration without notice, he cannot, after notice, get in the legal estate, and thus obtain precedence over a prior equity.[d]

§ 757. 3. Recording in Connection with Notice.— This general subdivision involves two entirely distinct matters: 1. The first deals with the record in its operation and effects as a constructive statutory notice to all subsequent pur-

Hatherley, in the recent case of Pilcher v. Rawlins, L. R. 7 Ch. 259, 267, is cited in support of that view. But when the *dictum* is read in connection with its context, and in the light of the facts and circumstances of the case, and of the decision made, it will be found not only to be consistent with but to fully sustain the distinction which I have drawn. Lord Hatherley, after referring to some observations by Lord Eldon in Maundrell v. Maundrell, 10 Ves. 246, and Ex parte Knott, 11 Ves. 609, said: "It appeared to me then, as now, that Lord Eldon applied his observations to a case in which the purchaser had advanced his money in good faith, but took the legal estate afterwards from one whom he knew to be a trustee for others, distinguishing that case from the *case of a legal estate acquired by paying off a mortgage.* In itself, it is immaterial whether the purchaser knows or not that another has an equitable interest prior to his own, provided he did not know that fact on paying his purchase-money. It may perhaps be sufficient in all possible cases for the purchaser to say, I am not to be sued in equity at all. *I hold what was conveyed to me by one in possession, who was, or pretended to be, seised, and who conveyed to me without my having notice of another equitable title;* and that the plaintiff in equity must disprove the plea before he can proceed any further in his suit." Now, it is entirely uncritical to take the single sentence beginning "In itself it is immaterial," etc., from the above passage, separate it from its context, and make it a universal rule applicable to all kinds of subsequent equitable interests and liens as well as estates. The facts of this case, the opinions of Lord Eldon referred to, the language of Lord Hatherley, and especially the closing sentences of the quotation show with absolute certainty that he is speaking only of those cases in which a subsequent purchaser acquires an estate by means of a conveyance purporting to

(d) The text is quoted in Jennings v. Kiernan, 35 Oreg. 349, 55 Pac. 443, 56 Pac. 72.

chasers and encumbrancers. This aspect of recording has already been examined in a former section, and nothing need here be added.[1] 2. The second deals with notice in its effects upon the holder of a subsequent conveyance or mortgage who obtains the earliest record, how and when it defeats his *bona fide* character and destroys the advantage of his first record; or, to state the same affirmatively, what is necessary to make the holder of a subsequent conveyance, who obtains the earliest record, a *bona fide* purchaser, so that he may secure the precedence under the statute by means of his record. Although this branch of the subject has also been considered,[2] it will be convenient to recapitulate the results as a part of the present discussion.

§ 758. **The Interest under a Prior Unrecorded Conveyance.**— Although the statutes pronounce unrecorded deeds and mortgages to be void as against subsequent purchasers who have complied with their provisions, yet in the practical operation of this legislation the right created by a prior

convey the title to the land, supposing it to be the legal estate, but which turns out to be only an equitable estate. If he acquired such estate in good faith, he may afterwards, upon learning of the prior right, get a conveyance of the legal title and be protected. It is demonstrable that Lord Hatherley is not referring to those who acquire mere equitable interests, liens, and the like, and that he is not interfering with the settled doctrines of priority from time among successive equities. If there could be a possible doubt as to the meaning of Lord Hatherley's language, it is completely put at rest by the opinion of James, L. J., in the same case (p. 268). He begins his opinion as follows: "I do not mean to refer to a class of cases which appear to me entirely distinct in principle from the case now before us. I mean that class of cases in which a person, finding himself in possession *under a defective title*, has cast about to cure that defect by procuring some one else to convey an outstanding legal estate. No doubt it has been held in this court that a man under those circumstances may get in a mortgage and tack his defective title to the estate of that mortgagee." The doctrine of "tacking" has been repudiated by the American courts, and they have thus rejected that application of the rule under discussion which has been altogether the most frequent in England.

[1] See *supra*, §§ 655–658; Baker v. Griffin, 50 Miss. 158. Subsequent purchaser is not charged with constructive notice by the record of an encumbrance created by a person other than those through or from whom he is compelled to trace his record title.

[2] See *supra*, §§ 659–664.

unrecorded instrument is generally regarded as tantamount to an equitable interest, which may therefore be cut off by a subsequent purchaser or encumbrancer who is in all respects *bona fide,* and who has also obtained the first record.[a] The total effect of the system is thus twofold; it both enlarges the scope of the doctrine concerning *bona fide* purchase, by extending it to all those interests, legal or equitable, which are required or permitted to be recorded,[b] and it adds to the elements constituting a *bona fide* purchase the further requisite of a registration.

§ 759. Requisites to the Protection from the First Record by a Subsequent Purchaser.—It follows that, in order to obtain the benefit of the first recording, the subsequent purchase or encumbrance must be for a valuable consideration within the meaning of the general doctrine. Although the subsequent purchaser or encumbrancer had no notice of the unrecorded instrument, still, if he had not paid a valuable consideration, he would not gain any superior title or lien by his earlier registration.[1] Since the subsequent purchaser or

[1] It is held in some of these cases that in a contest between the holder of the prior unrecorded conveyance and the subsequent grantee or mortgagee who has obtained a record, the burden of proof is on the latter of showing affirmatively that he paid a valuable consideration and had no notice; the record itself is not enough: Landers v. Bolton, 26 Cal. 393; Snodgrass v. Ricketts, 13 Cal. 359; Plant v. Smythe, 45 Cal. 161; Long v. Dollarhide, 24 Cal. 218;[a] but the contrary rule is established by many other cases, which hold that the burden of proof is on him who claims the priority and charges the other with having had notice: Center v. Planters' etc. Bank, 22 Ala. 743; Miles v. Blanton, 3 Dana, 525; McCormick v. Leonard, 38 Iowa, 272; Fort v. Burch, 6 Barb. 60, 78; Van Wagenen v. Hopper, 8 N. J. Eq. 684, 707; Cary v.

§ 758, (a) The text is quoted in Mullins v. Butte Hardware Co., 25 Mont. 525, 65 Pac. 1004, 87 Am. St. Rep. 430.

§ 758, (b) This should not be taken to imply that the *jurisdiction* of equity has been enlarged by the recording acts; by virtue of them the doctrine has become enforceable, and is constantly enforced, by courts of law. See *ante,* § 680, and note.

§ 759, [a] Burden of Proof as to Bona Fide Purchase.— See, also, Long v. Dollarhide, 24 Cal. 218; Galland v. Jackman, 26 Cal. 79, 85 Am. Dec. 172; Wilhoit v. Lyons, 98 Cal. 409, 413, 33 Pac. 325; Beattie v. Crewdson, 124 Cal. 577, 57 Pac. 463; Chapman v. Hughes, 134 Cal. 641, 58 Pac. 298, 60 Pac. 974, 66 Pac. 982; Bell v. Pleasant, (Cal.) 78 Pac. 957, reviewing the California cases; Lloyd v.

encumbrancer must be *bona fide*, in order to claim the benefits of the first registration, it also follows that if such subsequent purchaser or encumbrancer was, in taking his conveyance, mortgage, or other instrument required or permitted to be recorded, chargeable with notice of a prior un-

White, 52 N. Y. 138; Dickerson v. Tillinghast, 4 Paige, 215; 25 Am. Dec. 528; Harris v. Norton, 16 Barb. 264; Nice's Appeal, 54 Pa. St. 200; Spackman v. Ott, 65 Pa. St. 131; Maupin v. Emmons, 47 Mo. 304; and see cases cited under §§ 747, 750, 751.[b]

Simons, (Minn.) 95 N. W. 903; Connecticut Mut. Life Ins. Co. v. Smith, 117 Mo. 261, 38 Am. St. Rep. 656, 22 S. W. 623; Young v. Schofield, 132 Mo. 650, 34 S. W. 497; Bishop v. Schneider, 46 Mo. 472, 2 Am. Rep. 533; Bowman v. Griffith, 35 Nebr. 361, 53 N. W. 140; Phœnix Mut. Life Ins. Co. v. Brown, 37 Nebr. 705, 56 N. W. 488; Pfund v. Valley Loan & Tr. Co., 52 Nebr. 473, 72 N. W. 480; First Nat. Bank v. Gibson, 60 Nebr. 767, 84 N. W. 259; Smith v. White, 62 Nebr. 56, 86 N. W. 930; Seymour v. McKinstry, 106 N. Y. 238, 12 N. E. 348, 14 N. E. 94; Turner v. Cochran, 94 Tex. 480, 61 S. W. 923; Bremer v. Case, 60 Tex. 151; Houston & T. C. R. R. Co. v. Chaffin, 60 Tex. 555 (recital of payment in the deed insufficient proof); King v. Quincy Nat. Bank, 30 Tex. Civ. App. 92, 69 S. W. 978 (same); Watkins v. Edwards, 23 Tex. 448; Morton v. Lowell, 56 Tex. 646; Thompson v. Westbrook, 56 Tex. 268; Harrison v. Boring, 44 Tex. 263; Illies v. Frerichs, 11 Tex. Civ. App. 575, 32 S. W. 915; Hawley v. Bullock, 29 Tex. 217; Rogers v. Pettus, 80 Tex. 425, 15 S. W. 1093.

(b) **Burden of Proof as to Bona Fide Purchase.**— That the law will make no presumption against the subsequent instrument which was first recorded, and that the burden is on the one claiming under the unrecorded instrument to show either notice or a want of consideration, see Gratz v. Land & River Imp. Co., 82 Fed. 381, 27 C. C. A. 305, 40 L. R. A. 393; Ryder v. Rush, 102 Ill. 338; Anthony v. Wheeler, 130 Ill. 128, 22 N. E. 494, 17 Am. St. Rep. 281, and note; Hiller v. Jones, 66 Miss. 636, 6 South. 465; Atkinson v. Greaves, (Miss), 11 South. 688; Coonrod v. Kelly, 113 Fed. 378 (New Jersey); Roll v. Rea, 50 N. J. Law 264, 12 Atl. 905; Wood v. Chapin, 13 N. Y. 509, 67 Am. Dec. 62; Lacustrine Fertilizer Co. v. Lake Guano, etc., Co., 82 N. Y. 477; Ward v. Isbill, 73 Hun, 550, 26 N. Y. Suppl. 141 (but see Simpson v. Del Hoyo, 94 N. Y. 189; Seymour v. McKinstry, 106 N. Y. 238, 12 N. E. 348, 14 N. E. 94); Hoyt v. Jones, 31 Wis. 389, 404; Wilkins v. McCorkle, (Tenn.) 80 S. W. 834. This is the rule in Texas where a secret equitable interest or "equity," as distinguished from a recordable title, is asserted against the recorded legal title: see Hill v. Moore, 62 Tex. 610; Lewis v. Cole, 60 Tex. 341; Johnson v. Newman, 43 Tex. 628; Bremer v. Case, 60 Tex. 151; McAlpine v. Burnett, 23 Tex. 649; Barnes v. Jamison, 24 Tex. 362; Biggerstaff v. Murphy, 3 Tex. Civ. App. 363, 22 S. W. 768, and cases cited; Saunders v. Isbell, 5 Tex. Civ. App. 513, 24 S. W. 307; Peterson v. McCauley, (Tex. Civ. App.) 25 S. W.

recorded conveyance or encumbrance, within the operation of the settled rules concerning the nature of notice and the time and mode of its reception, then he is not a *bona fide* purchaser, and does not obtain the statutory superiority of title or precedence of lien by his earliest registration. This

826; Stewart v. Crosby, (Tex. Civ. App.) 26 S. W. 138; Hicks v. Hicks, (Tex. Civ. App.) 26 S. W. 227; Oaks v. West, (Tex. Civ. App.) 64 S. W. 1033; Lane v. De Bode, 29 Tex. Civ. App. 602, 69 S. W. 437. In the same state, where priority is claimed in favor of an unrecorded deed or mortgage over a subsequent lien "fixed upon land by legal process" and not by contract,— *e. g.*, a judgment lien, — on the ground of notice, the burden of proof regarding notice is on the one claiming under such unrecorded instrument: Turner v. Cochran, 94 Tex. 480, 61 S. W. 923; Barnett v. Squyres, 93 Tex. 193, 54 S. W. 241, 77 Am. St. Rep. 854; Wright v. Lassiter, 71 Tex. 644, 10 S. W. 295; Linn v. Le Compte, 47 Tex. 442. In California, also, a distinction appears to have been established between cases of prior unrecorded deeds and of prior resulting trusts or other unrecordable "equities": the holder of the recorded title having the burden of proof in the former class of cases, but not in the latter: see cases reviewed in Bell v. Pleasant, (Cal.), 78 Pac. 957.

Probably the rule which has most authority, and much reason, in its favor, is that the burden is on the one who claims protection as a *bona fide* purchaser to show the actual payment of a valuable consideration by evidence other than the recitals in his deed: Lakin v. Sierra B. G. M. Co., 25 Fed. 337; Reorganized Church of Jesus Christ of Latter Day Saints v. Church of Christ, 60 Fed. 937, 946, and cases cited; Hodges v. Winston, 94 Ala. 576, 10 South. 535; Barton v. Barton, 75 Ala. 400; Lake v. Hancock, 38 Fla. 53, 20 South. 811, 56 Am. St. Rep. 159, and cases cited; Brown v. Welch, 18 Ill. 343, 68 Am. Dec. 549; Walter v. Brown, 115 Iowa, 360, 88 N. W. 832; Block & Pollak Iron Co. v. Holcomb-Brown Iron Co., 105 Iowa, 624, 75 N. W. 499, 67 Am. St. Rep. 319; Sillyman v. King, 36 Iowa, 207; Nolan v. Grant, 53 Iowa, 392, 5 N. W. 513; Kibby v. Harsh, 61 Iowa, 196, 16 N. W. 85; Rush v. Mitchell, 71 Iowa, 333, 32 N. W. 367; Fogg v. Holcomb, 64 Iowa, 621, 21 N. W. 111; Shotwell v. Harrison, 22 Mich. 410; Morris v. Daniels, 35 Ohio St. 406; Richards v. Snyder, 11 Oreg. 501, 6 Pac. 186; Weber v. Rothchild, 15 Oreg. 385, 15 Pac. 650, 3 Am. St. Rep. 162; Bolton v. Jones, 5 Pa. St. 145, 47 Am. Dec. 404; Lloyd v. Lynch, 28 Pa. St. 417; Lamar v. Hale, 79 Va. 147; but when such payment is shown, the burden shifts, and it devolves upon the other party to prove that the subsequent purchaser took with notice, actual or constructive: see Hodges v. Winston, 94 Ala. 576, 10 South. 535, and cases cited; Bynum v. Gold, 106 Ala. 427, 17 South. 667; Barton v. Barton, 75 Ala. 400; Bush v. Golden, 17 Conn. 594; Lake v. Hancock, 38 Fla. 53, 20 South. 811, 56 Am. St. Rep. 159; Brown v. Welch, 18 Ill. 343, 68 Am. Dec. 549; Walter v. Brown, 115 Iowa, 360, 88 N. W. 832 (overruling *dicta* in Nolan v. Grant, 53 Iowa, 392; Kibby v. Harsh, 61 Iowa, 196, 16 N. W. 85; Fogg v. Holcomb, 64 Iowa, 621, 21 N. W. 111; Hannan v. Seiden-

construction was put upon the English statutes at an early day, and has been adopted in nearly all the American states.[2c] These exceptional states are Ohio and North Carolina.

§ 760. **Purchaser in Good Faith with Apparent Record Title from a Grantor Charged with Notice of a Prior Unrecorded Conveyance.**—This rule is of very easy application under all ordinary circumstances between two consecutive deeds or

2 See *supra*, §§ 659, 660; 1 Jones on Mortgages, secs. 570–573. In the following discussion of recording in connection with notice, I have availed myself of Mr. Jones's able and full treatment of the same subject in his work on mortgages,— a work which I may be permitted to say is a credit to the legal literature of the country. In the United States the equitable applications of the doctrine concerning *bona fide* purchase, as modified by the recording acts, are mainly confined to mortgages. I desire to acknowledge the assistance I have received and the material which I have borrowed from Mr. Jones's work: Rolland v. Hart, L. R. 6 Ch. 678; Benham v. Keane, 1 Johns. & H. 685; Le Neve v. Le Neve, Amb. 436; Forbes v. Deniston, 4 Brown Parl. C. 189; Hine v. Dodd, 2 Atk. 275; Davis v. Earl of Strathmore, 16 Ves. 419; Wyatt v. Barwell, 19 Ves. 435, 438; Tunstall v. Trappes, 3 Sim. 286, 301; Ford v. White, 16 Beav. 120, 123; Woodworth v. Guzman, 1 Cal. 203; Fair v. Stevenot, 29 Cal. 486; Mahoney v. Middleton, 41 Cal. 41, 50; Galland v. Jackman, 26 Cal. 79, 87; 85 Am. Dec. 172; Lawton v. Gordon, 37 Cal. 202; Thompson v. Pioche, 44 Cal. 508, 516; O'Rourke v. O'Connor, 39 Cal. 442, 446; Smith v. Yule, 31 Cal. 180; 89 Am. Dec. 167; Beal v. Gordon, 55 Me. 482; Copeland v. Copeland, 28 Me. 525; Hart v. Farmers' and Mechanics'

topf, 113 Iowa, 659, 86 N. W. 44; and Gardner v. Early, 72 Iowa, 518, 34 N. W. 311); McCormick v. Leonard, 38 Iowa, 272; Hoskins v. Carter, 66 Iowa, 638, 24 N. W. 249; Block & Pollak Iron Co. v. Holcomb-Brown Iron Co., 105 Iowa, 624, 75 N. W. 499, 67 Am. St. Rep. 319; Blackman v. Henderson, (Iowa) 90 N. W. 825, 56 L. R. A. 902; Jackson v. Reid, 30 Kan. 10, 1 Pac. 308; Spofford v. Weston, 29 Me. 140; Sidelinger v. Bliss, 95 Me. 316, 49 Atl. 1094; Shotwell v. Harrison, 22 Mich. 410; Atwood v. Bearss, 45 Mich. 469; Hull v. Diehl, 21 Mont. 71, 52 Pac. 782, and cases cited; Morris v. Daniels, 35 Ohio St. 406; Advance Thresher Co. v. Esteb, 41 Oreg. 469, 69 Pac. 447; Lamar v. Hale, 79 Va. 147; Snyder v. Grandstaff, 96 Va. 473, 31 S. E. 647, 70 Am. St. Rep. 863.

In Wynn v. Rosette, 66 Ala. 517, it is held that when a defendant sets up a purchase for a valuable consideration without notice in defense to a bill to enforce a vendor's lien, the burden of proof is on him to prove payment of such consideration; but he is not required to disprove notice of the non-payment by his grantor of the purchase-money, when the deed recites its payment.

(c) The text is cited and followed in Tolbert v. Horton, 31 Minn. 518, 18 N. W. 647.

mortgages where the second is recorded before the first. Circumstances may arise which present questions of great intricacy and difficulty, and occasion perhaps a conflict of judicial opinion. A grantee or mortgagee, being a purchaser in good faith, and holding a record title which appears perfect, may really have no title because a grantor or a mortgagor in the chain of title had knowledge, when he took the conveyance to himself, of a prior unrecorded deed or mortgage, which was, however, recorded before his own deed or mortgage to his own grantee. The essential facts

Bank, 33 Vt. 252; Day v. Clark, 25 Vt. 397, 402; Tucker v. Tilton, 55 N. H. 223; Flynt v. Arnold, 2 Met. 619; George v. Kent, 7 Allen. 16; White v. Foster, 102 Mass. 375; Hamilton v. Nutt, 34 Conn. 501; Jackson v. Burgott, 10 Johns. 457, 459; 6 Am. Dec. 349; Jackson v. Van Valkenburgh, 8 Cow. 260; Jackson v. Post, 15 Wend. 588; Van Rensselaer v. Clark, 17 Wend. 25; 31 Am. Dec. 280; Fort v. Burch, 5 Denio, 187; Ring v. Steele. 3 Keyes, 450; Butler v. Viele, 44 Barb. 166; La Farge F. Ins. Co. v. Bell, 22 Barb. 54; Schutt v. Large, 6 Barb. 373; Goelet v. McManus, 1 Hun, 306; Smallwood v. Lewin, 15 N. J. Eq. 60; Mathews v. Everitt, 23 N. J. Eq. 473; Conover v. Van Mater, 18 N. J. Eq. 481; Jaques v. Weeks, 7 Watts, 261; Union Canal Co. v. Young, 1 Whart. 410, 432; 30 Am. Dec. 212; Solms v. McCulloch, 5 Pa. St. 473; Nice's Appeal, 54 Pa. St. 200; Ohio etc. Co. v. Ross, 2 Md. Ch. 25; Owens v. Miller, 29 Md. 144; Johnston v. Canby, 29 Md. 211; Lambert v. Nanny, 2 Munf. 196; Gibbes v. Cobb, 7 Rich. Eq. 54; Nelson v. Dunn, 15 Ala. 501; Harrington v. Allen, 48 Miss. 493; Smith v. Nettles, 13 La. Ann. 241; Myers v. Ross, 3 Head, 60; Underwood v. Ogden, 6 B. Mon. 606; Forepaugh v. Appold, 17 B. Mon. 625; Sparks v. State Bank, 7 Blackf. 469; Farmers' Bank v. Bronson, 14 Mich. 361; Baker v. Mather, 25 Mich. 51; Bayliss v. Young, 51 Ill. 127; Gilbert v. Jess, 31 Wis. 110; Fallass v. Pierce, 30 Wis. 443; Bell v. Thomas, 2 Iowa, 384; English v. Waples, 13 Iowa, 57; Coe v. Winters, 15 Iowa, 481; Sims v. Hammond, 33 Iowa, 368; Musgrove v. Bonser, 5 Or. 313; 20 Am. Rep. 737. *Exceptions:* In Ohio and North Carolina, the courts have held, in construing the somewhat special language of the local statutes, that notice, whether actual or constructive, of a prior unrecorded instrument shall not affect the precedence acquired by the earlier record of a subsequent conveyance or mortgage.[d] It has already been shown (*ante*, § 722) that in Ohio a docketed judgment has precedence over a prior unrecorded mortgage: Bercaw v. Cockerill, 20 Ohio St. 163; Bloom v. Noggle, 4 Ohio St. 45; Mayham v. Coombs, 14 Ohio, 428; Stansell v. Roberts, 13 Ohio, 148; 42 Am. Dec. 193; Robinson v. Willoughby, 70 N. C. 358; Fleming v. Burgin, 2 Ired. Eq. 584.

(d) But if a mortgage is expressly taken subject to a prior mortgage, it is postponed, though the prior mortgage was not entitled to record: Coe v. Columbus, P. & I. R. Co., 10 Ohio St. 372, 75 Am. Dec. 518.

giving rise to such a question are as follows: A gives a deed to B, which for a while is unrecorded. A subsequently conveys the same land to C, who pays a valuable consideration, but who has actual notice of B's prior deed, and C puts his deed on record first. B then, after the recording of C's deed, puts his own prior deed on record. After the record of B's deed, C conveys the land to D, who pays a valuable consideration, and has no *actual* notice of B's deed, and only the constructive notice given by the record. The facts might be varied by supposing mortgages in place of deeds. Which has the priority, B or D? There are earlier decisions which give the precedence to D.[1 a] These decisions, however, have been overruled in the same states in which they were given, and it is now settled by an overwhelming weight of authority that B would have the precedence over D. It is plain that C got no title by his first recording, because he had actual notice. When C conveyed to D, if B's deed had not then been on record, and D had put his own deed on record before B's deed was recorded, D would have obtained the title. But the record of B's deed prior to the conveyance to D cut off the latter's precedence, because D could claim nothing from C's *first* record, by reason of C's having actual notice.[2 b] This result evidently rests upon the

[1] Connecticut v. Bradish, 14 Mass. 296, 303; Trull v. Bigelow, 16 Mass. 406; 8 Am. Dec. 144; Glidden v. Hunt, 24 Pick. 221; Ely v. Wilcox, 20 Wis. 523, 530; 91 Am. Dec. 436; and see 2 Lead. Cas. Eq., 4th Am. ed., Am. notes, 40, 41, 212. The reason given is, that D, on taking his deed or mortgage, and on making search, would find an unbroken chain of record title from himself through C up to A, and that he was under no obligation to go out of such a chain of record title, and search for deeds or mortgages to persons *by* or through whom he did not derive his title.

[2] 1 Jones on Mortgages, secs. 574, 575; Flynt v. Arnold, 2 Met. 619; Mahoney v. Middleton, 41 Cal. 41, 50; Fallass v. Pierce, 30 Wis. 443; English v. Waples, 13 Iowa, 57; Sims v. Hammond, 33 Iowa, 368; Van Rensselaer v. Clark, 17 Wend. 25; 31 Am. Dec. 280; Jackson v. Post, 15 Wend. 588; Ring v. Steele, 3 Keyes, 450; Schutt v. Large, 6 Barb. 373; Goelet v. McManus, 1 Hun, 306. In Flynt v. Arnold, 2 Met. 619, Shaw, C. J., said: "Suppose, for instance,

(a) See, also, Morse v. Curtis, 140 Mass. 112, 54 Am. Rep. 456.

(b) See, also, Parrish v. Mahany, 10 S. Dak. 276, 73 N. W. 97, 66 Am.

fact — and there all of the decisions place it — that C took with actual notice, and so could acquire no precedence by his earliest record. If this fact were otherwise, if C had no notice and first put his deed or mortgage upon record, he would then clearly obtain a perfect title or superior lien

A conveys to B, who does not immediately record his deed. A then conveys to C, who has notice of the prior unregistered deed to B; C's deed, though first recorded, will be postponed to the prior deed to B. Then, suppose B puts his deed on record, and afterwards C conveys to D. If the above views are correct, D could not hold against B; not in the right of C, because, in consequence of actual knowledge of the prior deed, C had but a voidable title; and not in his own right, because, before he took his deed, B's deed was on record, and was constructive notice to him of the prior conveyance to B from A, under whom his title is derived. But, in such a case, if, before B recorded his deed, C had conveyed to D without actual notice, then D, having neither actual nor constructive notice of the prior deed, would take a good title. And as D, in such case, would have an indefeasible title himself against B's prior deed, so, as an incident to the right of property, he could convey a good and indefeasible title to any other person, although such grantee should have full notice of the prior conveyance from A to B. Such purchaser, and all claiming under him, would rest on D's indefeasible title, unaffected by any early defect of title, by want of registration, which had ceased to have any effect on the title, by a conveyance to D without notice, from one having a good apparent record title." Shaw, C. J., criticises the earlier Massachusetts cases, and adds some very valuable remarks upon the general policy and operation of the recording acts, and the duties of purchasers in searching the records.c The New York case of Van Rensselaer v. Clark, 17 Wend. 25, 31

St. Rep. 715, reviewing the cases; s. c., 12 S. Dak. 278, 76 Am. St. Rep. 604, 81 N. W. 295 (burden of proof rests on D. to show that C. was a *bona fide* purchaser); Erwin v. Lewis, 32 Wis. 276; Cook v. French, 96 Mich. 525, 56 N. W. 101; Woods v. Garnett, 72 Miss. 78, 16 South. 390. The Massachusetts courts, however, have returned to their former rule: Morse v. Curtis, 140 Mass. 112, 54 Am. Rep. 456.

(c) See, also, the following extract from the opinion of Dixon, C. J., in Fallass v. Pierce, 30 Wis. 443: "Now, the reason why the purchaser from C, in the case above supposed, who buys after the recording of the prior deed to B from A, also the grantor of C, is bound to take notice of B's deed, or of the fact that the true title is or may be in B, is that such purchaser, in looking upon the statute, sees that B's prior and paramount title at common law is not to be devested, or his deed avoided, except upon the happening of three distinct events or contingencies, the absence of either of which will save the title of B, or prove fatal to that claimed by C, or which may be acquired by a purchaser from him. Those events or contingencies are: First, good faith in C, or the purchase by him without notice of the previous conveyance to B; second, the payment of a valuable consideration by C; and, third, the first recording of C's deed.

over B's prior but unrecorded deed. That being the case, and C having obtained an indefeasible title, if he should then convey to D, who had notice, the latter, by virtue of another settled rule, would succeed to *his* grantor's rights, and also acquire a like perfect title, as Chief Justice Shaw expressly states in the passage quoted. The same would be true in the succession of purchasers, each obtaining a record but each affected with notice. As soon as any one

Am. Dec. 280, is a leading authority in support of the proposition contained in the text, and has been followed by all the other decisions in the same state. In Mahoney v. Middleton, 41 Cal. 41, the supreme court of California squarely meets the question, and decides in full accordance with the foregoing Massachusetts and New York cases. The same rule applies, not only to one, but to any number of successive grantees and grantors who have put their conveyances on record, but who have had notice of a prior unrecorded deed or mortgage, or who have not paid a valuable consideration. In the recent case of Fallass v. Pierce, 30 Wis. 443, Dixon, C. J., discussing the same general question, and adopting the same supposition as that given in the text and used by Shaw, C. J., said: "If, in the case supposed, C took his deed with knowledge of the prior conveyance to B, and had then conveyed to D, who had like knowledge, and D should convey to E, and so on, conveyances should be executed to the end of the alphabet, each subsequent grantee having knowledge of B's prior right, and all of their conveyances being recorded, yet then, if B should record his deed before the last grantee with knowledge, and Z should make conveyance, the purchaser from Z would be bound to take notice of B's right, and of the relations existing between him and all the subsequent purchasers from C to Z, inclusive. And in the same case, if Z should sell to a purchaser in good faith for value from him, yet if B should get his conveyance recorded *before* that of such purchaser, his title would be preferred, because of such first record. And it is manifest that the same result would follow if in the case supposed none of the subsequent grantees, from C to Z, inclusive, paid any valuable consideration for the land, or, if in the case of each successive grantee, his title was defective and invalid as against B. either by reason of his knowledge of B's title, or because he was a mere volunteer, paying no consideration whatever for the conveyance."

The purchaser from C, looking upon the record, sees — first, the prior conveyance from A to B; and, second, the first recording of C's deed. Of these two facts the record informs him, but of the other two facts requisite, under the statute, to constitute valid title in C, as against the prior purchaser, B, the record gives him no information. For knowledge of the other two facts, namely, the good faith of C, and valuable consideration paid by him, the purchaser from, or any one claiming title under, C, as against B or his grantees, must inquire elsewhere than by the record, and is bound, at the peril of his title, or of any right which can be granted by or claimed under C, to ascertain the existence of those facts."

in the series purchases for value and without notice, and places his conveyance upon record, he acquires a title or lien secure as against the earliest unrecorded deed to B. This necessarily leads to another most important rule concerning notice in connection with recording, and the extent to which a record is constructive notice to subsequent purchasers and encumbrancers.

§ 761. **Break in the Record Title — When Purchaser is still Charged with Notice of Prior Unrecorded Title.**—A purchaser or encumbrancer is not, in general, bound to search the records for encumbrances as against a title which does not appear on the record. From the general policy of the recording acts to protect purchasers and encumbrancers against prior unrecorded deeds and mortgages, it necessarily follows that the title upon record, in the absence of notice *aliunde,* is the purchaser's protection. As has been shown in the section upon notice,[1] [a] the record of a conveyance or of a mortgage is a constructive notice to those, and to those only, who must trace their title from or through the grantor, or the mortgagor by whom the deed or mortgage was executed. If there is a break in the chain of record title, the records will not enable the purchaser to supply the missing links and to connect the broken parts by any systematic search. If a purchaser has traced the title by the records regularly up or down to A, and the record does not show the title out of A, then the statutes render A's title a protection to the purchaser under it. As a general rule, therefore, if the records show a regular chain of conveyances from A to B, from B to C, the record of a mortgage or deed of the same land from B, *prior to the date of the conveyance by which he received the title from his grantor, A,* would not affect a purchaser or mortgagee from C with

1 See *supra,* § 658.

(a) See, also, Traphagen v. Irwin, 18 Nebr. 195, 24 N. W. 684, citing § 761 of the text.

notice.[2b] Notwithstanding the generality of this rule, a purchaser or encumbrancer *may* be bound to search for encumbrances as against a title not appearing of record, and may therefore be affected with notice by such encumbrances. Thus in the case last supposed, if before the conveyance to B from A, B had held some estate, legal or equitable, which was a mortgageable interest, though not the legal fee, and

2 Page v. Waring, 76 N. Y. 463, 467–469; Cook v. Travis, 20 N. Y. 400; Farmers' Loan & T. Co. v. Maltby, 8 Paige, 361; Losey v. Simpson, 11 N. J. Eq. 246; Calder v. Chapman, 52 Pa. St. 359; 91 Am. Dec. 163; Wing v. McDowell, Walk. Ch. 175. The late case of Page v. Waring, 76 N. Y. 463, clearly illustrates this rule. The controversy was between two titles. Peter Poillon owned the land in 1827. In 1827 he gave a deed of it to one Hart, but this deed was not recorded until 1864. In 1830, Hart executed a deed to one Greenly which was recorded at once. In 1863, a deed from Greenly's executors was given to the plaintiff and recorded. "This is the chain of the plaintiff's title, upon which he bases his right to recover, and if there was nothing to break this chain, his right would be plain enough." The following is the chain of defendant's title: In 1861, Peter Poillon gave a deed of the same land to Goldsmith, which was recorded immediately. In 1862, Goldsmith gave a deed of an undivided half of the land to Marks, which was recorded in September of that year. In March, 1863, Goldsmith and Marks gave a deed of the land to Morton, which was recorded during the same month. In 1869, Morton conveyed to Fox, and immediately after, Fox to the defendant, both deeds being immediately put on record. "It will be seen that the defendant has a regular chain of title from Poillon, and that all the deeds of his claim, down to and including the deed to Morton, were recorded before the deed from Poillon to Hart was recorded; and this priority upon the records presents the question to be considered in determining the rights of the parties." Earl, J., said (p. 468): "It matters not that the deed from Hart to Greenly was recorded before the deeds in the defendant's chain of title; because if the defendant, by reason of the record of the deeds under which he holds, has priority over the deed to Hart, and a title good as against that deed, then there is a break in the plaintiff's chain of title, and no title could be derived from Hart that would be good as against the defendant: Cook v. Travis, 20 N. Y. 400. And it matters not that all the deeds in the plaintiff's chain were recorded before the conveyance by Morton to Fox, and by Fox to the defendant;

(b) This principle is further explained in § 658, *supra*. The text is cited and followed in Bright v. Buckman, 39 Fed. 243. See Wheeler v. Young, (Conn.) 55 Atl. 670; Higgins v. Dennis, 104 Iowa, 605, 74 N. W. 9; Schoch v. Birdsall, 48 Minn. 441, 51 N. W. 382; Ford v. Unity Church Society, 120 Mo. 498, 25 S. W. 394, 41 Am. St. Rep. 711, 23 L. R. A. 561; Boyd v. Mundorf, 30 N. J. Eq. 545; Bingham v. Kirkland, 34 N. J. Eq. 229; Oliphant v. Burns, 146 N. Y. 218, 40 N. E. 980; Coleman v. Reynolds, 181 Pa. St. 317, 37 Atl. 543.

had given a mortgage while holding such estate, which was put on record, the mortgage being executed and recorded before he received the deed of the fee from A, then if the purchaser from C had notice of the fact that B held such an estate, he would be bound to search the records for any mortgage made by B while holder thereof, and would be affected with constructive notice by the record of such a notice. The equitable estate of a vendee in possession under an executory contract for sale, even in states where the contract is not to be recorded, and even when it is verbal, is such a mortgageable interest; and if the vendee gives a mortgage which is recorded before he obtains a conveyance of the fee, a purchaser who has notice of his prior equitable interest must search for the mortgage; it would take precedence over his own conveyance or encumbrance.[3] The notice of such mortgageable interest might be actual or constructive; and an example of the latter kind would be that given by recitals in a deed through which the subsequent purchaser must derive his title.[4] What is notice, in its various forms and species, has been considered in a former section.[5]

because if Morton was protected by the recording act, and had good title under such act, then the persons taking title under him were also protected: Webster v. Van Steenbergh, 46 Barb. 211; Wood v. Chapin, 13 N. Y. 509; 67 Am. Dec. 62; Hooker v. Pierce, 2 Hill, 650." After quoting the sections of the statutes, he adds: "Under these acts the unrecorded deed, though prior in date, has no effect as to the subsequent deed first recorded, and the subsequent deed conveys the title as if the first deed had not been executed: Hetzel v. Barber, 69 N. Y. 1.

3 Crane v. Turner, 7 Hun, 357; affirmed, 67 N. Y. 437.

4 Crane v. Turner, 7 Hun, 357; 67 N. Y. 437. Thus the subsequent purchaser or encumbrancer must derive his title not only through the deed from B to C, but also through that from A to B. If the latter deed should contain a recital that the grantee B had been in possession of the land for a certain period of time prior to the execution of the deed, under a contract for the sale of the land, the purchaser would, by such recital, be charged with notice of B's equitable interest, and that it was a mortgageable interest, and would be bound to search for encumbrances created by B during the entire period while he was in possession by virtue of his equitable interest as stated by the recital.

5 See *ante*, sec. V., §§ 591–676.

§ 762. III. Good Faith Necessary.— The most general statement of the doctrine describes the purchase as one made in good faith for a valuable consideration and without notice. It is true that in most instances the want of good faith consists in the completion of the purchase after the party has been charged with notice, for such conduct is regarded by equity as constructively fraudulent.[1] The requisite of good faith extends much further. A purchaser may part with a valuable consideration, may have no notice of any opposing claim, and yet lack the good faith which is essential to render his position a protection, and his defense available. It is an elementary doctrine, therefore, that, independently of notice and valuable consideration, any want of good faith on the purchaser's part, any inequitable conduct of his, such as fraud committed in the transaction against his own immediate vendor or grantor, or a participation in an intended fraud against the creditors of his vendor or grantor, or his obtaining the transfer through misrepresentations or concealments which are inequitable, although not amounting to positive fraud, and the like, will destroy the character of a *bona fide* purchase, and defeat the protection otherwise given to it. The party claiming to be a *bona fide* purchaser must come into a court of equity with absolutely clean hands.[2] [a]

1 See *ante*, § 591.

2 Cram v. Mitchell, 1 Sand. Ch. 251. There are some old cases in which a so-called *bona fide* purchaser, through fraud or violence, was protected: See Culpepper's Case, cited in Sanders v. Deligne, Freem. Ch. 123; Fagg's Case, cited in 2 Vern. 701; 1 Cas. Ch. 68; Harcourt v. Knowel, cited in 2 Vern. 159; but they have long been overruled: See Carter v. Carter, 3 Kay & J. 617, 636, 637; Zollman v. Moore, 21 Gratt. 313, 321.

(a) The text is quoted in Young v. Schofield, 132 Mo. 650, 34 S. W. 497; and cited, Connecticut Mut. Life Ins. Co. v. Smith, 117 Mo. 261, 38 Am. St. Rep. 656, 22 S. W. 623; Schneider v. Sellers, (Tex. Civ. App.) 81 S. W. 126. See, also, Laprad v. Sherwood, 79 Mich. 520, 44 N. W. 943 (mortgage obtained by fraud or perjury of agent). In some states it is held that if there be any usury in the debt secured by a mortgage, that vitiates the defense of a *bona fide* purchase by the mortgagee, and

§ 763. Third. Effects of a Bona Fide Purchase as a Defense. — Having explained the *rationale* of the doctrine, and ascertained what elements enter into the conception of a *bona fide* purchase, I pass to consider with somewhat more of detail the effects which it produces by way of a defense in equitable suits,— the protection which it affords to a defendant. Pursuing the order, already mentioned, adopted by Lord Westbury, the various cases in which the defense will prevail may be collected into three classes: 1. Where the holder of a legal estate appeals to the auxiliary jurisdiction of equity for relief; 2. Where the holder of an equitable estate seeks relief against a subsequent purchaser of the legal estate, or against a purchaser of a subsequent equitable estate who has obtained the legal estate; 3. Where the holder of a mere "equity," or right to some distinctively equitable relief, as distinguished from an equitable estate, seeks to enforce it against a subsequent purchaser of either a legal or an equitable estate.

§ 764. I. Suits by Holder of the Legal Estate under the Auxiliary Jurisdiction of Equity.— As cases falling within this class are very infrequent in the United States, no detailed discussion seems to be necessary. The kinds of suits embraced within the term "auxiliary jurisdiction" as here used are those for discovery proper, those for the delivery up of title deeds in connection with discovery, those to prevent a defendant in ejectment from setting up outstanding terms to defeat the action, and those to perpetuate testimony. It has been settled from an early day that no suit for a discovery can be maintained by the holder of the legal

permits any equity, even though latent, to prevail: Smith v. Lehrman, 85 Ala. 394, 5 South. 204; Meyer Bros. v. Cook, 85 Ala. 417, 5 South. 147; National Mut. B. & L. Assn. v. Culberson, (Ala.) 25 South. 173; Southern Home B. & L. Assn. v. Riddle, (Ala.) 29 South. 667; Clark v. Johnson, 133 Ala. 432, 31 South. 960; Hoots v. Williams, 116 Ala. 372, 22 South. 497 (but a *bona fide* purchaser at the foreclosure sale, having no notice of the usury, is protected); White v. Interstate B. & L. Assn., 106 Ga. 146, 32 S. E. 26.

estate in order to assist him in maintaining his title against a *bona fide* purchaser of an equitable estate, further than as to facts relevant to the question whether the defendant had notice. After such purchaser has sufficiently denied notice, he will not be compelled to make discovery in aid of plaintiff's title.[1 a] It is equally well settled that the holder of the legal estate cannot compel a delivery up of the title deeds by a *bona fide* purchaser of an equitable estate — for example, an equitable mortgagee — even though some other relief, such as a foreclosure, may have been granted.[2] The defense likewise prevails in suits, unknown in this country, brought by the legal owner against a defendant who has been sued in ejectment, to restrain the latter from setting up old outstanding legal terms, in order to defeat a recovery in

1 Burlace v. Cooke, Freem. Ch. 24, per Lord Nottingham; Parker v. Blythmore, Prec. Ch. 58, per Sir John Trevor, M. R.; Basset v. Nosworthy, Cas. t. Finch, 102; 2 Lead. Cas. Eq. 1, per Lord Nottingham (this is the leading case. An heir at law sued a purchaser from a devisee of plaintiff's ancestor seeking to discover a revocation of the will, and also to set aside certain outstanding terms which defendant bought in order to protect his equitable title. The defense of *bona fide* purchase was sustained against both reliefs); Jerrard v. Saunders, 2 Ves. 187, 454, per Lord Loughborough (a bill for discovery only).

2 Wallwyn v. Lee, 9 Ves. 24 (a life tenant mortgaged property in fee, fraudulently concealing the fact of his mere life estate and pretending to be owner in fee, and delivered the title deeds to the mortgagee. On his death the remainderman sued for a discovery and to have the deeds surrendered. Lord Eldon sustained the defense of *bona fide* purchase); Joyce v. De Moleyns, 2 Jones & L. 374 (an heir at law of a deceased owner obtained possession of the title deeds, and deposited them with bankers as security by way of equitable mortgage for a loan. The real title was in a devisee from the deceased owner. A suit was brought on behalf of the devisee to compel a delivery up of the deeds by the bankers, but the relief was refused by Chancellor Sugden); Heath v. Crealock, L. R. 10 Ch. 22, 28 (a mortgagor, fraudulently concealing the fact of the outstanding mortgage, which had conveyed the legal estate, sold and conveyed the property to the defendant and handed over the title deeds. The prior mortgagee sues for a foreclosure and a delivery up of the deeds. While the foreclosure was granted, the other relief was refused. It should be noticed that the defendant, although receiving a conveyance purporting to transfer the legal estate, only obtained an equitable estate, since the legal estate had already been vested in the prior mortgagee, the plaintiff;

(a) See also *ante*, § 200.

such action, and to set aside those terms.[3] Finally, it has been said that the defense of *bona fide* purchase is sufficient to defeat a suit for the perpetuation of testimony; but with respect to the correctness of this conclusion there is at least some doubt.[4]

§ 765. **Exceptions and Limitations.**— There are, however, well-considered and authoritative decisions, in which the defense has not been permitted to prevail against the holder of the legal estate suing for relief. Although these decisions were not in express terms placed by the judges rendering them upon the ground now mentioned, yet the general doctrine upon which they can alone be sustained and harmonized with the current of authority is that first explained by Lord Westbury, and already stated.[1] Where the suit is one belonging to the *concurrent* jurisdiction of equity and law, and is brought by the holder of a legal title to obtain a relief purely legal, the defense of *bona fide* purchase will not

also that the defense of *bona fide* purchase under these circumstances did not prevent the main relief of a foreclosure); Waldy v. Gray, L. R. 20 Eq. 238. See, however, Newton v. Newton, L. R. 6 Eq. 135; L. R. 4 Ch. 143, where, under the special facts, Lord Romilly drew a distinction, and ordered the deeds to be surrendered. The opinion of Lord Hatherley in this case on appeal is valuable as drawing the line between the cases of successive equities where the priority is determined by order of time, and the cases where the purchaser of a subsequent equitable *estate* may set up the defense of *bona fide* purchase.[b]

[3] Basset v. Nosworthy, Cas. t. Finch, 102; Goleborn v. Alcock, 2 Sim. 552.

[4] The reasons which shield the purchaser from making a discovery which shall undermine his title do not seem to apply to a mere suit for the perpetuation of testimony. Bechinall v. Arnold, 1 Vern. 354, and Jerrard v. Saunders, 2 Ves. 454, 458 (a *dictum* of Lord Loughborough), either sustain or seem to favor the defense; *per contra*, see Dursley v. Fitzhardinge, 6 Ves. 251, 263, 264, per Lord Eldon. See Coopers' Eq. Pl. 56, 57, 283, 287.

[1] See *supra*, § 742.

(b) Since the passage of the Judicature Act in England, these rules have been modified. The Chancery Division of the High Court of Justice now have jurisdiction, on the application of the legal owner of title deeds, to order them to be delivered up by a purchaser for value without notice: Cooper v. Vesey, L. R. 20 Ch. Div. 611; see also the quotation from the opinion in Ind, Coope & Co. v. Emmerson, L. R. 12 App. Cas. 300, cited *ante*, vol. 1, § 200, where the changes affected by the Judicature Act, and the reasons therefor, are fully stated.

prevail, because it would not prevail at law, and to allow it in equity would simply be an abdication of its rightful jurisdiction by a court of equity, and a putting the plaintiff to the unnecessary expense and delay of a second action at law. Such suits especially are those brought to establish and recover dower, and those brought to establish tithes in England.[2 a] Whatever difference of opinion there may be as to the correctness of this limitation, it is fully settled in England, independently of any statutes concerning registration, that the defense of *bona fide* purchase cannot avail to defeat a suit for foreclosure brought by a prior *legal* mortgagee against a subsequent equitable mortgagee or purchaser of an equitable estate who has paid a valuable consideration without notice of the prior mortgage.[3] The system of recording necessarily hinders the operation of this particular rule in the United States; but it is based upon principle, and in the absence of recording acts would doubtless be adopted by our courts.

§ 766. II. Suits by the Holder of an Equitable Estate or Interest against the Purchaser of the Legal Estate.—This application of the doctrine includes not only purchasers who re-

2 Williams v. Lambe, 3 Brown Ch. 263, per Lord Thurlow (dower); Collins v. Archer, 1 Russ. & M. 284, per Sir John Leach (tithes), as explained by Lord Westbury in Phillips v. Phillips, 4 De Gex, F. & J. 208, 217. These decisions themselves, as well as the principle laid down by Lord Westbury, do not stand unchallenged. Their correctness has been denied by some; the explanation given by Lord Westbury has been rejected by others: See Bowen v. Evans, 1 Jones & L. 178, 263; Attorney-General v. Wilkins, 17 Beav. 285, 292; Payne v. Compton, 2 Younge & C. 457; Blain v. Harrison, 11 Ill. 384. Mr. Roper strongly upholds the correctness of the decisions and the ground upon which they are rested: 1 Roper on Husband and Wife, 446; while Lord St. Leonards, in the later editions of his work on vendors, of course opposes the opinion of Lord Westbury.

3 Heath v. Crealock, L. R. 10 Ch. 22, 28; Waldy v. Gray, L. R. 20 Eq. 238; Finch v. Shaw, 19 Beav. 500; affirmed *sub nom.* Colyer v. Finch, 5 H. L. Cas. 905. For the general doctrine upon which such cases must be rested, as laid down by Lord Romilly, see quotation *supra*, in note under § 742.

(a) See, also, Mitchell v. Farrish, 69 Md. 235, 14 Atl. 712 (dower); Sandley v. Caldwell, 28 S. C. 583, 6 S. E. 818 (dower); Ind, Coope & Co. v. Emmerson, L. R. 12 App. Cas. 300; *ante*, § 200, note.

ceive a conveyance of the legal estate at the time and as a part of their original and single purchase, but also those who, having originally purchased and acquired merely an equitable estate, afterwards obtain a conveyance of the outstanding legal title from the one in whom it was vested.[a] It has even been extended to such purchasers of an equitable estate, who have not yet actually acquired the legal title, but who have the best right to call for it. Cases in which this last phase of the doctrine can be *properly* applied are, from the nature of our modes of dealing with real estate, very infrequent in the United States. The common occasions for a resort to the doctrine in England, where it is little affected by statutes of registration, are the cases of a prior equitable mortgage, and a subsequent sale and conveyance of the land by the mortgagor, he concealing the fact of such existing mortgage; of several consecutive mortgages of the same land, the later ones being taken in ignorance of the earlier; successive conveyances of his equitable estate by the same *cestui que trust,* the later purchaser being ignorant of the earlier transfer; and purchasers from a trustee in violation of his trust. In the United States the recording system has greatly modified the practical operation of the doctrine, since the defendant must generally show, in order to obtain protection, that he has recorded the instrument by which his title was acquired. With this additional feature, the instances most frequently coming before the American courts of equity are cases of a prior unrecorded mortgage and a subsequent recorded conveyance, a prior unrecorded and a subsequent recorded mortgage, a prior contract of sale and a subsequent recorded conveyance or mortgage, a prior vendor's lien or other equitable lien and a subsequent recorded conveyance or mortgage, and a conveyance by a trustee of land subject to

(a) The text is cited in United States v. Detroit Timber & L. Co., (C. C. A.) 131 Fed. 668 (where, however, the purchaser acquired the outstanding legal title before receiving notice).

a prior trust, the trust being more often constructive or resulting than express. The case of a prior unrecorded deed purporting to convey the legal estate, and a subsequent recorded deed depending wholly upon the recording acts, does not belong to the equitable jurisdiction.

§ 767. **Legal Estate Acquired by the Original Purchase.**— In the first place, it is the very central portion of the doctrine, to which all others have been additions, that where the defendant acquired the legal estate at the time and as a part of his original purchase, the fact of his purchase having been *bona fide* for value and without notice is a perfect defense in equity to any suit brought by the holder of a prior equitable estate, lien, encumbrance, or other interest, seeking either to establish and enforce his equitable estate, lien, or interest, or to obtain any other relief with respect thereto which can be given by a court of equity.[1] [a]

[1] See Basset v. Nosworthy, 2 Lead. Cas. Eq., 4th Am. ed., 1, 4, and notes; Pilcher v. Rawlins, L. R. 7 Ch. 259, 268, 269, per James, L. J.; Willoughby v. Willoughby, 1 Term Rep. 763, 767, per Lord Hardwicke, and other cases

(a) The text is quoted in Sengfelder v. Hill, 21 Wash. 371, 58 Pac. 250; and cited in Freeman v. Pullen, 130 Ala. 653, 31 South. 451; Robbins v. Moore, 129 Ill. 30, 21 N. E. 934. See some instructive observations on the doctrine by Stayton, C. J., in Patty v. Middleton, 82 Tex. 586, 17 S. W. 909.

Forged and Undelivered Deeds.— The doctrine of *bona fide* purchase does not apply for the protection of one who claims through a forged deed, since his title is a nullity: Bird v. Jones, 37 Ark. 195; Camp v. Carpenter, 52 Mich. 375, 18 N. W. 113 (assignee of forged mortgage); Crawford v. Hoeft, 58 Mich. 1, 23 N. W. 27, 24 N. W. 645, 25 N. W. 567, 26 N. W. 870; McGinn v. Tobey, 62 Mich. 252, 28 N. W. 818, 4 Am. St. Rep. 848; Abee v. Bargas, (Tex. Civ. App.) 65 S. W. 489. See, also, *post*, § 918. For similar reasons, it is held, by the weight of authority, that one who claims through a deed which was placed in escrow by the grantor therein, and fraudulently abstracted and recorded by the grantee, cannot have the benefit of his *bona fide* purchase: Dixon v. Bristol Savings Bank, 102 Ga. 461, 66 Am. St. Rep. 193, 31 S. E. 96, and cases cited; Mays v. Shields, 117 Ga. 814, 45 S. E. 68; Jackson v. Lynn, 94 Iowa 151, 58 Am. St. Rep. 386, 62 N. W. 704; Everts v. Agnes, 4 Wis. 343, 65 Am. Dec. 314, 6 Wis. 453; unless there are circumstances by which the grantor is estopped: Mays v. Shields, 117 Ga. 814, 45 S. E. 68; Shurtz v. Colvin, (Ohio St.) 45 N. E. 527. See, also, Allen v. Ayer, 26 Oreg. 589, 39 Pac. 1, and cases cited (*bona fide*

A mortgagee of land may be a *bona fide* purchaser within the meaning of the general doctrine. In some states every mortgagee, subsequent as well as prior, acquires the legal estate as against the mortgagor. In other states, although mortgages create only an equitable lien, they are expressly

cited *ante*, in vol. 1, under § 200.[b] In this country, it must be remembered that the defense is only made available by the defendant's having first put his title deed upon record. The following are some *illustrations* merely taken from innumerable decisions: A *bona fide* purchaser from a trustee of land subject to a *constructive or resulting trust* is protected against the claims of the beneficiaries:[c] Wilson v. Western etc. Co., 77 N. C. 445; Bass v. Wheless, 2 Tenn. Ch. 531; Fahn v. Bleckley, 55 Ga. 81; Gray v. Coan, 40 Iowa, 327; Maxwell v. Campbell, 45 Ind. 360 (purchaser at judicial sale by a guardian is protected against claims by the wards). *Against prior liens:*[d] Burchard v. Fair Haven, 48 Vt. 327 (attachment lien); Beall v. Butler, 54 Ga. 43 (laborer's lien); Jones v. Lapham, 15 Kan. 540 (equitable lien). *Against other equitable interests:*[e] Eldridge v. Walker, 80 Ill. 270; Farmers' Nat.

purchaser not protected, where deed fraudulently delivered by agent); Steffian v. Milmo Nat. Bank, 69 Tex. 513, 6 S. W. 823 (*bona fide* purchaser not protected, when possession of undelivered deed had been fraudulently obtained); and it has been held that, since a conveyance by a married woman passes no legal title, the fact that the records do not disclose that a grantor was a married woman does not render one claiming through such conveyance a *bona fide* purchaser: Daniels v. Mason, 90 Tex. 240, 59 Am. St. Rep. 815, 38 S. W. 161, reversing 36 S. W. 1113.

(b) See, also, Taylor v. London and County Banking Co., [1901] 2 Ch. 231.

(c) Against Resulting or Constructive Trust.— See, also, McNeil v. Congregational Soc., 66 Cal. 105, 4 Pac. 1096 (purchase of partnership lands standing in the name of one of the partners); Warnock v. Harlow, 96 Cal. 298, 31 Pac. 166, 31 Am. St. Rep. 209; Warner v. Watson, 35 Fla. 402, 17 South. 654; Gorman v. Wood, 68 Ga. 524; Parker v. Barnesville Sav. Bank, 107 Ga. 650, 34 S. E. 365; Dill v. Hamilton, (Ga.) 44 S. E. 989; Richardson v. Haney, 76 Iowa, 101, 40 N. W. 115; Very v. Russell, 65 N. H. 646, 23 Atl. 522; Bigley v. Jones, 114 Pa. St. 517, 7 Atl. 54; Harris v. Smith, 98 Tenn. 286, 39 S. W. 343; Hawley v. Geer, (Tex.) 17 S. W. 914; Phillips v. Sherman, (Tex. Civ. App.) 39 S. W. 187.

(d) Against Prior Liens.— Watkins v. Reynolds, 123 N. Y. 211, 25 N. E. 322 (prior equitable mortgage); Lynch v. Murphy, 161 U. S. 247, 16 Sup. Ct. 523 (same).

Against Prior Grantor's Lien.— See *post*, § 1253, and cases cited; Lewis v. Henderson, 22 Oreg. 548, 30 Pac. 324; Taylor v. Callaway, 7 Tex. Civ. App. 461, 27 S. W. 934; Johnson v. Dyer, 19 Tex. Civ. App. 602, 47 S. W. 727.

(e) Against Other Equitable Interests.— Express trust: See *post*, § 1048, and cases cited; Learned v. Tritch, 6 Colo. 432. Against the "community" property interest of the wife or her heirs, in favor of a purchaser from the husband in whose

embraced within the recording acts.[2g] The doctrine is also extended, in many of the states at least, to assignments of mortgages, the assignment being regarded as a "conveyance," and the assignee as a "purchaser." It should be observed that the effect of a *bona fide* purchase and a previous registration is applied not only between successive assignees of the mortgage from the same assignor, but also between such an assignee and a third person who has ob-

Bank v. Fletcher, 44 Iowa, 252; Hardin v. Harrington, 11 Bush, 367; Briscoe v. Ashby, 24 Gratt. 454; Carter v. Allan, 21 Gratt. 241; Zollman v. Moore, 21 Gratt. 313; Campbell v. Texas, etc. R. R. Co., 2 Woods, 263. *Against an unrecorded defeasance:*[f] Knight v. Dyer, 57 Me. 174; 99 Am. Dec. 765; Cogan v. Cook, 22 Minn. 137; Hart v. Farmers' etc. Bank, 33 Vt. 252; Bailey v. Myrick, 50 Me. 171; Newton v. McLean, 41 Barb. 285; Koons v. Grooves, 20 Iowa, 373. See, however, Corpman v. Baccastow, 84 Pa. St. 363. *Against an unrecorded mortgage:* Parker v. Jones, 57 Ga. 204; Saffold v. Wade's Ex'r, 51 Ala. 214; Williams v. Beard, 1 S. C. 309. *Purchasers of chattels, when protected:* Reed v. Gannon, 3 Daly, 414 (trustee to whom personal property had been conveyed by a marriage settlement protected against a prior unrecorded mortgage of the same chattels given by the husband); Sleeper v. Chapman, 121 Mass. 404 (*bona fide* assignee of a chattel mortgage, given in fraud of mortgagor's creditors, protected as against such creditors); Thorndike v. Hunt, 3 De Gex & J. 563.

[2] Haynsworth v. Bischoff, 6 Rich. 159; Porter v. Green, 4 Iowa, 571; Seevers v. Delashmutt, 11 Iowa, 174; 77 Am. Dec. 139; Willoughby v. Willoughby, 1 Term Rep. 763, per Lord Hardwicke.

name the legal title stands: Hill v. Moore, 62 Tex. 610; Edwards v. Brown, 68 Tex. 329, 4 S. W. 380, 5 S. W. 87, reviewing earlier Texas cases; Patty v. Middleton, 82 Tex. 586, 17 S. W. 909; Mangum v. White, 16 Tex. Civ. App. 254, 41 S. W. 80; Oaks v. West, (Tex. Civ. App.) 64 S. W. 1033. Holder of legal title through patentee, protected against one who afterwards establishes right to have the patent set aside because of prior entry: Robbins v. Moore, 129 Ill. 30, 21 N. E. 934, citing the text. *Bona fide* purchaser for value from devisee, against claims of decedent's creditors: Van Bibber v. Reese, 71 Md. 608, 18 Atl. 892, 6 L. R. A. 332.

(f) See *post*, § 1196, and cases cited; Frink v. Adams, 36 N. J. Eq. 485; Hicks v. Hicks, (Tex. Civ. App.) 26 S. W. 227; Brigham v. Thompson, 12 Tex. Civ. App. 562, 34 S. W. 358; Lynn v. Sims, (Tex. Civ. App.) 43 S. W. 554.

(g) See, also, Warner v. Watson, 35 Fla. 402, 17 South. 654; Parker v. Barnesville Sav. Bank, 107 Ga. 650, 34 S. E. 365; Barney v. McCarty, 15 Iowa, 510, 83 Am. Dec. 427; Doye v. Carey, 3 Okl. 627, 41 Pac. 432; Landigan v. Mayer, 32 Oreg. 245, 67 Am. St. Rep. 521, 51 Pac. 649; Bigley v. Jones, 114 Pa. St. 517, 7 Atl. 54; Jones v. Hudson, 23 S. C. 494; Brigham v. Thompson, 12 Tex. Civ. App. 562, 34 S. W. 358.

tained some title, estate, or interest in or lien upon the mortgaged premises.[3 h]

§ 768. **Purchaser First of an Equitable Estate Subsequently Acquires the Legal Estate — Tabula in Naufragio.**— The protection is not confined to a defendant who obtained the legal title contemporaneously with his original purchase. It includes those cases where, of several successive purchasers holding equitable estates, one of them later in time has obtained an outstanding legal estate. By far the most frequent instance in England is that of three or more successive mortgagees by conveyance, A, B, and C, where the first only would obtain the legal estate and the others an equitable one. If C, at the time of loaning his money and taking his mortgage, had no notice of B's prior encumbrance,— that is, was a *bona fide* purchaser of the equitable estate,— on afterwards learning of B's claim, he may buy in or procure a transfer of A's mortgage to himself, and may thus put himself in a position of perfect defense against the enforcement of B's lien; he thus acquires, in fact, not only a defense to any suit brought by B, but the absolute precedence over B in the satisfaction of the liens out of the mortgaged premises.[1] This particular application of the doctrine to successive mortgages is known in the English equity

[3] Westbrook v. Gleason, 79 N. Y. 23, 30, 31; Fort v. Burch, 5 Denio, 187; St. John v. Spalding, 1 Thomp. & C. 483; Farmers' Nat. Bank v. Fletcher, 44 Iowa, 242; and see *ante*, §§ 733, 734, and cases cited.

[1] The leading case in which this rule was formulated is Brace v. Duchess of Marlborough, 2 P. Wms. 491. Sir Joseph Jekyll said: "1. That if a third mortgagee buys in the first mortgage, though it be pending a bill brought by the second mortgagee to redeem the first, yet the third mortgagee having obtained the first mortgage, and got the law on his side and equal equity, he shall thereby squeeze out the second mortgagee; and this Lord Chief Justice Hale called a *plank* gained by the third mortgagee, or *tabula in naufragio*, which construction is in favor of a purchaser, every mortgagee being such *pro tanto*. . . . . 6. His honor said in all these cases it must be intended that the *puisne* mortgagee, *when he lent his money*, had no notice of the second mortgage." In the earlier case of Marsh v. Lee, 2 Vent. 337, 1 Cas. Ch. 162, decided in 1670, the same rule was recognized, and Chief Baron Hale

(h) Bacon v. Van Schoonhoven, 87 N. Y. 447; Simpson v. Del Hoyo, 94 N. Y. 189; Sweetzer v. Atterbury, 100 Pa. St. 18; Economy Sav. Bank v. Gordon, 90 Md. 486, 45 Atl. 176, 48 L. R. A. 63.

as the rule concerning "tacking," — a rule which has been universally rejected by the courts of the various states.

§ 769. **Extent and Limitations of This Rule.**—The doctrine under consideration has not been confined to mortgagees. It is fully settled in England that a *bona fide* purchaser of an equitable estate, without notice of a prior conflicting equitable interest, may, even on afterwards discovering the same and the consequent defect of his own title, protect himself against such claimant by procuring a conveyance to himself of the outstanding legal estate; subject, however, to this important exception, that if the prior claimant is a *cestui que trust,* and the title of the purchaser is thus subject to a trust either express or implied, he cannot, after notice of *such a defect,* protect himself by acquiring the legal estate from the trustee.[1] [a] Even where the *bona fide* purchaser has the best right to call for the legal estate, but has not yet actually obtained it, he is protected against the prior equitable claimant.[2]

used the figure *tabula in naufragio,* which has since been constantly repeated. See also Marsh v. Lee, 1 Lead. Cas. Eq., 4th Am. ed., Eng. note, 837; Young v. Young, L. R. 3 Eq. 801; Pease v. Jackson, L. R. 3 Ch. 576; Prosser v. Rice, 28 Beav. 68: Bates v. Johnson, Johns. 304.[a] Although the doctrine applied to successive mortgages, as stated in the text, forms that peculiar rule known to English equity as "tacking," and has been completely rejected by the courts of this country as both inequitable and impossible under our registry system, yet these and similar cases are sometimes quoted as authority upon the general proposition that the purchaser of a subsequent equity may protect himself by obtaining the legal title. I doubt their authority in this country upon that general question.

1 The English cases in support of the above proposition are numerous. The following are some of the more recent: Pilcher v. Rawlins, L. R. 7 Ch. 259; L. R. 11 Eq. 53; Carter v. Carter, 3 Kay & J. 617; Young v. Young, L. R. 3 Eq. 801; Jones v. Powles, 3 Mylne & K. 581; Prosser v. Rice, 28 Beav. 68; Pease v. Jackson, L. R. 3 Ch. 576.

2 Willoughby v. Willoughby, 1 Term Rep. 763, per Lord Hardwicke; Charlton v. Low, 3 P. Wms. 328; Ex parte Knott, 11 Ves. 609; Tildesley v.

§ 768, (a) As to the notice sufficient to prevent tacking, see Freeman v. Laing, [1899] 2 Ch. 355, 68 Law J. (Ch.) 586, 81 Law T. (N. S.) 167, 48 Wkly. Rep. 9 (notice to a joint mortgagee).

§ 769, (a) See, also, Bailey v. Barnes, [1894] 1 Ch. 25; Hosking v. Smith, L. R. 13 App. Cas. 582; Hoult v. Donahue, 21 W. Va. 294 (*dictum*).

§ 770. The Purchaser Acquires the Legal Estate from a Trustee.— The exception already mentioned is no less firmly settled. It has already been seen that one who obtains the legal title at the time of and as a part of his original purpose may acquire his estate from a trustee in derogation of the trust; but if he purchases in good faith and for value and without notice, he will be protected against the claims of the beneficiary, and hold the property free from the trust; and this effect extends in equity not only to conveyances of land, but to transfers of all kinds of personal property.[1] [a] The following are the four possible conditions of fact: 1. Both the trustee and the purchaser might at the time of the conveyance be aware of the trust, and therefore of its violation by the conveyance. Here the purchaser would clearly obtain no title, and the trustee himself would be responsible. 2. Both might be ignorant of the trust. This case is barely *possible,* but very improbable. If it should occur, the purchaser would clearly be protected. 3. The trustee might be ignorant and the purchaser have knowledge. This case, so far as it relates to the trustee's ignorance, is improbable; but the purchaser would plainly obtain no secure title. 4. The trustee might have knowledge and the purchaser be ignorant. This is a more common case. The purchaser, being *bona fide,* would obtain the title, but the trustee would be responsible personally for his violation of duty. When we pass to the other condition, of the purchaser of an equitable estate seeking to obtain protection by getting in the legal title, it is clear that two of the foregoing cases could not exist. The very question assumes that the purchaser

Lodge, 3 Smale & G. 543; Bowen v. Evans, 1 Jones & L. 178, 264; Shine v. Gough, 1 Ball & B. 436.

[1] Thorndike v. Hunt, 3 De Gex & J. 563; Dawson v. Prince, 2 De Gex & J. 41.

(a) The text is cited in Robbins v. Moore, 129 Ill. 30, 21 N. E. 934; Smith v. Willard, 174 Ill. 538, 51 N. E. 835, 66 Am. St. Rep. 313; Home Sav. & State Bank v. Peoria Agricultural & Trotting Soc., 206 Ill. 9, 99 Am. St. Rep. 132, 69 N. E. 17; Coleman v. Dunton, (Me.) 58 Atl. 430.

had discovered the defect in his own title, and has therefore become aware of the trust, and that a conveyance to himself by the trustee would be a violation of the trust, and of the rights of the prior and opposing *cestui que trust*. The only two possible cases, therefore, are: 1. The trustee and the purchaser both aware of the trust; 2. The trustee ignorant and the purchaser aware. The latter is not probable, but is possible. The foregoing considerations show that in both of these cases the purchaser would not be protected; taking the legal estate from the trustee with notice of the existing trust, he would himself become a trustee. In this conclusion the decisions are unanimous, holding that the purchaser without notice and for value of an equitable estate cannot after notice protect himself and defeat the claims of the prior beneficial owner by getting a conveyance of the legal title from the trustee.[2] [b]

§ 771. **The Rule as Applied in the United States.**— Although the modes of dealing with real property in the United States are entirely unlike those prevailing in England, and although the forms and species of the estates created and the circumstances of the transactions coming before the American judges are very different from those passed upon by the English chancellor, yet the courts of this country have recognized and adopted the foregoing doctrines, and have applied them when necessary to analogous cases, and under analogous conditions of fact. Indeed, the defense of *bona*

2 Saunders v. Dehew, 2 Vern. 270; Willoughby v. Willoughby, 1 Term Rep. 763, 771; Carter v. Carter, 3 Kay & J. 617, 642; Allen v. Knight, 5 Hare, 272; Baillie v. McKewan, 35 Beav. 177; Sharples v. Adams, 32 Beav. 213; Colyer v. Finch, 19 Beav. 500; 5 H. L. Cas. 905.

(b) "An equitable mortgagee, who has made an advance without notice of a prior equitable title, may gain priority by getting in the legal title, unless there are circumstances which make it inequitable for him to do so. One case which falls within this exception is where the mortgagee has notice that the legal title, at the time when it is so got in, is held on an express trust in favor of persons who assert a claim to the property": Taylor v. London and County Banking Co., [1901] 2 Ch. 231; Taylor v. Russell, [1892] App. Cas. 244, 259.

fide purchase has sometimes been pushed to an extent, as it seems, not warranted by the established doctrines. It has been made to embrace not only those who have purchased equitable *estates* by means of conveyances purporting to transfer the whole title, but even to those who have intentionally acquired a mere *equitable interest or lien* by executory contract or otherwise, knowing that the legal estate was held by another, and who, upon afterwards discovering a prior and conflicting equity in favor of a third person, have taken a conveyance of that legal estate. I have already discussed the subject with some care, have examined American authorities, and have stated those conclusions which seem to be sustained by settled principles. It is unnecessary to repeat the discussion, and I simply refer to those paragraphs.[1]

§ 772. **And as Modified by the Recording Acts.**— There may be modifications of these results produced by the peculiar language of recording acts. In some of the states the statutes provide for the registration, not only of deeds, mortgages, and assignments, but also of every species of instrument which can affect land titles, or create any equitable interest in or lien upon land, including executory contracts for the sale of land. Such statutes must necessarily modify the operation of equitable doctrines originally applicable to an entirely different condition. If, where these enactments exist, the owner of land gives a contract for its sale to A, and afterwards gives a like contract to B, both vendees being equally meritorious, and A's contract is not recorded, while B, without notice, puts his agreement upon record, B undoubtedly obtains a precedence by his record; and if he subsequently learns of A's prior claim, he can take a conveyance of the legal estate from the vendor and legal owner, and completely protect himself by an earliest record thereof. In like manner, if A, the legal owner of land, gives a contract of sale to B, and this vendee executes a deed purport-

[1] See *ante*, §§ 740, 741, 756.

ing to convey the land to C, and afterwards executes a like deed to D, both grantees being equally meritorious, and C's deed is unrecorded, but D, without notice, puts his upon record, then D, although acquiring only an equitable interest by his conveyance, would undoubtedly gain the precedence over C. When D subsequently learns of C's prior claim, he can take a conveyance of the legal estate from A, and by a first record of that conveyance can place himself in a position of complete protection. These results seem to flow necessarily from the statute, but they are due entirely to the peculiar statutory provisions.[1]

§ 773. **And as Applied in This Country to Purchasers Acquiring the Legal Estate from a Trustee.**— The instances of a purchaser's attempting to obtain protection by means of the legal estate acquired from a trustee are much less frequent in this country than in England. There are the two quite distinct cases of the purchaser who acquires the legal estate at the time of his original purchase, and the purchaser of an equitable interest who afterwards gets in the legal estate for his protection. The first of these cases would be presented where a *cestui que trust* sold and assigned or conveyed to A and afterwards sold and conveyed the same interest to B, who, at the same time, and as a part of the same transaction, received a conveyance also from the trustee. There are decisions which hold that a purchaser who, like B in the above supposition, intentionally takes a transfer from a *cestui que trust* of his interest, knowing that he *is* a *cestui que trust,* is necessarily charged with notice of any and all defects and infirmities in his grantor's title, and buys subject to any prior outstanding interest in another person, A, which had been created by his grantor, and cannot, at the same time, and as a part of the same transaction, obtain a deed from the trustee, and protect himself thereby. His title would be subject to the prior

[1] Ohio Life Ins. Co. v. Ross, 2 Md. Ch. 25; U. S. Ins. Co. v. Shriver, 3 Md. Ch. 381; Bellas v. McCarty, 10 Watts, 13.

equities of A, notwithstanding his earliest registration of his own conveyances.[1] Other decisions do not apply the doctrine of constructive notice so severely, and would regard the second purchaser, under these circumstances, as protected by the legal estate obtained from the trustee without notice.[2] Passing to the second case, if, under circumstances similar to those supposed above, a *cestui que trust* has sold and transferred his interest, or part of it, to A, and afterwards makes a like sale and transfer to B, who pays value and has no notice of A's rights, but knows that his grantor is a *cestui que trust,* and intentionally purchases his interest *as an equitable one,* and afterwards, on discovering A's prior claim, procures a conveyance of the legal estate from the trustee, in accordance with the doctrines as settled by courts of the highest authority, he cannot rely upon the legal title as a protection against A. The same must be true, and upon the same principle, independently of peculiar recording acts, of a second vendee, who enters into his contract in good faith, but afterwards discovers that another vendee claims under a prior contract, and thereupon obtains the first conveyance of the legal estate from their common vendor; and of a second grantee from the vendee under an executory contract, who, upon discovering a prior grant to another person by the same vendee, procures a deed of the legal estate from the vendor in whom the legal title was vested.[3]

§ 774. Other Instances — Purchaser at Execution Sale — Assignee of Thing in Action.— Among the other instances in

[1] Sergeant v. Ingersoll, 7 Pa. St. 340; 15 Pa. St. 343; and see Kramer v. Arthurs, 7 Pa. St. 165, per Gibson, C. J.

[2] Flagg v. Mann, 2 Sum. 486, 560; Vattier v. Hinde, 7 Pet. 252, 271.

[3] See *ante*, §§ 740, 756; Sumner v. Waugh, 56 Ill. 531, 539; Flagg v. Mann, 2 Sum. 486, 518; Fed. Cas. No. 4,847; Bellas v. McCarty, 10 Watts, 13; Zollman v. Moore, 21 Gratt. 313.

It is held that a vendee in possession under a land contract, who buys in a title superior to that of his vendors, cannot claim the protection of a *bona fide* purchaser, but must hold the title for the benefit of his vendor: Lewis v. Boskins, 27 Ark. 61; Peay v. Capps, 27 Ark. 160.

which the general doctrine has been applied, and the defense sustained, by the American courts, the following are some of the most important: Where a person becomes a *bona fide* purchaser of land at execution sale, and perfects his purchase by receiving the sheriff's deed, he stands in the same position as any other purchaser in good faith without notice who acquires the legal estate; he takes the land free from any unrecorded mortgage or other equitable interest or lien not appearing of record which would have affected the land in the hands of the judgment debtor, and of which the judgment creditor might even have had notice.[1 a] An assignee in good faith of shares of stock, who has perfected his title by a surrender of the certificate, the issue of a new one to himself, and an entry upon the transfer-books of the company, is generally treated as

[1] See *ante*, § 724; Orth v. Jennings, 8 Blackf. 420; Siemon v. Schurck, 29 N. Y. 598; Jackson v. Chamberlain, 8 Wend. 620, 625; Jackson v. Post, 15 Wend. 588; 9 Cow. 120; Gouverneur v. Titus, 6 Paige, 347; Den v. Rickman, 13 N. J. L. 43; Rodgers v. Gibson, 4 Yeates, 111; Heister v. Fortner, 2 Binn. 40; 4 Am. Dec. 417; Morrison v. Funk, 23 Pa. St. 421; Stewart v. Freeman, 22 Pa. St. 120, 123; Kellam v. Janson, 17 Pa. St. 467; Mann's Appeal, 1 Pa. St. 24; Wilson v. Shoenberger, 24 Pa. St. 121; Scribner v. Lockwood, 9 Ohio, 184; Paine v. Mooreland, 15 Ohio, 435; 45 Am. Dec. 585; Runyan v. McClellan, 24 Ind. 165; Ehle v. Brown, 31 Wis. 405; Rogers v. Hussey, 36 Iowa, 664; Draper v. Bryson, 26 Mo. 108; 69 Am. Dec. 483; Harrison v. Cachelin, 23 Mo. 117; Waldo v. Russell, 5 Mo. 387; Ohio etc. Co. v. Ledyard, 8 Ala. 866; Cooper v. Blakey, 10 Ga. 263; Miles v. King, 5 S. C. 146; Ayres v. Duprey, 27 Tex. 593, 605; 86 Am. Dec. 657. As to the effect of purchase at execution sale by the judgment creditor himself, see Gower v. Doheny, 33 Iowa, 36, 39; Halloway v. Platner, 20 Iowa, 121; 89 Am. Dec. 517; but, *per contra*, Arnold v. Patrick, 6 Paige, 310, 316; Dickerson v. Tillinghast, 4 Paige, 215; 25 Am. Dec. 528; Wright v. Douglass, 10 Barb. 97; Sargent v. Sturm, 23 Cal. 359; 83 Am. Dec. 118; Orme v. Roberts, 33 Tex. 768; Ayres v. Duprey, 27 Tex. 593; 86 Am. Dec. 657.

(a) This section is cited in Tennant v. Watson, 58 Ark. 252, 24 S. W. 495. As to whether the purchaser or his assignee, who has received merely the sheriff's certificate of sale, but not the deed, is thus protected, the cases are at variance: some holding that he is but the purchaser of an equitable interest, others that his title is at least an "inchoate" legal one; see *ante*, § 683, note, and cases cited.

a *bona fide* purchaser; and the protection has sometimes been extended to a transferee who has not taken these steps for the completion of his legal title. The defense has in like manner been applied to the assignee in good faith of other things in action.[2]

§ 775. III. Suits by the Holder of an "Equity."—In all the instances of the preceding subdivision, the plaintiff has held some equitable estate or interest in or lien upon the property, which he has sought to establish or enforce against the very subject-matter, either by perfecting his title and ownership, or by subjecting it to his encumbrance. The defense of *bona fide* purchase is not confined to such plaintiffs; it avails also against parties who claim to have some "equity" as distinguished from an equitable estate or interest,—parties, that is, who simply claim and are seeking to obtain some peculiar equitable remedy, such as reformation or cancellation, and the like. In this respect the defense is a protection alike to defendants who have a legal estate, and those who have purchased an equitable interest.[1]

[2] See *ante*, §§ 698, note, 701, 712, 713, 715. Stocks: Pratt v. Taunton etc. Co., 123 Mass. 110, 112; 25 Am. Rep. 37; Loring v. Salisbury Mills, 125 Mass. 138; Pratt v. Boston etc. R. R., 126 Mass. 443; Machinists' National Bank v. Field, 126 Mass. 345; Sewall v. Boston Water Works, 4 Allen, 277; 81 Am. Dec. 701; Bank v. Lanier, 11 Wall. 369; Telegraph Co. v. Davenport, 97 U. S. 369; Morris etc. Co. v. Fisher, 9 N. J. Eq. 667; 64 Am. Dec. 423; Mt. Holly Co. v. Ferree, 17 N. J. Eq. 117; Bank of Commerce's Appeal, 73 Pa. St. 59, 64; Craig v. Vicksburg, 31 Miss. 216; Brewster v. Sime, 42 Cal. 139, 147; Thompson v. Toland, 48 Cal. 99; Winter v. Belmont M. Co., 53 Cal. 428, 432; People v. Elmore, 35 Cal. 653. Where assignee obtains possession: Ancher v. Bank of England, Dough. 637, 639; Wells v. Archer, 10 Serg. & R. 412; 13 Am. Dec. 682; Ellis v. Kreutzinger, 27 Mo. 311; 72 Am Dec. 270. Where assignee of any thing in action perfects his legal title: Fitzsimmons v. Ogden, 7 Cranch, 1, 18; Judson v. Corcoran, 17 How. 612; Downer v. Bank, 39 Vt. 25, 29. And generally that *bona fide* assignee is protected: Livingston v. Dean, 2 Johns. Ch. 478; Murray v. Lylburn, 2 Johns. Ch. 441; Bloomer v. Henderson, 8 Mich. 395, 402; 77 Am. Dec. 453; Croft v. Bunster, 9 Wis. 503, 508; Moore v. Holcombe, 3 Leigh, 597; 24 Am. Dec. 683; Ohio Life Ins. Co. v. Ross, 2 Md. Ch. 25, 39; Sleeper v. Chapman, 121 Mass. 404. But see §§ 708, 709, 714, and cases cited.

[1] Phillips v. Phillips, 4 De Gex, F. & J. 208, 218, per Lord Westbury; St. John v. Spalding, 1 Thomp. & C. 483 (a *bona fide* assignee of a recorded

§ 776. **Suits for Relief against Accident or Mistake.**— Thus, as against a subsequent *bona fide* purchaser for value, a court of equity will not relieve a prior party, on the ground of accident or mistake, by granting a remedy otherwise appropriate, such as setting aside a conveyance which had been executed by the plaintiff under a mistake or ignorance of his rights, or correcting an instrument executed under a mistake of fact.[1] [a]

§ 777. **Suits for Relief against Fraud upon Creditors or between Parties.**— The same is true with respect to the remedy of cancellation in suits to set aside conveyances or sales on account of fraud, either as against the creditors of the grantor, or against the grantor himself. In the first case, where a conveyance has been made with intent to defraud creditors of the grantor, so that it would be voidable as against the grantee, but this grantee has in turn conveyed to a *bona fide* purchaser for value, the remedial rights of the creditors to have the original and fraudulent transfer set aside are then cut off, and the purchaser has a com-

mortgage, who had also recorded his assignment, was held unaffected by a prior unrecorded agreement by which the mortgage was satisfied).

[1] Bell v. Cundall, Amb. 102; Malden v. Menil, 2 Atk. 8; Warrick v. Warrick, 3 Atk. 291, 293; Harvey v. Woodhouse, Sel. Cas. Ch. 80; Marshall v. Collett, 1 Younge & C. 232, 238; Penny v. Watts, 2 De Gex & S. 501; 1 Macn. & G. 150 (reversed on the facts, but the law of the decision below not disturbed); Ligon v. Rogers, 12 Ga. 281, 292; Whitman v. Weston, 30 Me. 285; Lowe v. Allen, 68 Ga. 225.

(a) The text is cited in Snyder v. Grandstaff, 96 Va. 473, 70 Am. St. Rep. 863, 31 S. E. 647 (mutual mistake in deed). See, also, Knoblock v. Mueller, 123 Ill. 554, 17 N. E. 696 (*bona fide* purchaser from heir to whom, by partition decree, a certain lot had been awarded as her share, protected against sole devisee under subsequently discovered will, seeking to set aside the decree for mistake of fact); Harms v. Coryell, 177 Ill. 496, 53 N. E. 87; Toll v. Davenport, 74 Mich. 386, 42 N. W. 63 (mortgage cannot be reformed so as to include property which has come into the hands of a *bona fide* purchaser); Garrison v. Crowell, 67 Tex. 626, 4 S. W. 69 (mistake in boundaries whereby more conveyed than was intended, not corrected); and the same rule applies where relief is sought on the ground of duress: Rogers v. Adams, 66 Ala. 600.

plete defense against their claims.[1] [a] In the second case of fraud between the parties, where a conveyance has been obtained by the grantee's fraud, so that it would be set aside at the suit of the defrauded grantor, but the fraudulent grantee has in turn conveyed to a *bona fide* purchaser for value and without notice, the latter will take and hold the property free from all these equities, protected against the equitable remedies of the original defrauded owner.[2] [b]

1 Bean v. Smith, 2 Mason, 252, 272–282; Wood v. Mann, 1 Sum. 506; Fletcher v. Peck, 6 Cranch, 87, 133, 134; Erskine v. Decker, 39 Me. 467; Hart v. Bank, 33 Vt. 252; Poor v. Woodburn, 25 Vt. 234, 236; Hubbell v. Currier, 10 Allen, 333; Rowley v. Bigelow, 12 Pick. 307; 23 Am. Dec. 607; Frazer v. Western, 1 Barb. Ch. 220; Ledyard v. Butler, 9 Paige, 132; 37 Am. Dec. 379; Anderson v. Roberts, 18 Johns. 515; 9 Am. Dec. 235; reversing 3 Johns. Ch. 371, 377; Phelps v. Morrison, 24 N. J. Eq. 195; Hood v. Fahnestock, 8 Watts, 489; 34 Am. Dec. 489; Price v. Junkin, 4 Watts, 85; 28 Am. Dec. 685; Boyce v. Waller, 2 B. Mon. 91; Spicer v. Robinson, 73 Ill. 519; Henderson v. Henderson, 55 Mo. 534; Sydnor v. Roberts, 13 Tex. 598; 65 Am. Dec. 84; Reed v. Smith, 14 Ala. 380; Collins v. Heath, 34 Ga. 443; Coleman v. Cocke, 6 Rand. 618; 18 Am. Dec. 757; Sleeper v. Chapman, 121 Mass. 404 (a chattel mortgage given in fraud of the mortgagor's creditors, but assigned to a *bona fide* purchaser).

2 Sturge v. Starr, 2 Mylne & K. 195; Bowen v. Evans, 1 Jones & L. 178, 263, 264; Gavagan v. Bryant, 83 Ill. 376; McNab v. Young, 81 Ill. 11; Dickerson v. Evans, 84 Ill. 451; Chicago etc. Co. v. Foster, 48 Ill. 507; Fulton v. Woodman, 54 Miss. 158; Farmers' Nat. Bank v. Fletcher, 44 Iowa, 252; Hurley v. Osler, 44 Iowa, 642; Henderson v. Henderson, 55 Mo. 534; Rowley v. Bigelow, 12 Pick. 307; 23 Am. Dec. 607; Williamson v. Russell, 39 Conn. 406; Root v. French, 13 Wend. 570; 28 Am. Dec. 482; Mears v. Waples, 3 Houst. 581.

(a) See, also, Neal v. Gregory, 19 Fla. 356; Halverson v. Brown, 75 Iowa, 702, 38 N. W. 123; Nicholson v. Condon, 71 Md. 620, 18 Atl. 812; Zoeller v. Riley, 100 N. Y. 108, 2 N. E. 388, 53 Am. Rep. 157 (purchaser on foreclosure of chattel mortgage given in fraud of mortgagor's creditors); Saunders v. Lee, 101 N. C. 3, 7 S. E. 590; Bergen v. Producers' Marble Yard, 72 Tex. 53, 11 S. W. 1027.

(b) The text is quoted in Fish v. Benson, 71 Cal. 429, 12 Pac. 454. See, also, Colorado Coal Co. v. United States, 123 U. S. 313, 8 Sup. Ct. 131 (suit to cancel patent for fraud); Hewlett v. Pilcher, 85 Cal. 542, 24 Pac. 781; King v. Cabaness, 81 Ga. 661, 7 S. E. 620; Harris v. Harris, 109 La. 913, 33 South. 918; Valentine v. Lunt, 115 N. Y. 496, 22 N. E. 209 (undue influence); Dixon v. Wilmington Sav. & Tr. Co., 115 N. C. 274, 20 S. E. 464; Martin v. Robinson, 67 Tex. 368, 3 S. W. 550. So, a *judgment* which, by fraud of the judgment plaintiff, included an agree-

§ 778. **Fraudulent Sales of Chattels.**— The defense has been extended to fraudulent sales of chattels under the following limitations, which it may be proper to state, although the rules belong to the law rather than to equity: If the vendor, induced by fraud, sold and delivered possession, and by the contract *intended to transfer the property as well as the possession* to the fraudulent vendee, and if this vendee, before the vendor has disaffirmed, should transfer the goods to an innocent purchaser for a valuable consideration and in good faith, the rights of such purchaser would be superior to those of the original vendor. If, however, it was not the intention of the original vendor to pass the property to the fraudulent vendee, *but only the possession*, such vendee could not transfer any property in the goods even to an innocent purchaser, and the original vendor could still assert his title. Finally, if, under the circumstances first described, the fraudulent vendee should transfer the goods to a third person, who had actual or constructive notice, or who did not pay value, the original vendor could still rescind and assert his ownership.[1]

[1] Stevenson v. Newnham, 13 Com. B. 285; Kingsford v. Merry, 11 Ex. 577; Pease v. Gloahec, L. R. 1 P. C. 219; Oakes v. Turquand, L. R. 2 H. L. 325; Root v. French, 13 Wend. 570; 28 Am. Dec. 482; Caldwell v. Bartlett, 3 Duer, 341; Keyser v. Harbeck, 3 Duer, 373; Brower v. Peabody, 13 N. Y. 121; Fassett v. Smith, 23 N. Y. 252; Hathorne v. Hodges, 28 N. Y. 486; Spraights v. Hawley, 39 N. Y. 441; 100 Am. Dec. 452; Paddon v. Taylor, 44 N. Y. 371; Kinney v. Kiernan, 49 N. Y. 164; Weaver v. Barden, 49 N. Y. 286; Devoe v. Brandt, 53 N. Y. 462; Manning v. Keenan, 73 N. Y. 45; Stevens v. Brennan, 79 N. Y. 254; Robinson v. Dauchy, 3 Barb. 20; Pearse v. Pettis, 47 Barb. 276; Spaulding v. Brewster, 50 Barb. 142; Barnard v. Campbell, 65 Barb. 286; Joslin v. Cowee, 60 Barb. 48; Roberts v. Dillon, 3 Daly, 50; Field v. Stearns, 42 Vt. 106; Poor v. Woodburn, 25 Vt. 234; Hodgeden v. Hubbard, 18 Vt. 504; 46 Am. Dec. 167; Decan v. Shipper, 25 Pa. St. 239; 78 Am. Dec. 334; Jackson v. Summerville, 13 Pa. St. 359; Dean v. Yates, 22 Ohio St. 388; Sargent v. Sturm, 23 Cal. 359; 83 Am. Dec. 118; Rison v. Knapp, 1 Dill. 186, 201.[a]

ment that the defendant therein should erect a certain improvement on the judgment plaintiff's land, was not amended in favor of such defendant against an innocent assignee of the judgment and purchaser of the land: Indiana, etc. R. R. Co. v. Bird, 116 Ind. 217, 18 N. E. 837, 9 Am. St. Rep. 842. For certain exceptional forms of fraud, rendering the transaction absolutely void, where the *bona fide* purchase does not avail as a defense, see *post*, §§ 915, note, 918.

(a) See, also, Muir v. Jones, 23 Oreg. 332, 31 Pac. 646, 19 L. R. A. 441, and cases cited.

§ 779. Fourth. Affirmative Relief to a Bona Fide Purchaser.— The peculiar theory upon which equity acts towards a *bona fide* purchaser seems of necessity to imply that he should be a defendant. There are a few special circumstances, however, in which the theory, consistently followed out, requires that he should be aided by affirmative relief. When these circumstances are carefully examined, it will be found that the fraud, or what equity regards as fraud, of the party holding the prior title or interest, and against whom the affirmative relief is granted, is usually, if not always, the ground upon which the court interposes on behalf of the subsequent *bona fide* purchaser. The following are the important instances of such relief.

§ 780. Same. Illustrations.— When a person, A, having a prior title to property, and, knowing of such title, actively encourages another person, B, to buy the same property, concealing or not disclosing his own interest, but leading B to suppose that he is obtaining a valid title; or when, under the same circumstances, A being informed of B's intention, and being brought in contact with and made cognizant of the transaction, he simply keeps silence and permits B to buy,— in either case, B, being a *bona fide* purchaser for value and without notice, can compel a conveyance or release by A. of whatever estate, title, or interest the latter has. This relief will be granted, even though A was an infant or a married woman, since it does not depend upon a capacity to contract, but upon unrighteous conduct.[1]

[1] Savage v. Foster, 9 Mod. 35. In the following cases the doctrine has been applied to estates in land, trust funds, things in action, and other forms of interests, in some defensively, in others as the ground of affirmative relief: Sharpe v. Foy, L. R. 4 Ch. 35 (infant married woman); In re Lush's Trusts, L. R. 4 Ch. 591 (married woman); Overton v. Banister, 3 Hare, 503 (infant *cestui que trust*); Nicholson v. Hooper, 4 Mylne & C. 179, 185, 186 (assignment of things in action); Hobbs v. Norton, 1 Vern. 136; Watts v. Hailswell, 4 Brown Ch. 507, note; Berrisford v. Milward, 2 Atk. 49; Thompson v. Simpson, 2 Jones & L. 110; Wendell v. Van Rensselaer, 1 Johns. Ch. 344; Niven v. Belknap, 2 Johns. 573; Cheeney v. Arnold, 18 Barb. 434; Wells v. Pierce, 27 N. H. 503; Carr v. Wallace, 7 Watts, 394; Vanhorn v. Frick, 3 Serg. & R.

§ 781. Same. Illustrations.— The second important class of cases in which relief may be given to the *bona fide* purchaser is that of encumbrancers who have misled the purchaser by their words or acts. If a prior encumbrancer, upon being inquired of by one intending to purchase the property, deny the existence of his encumbrance, a court of equity will certainly grant affirmative relief to the *bona fide* purchaser who has thus been misled, either by postponing or by completely setting aside the encumbrance, as the circumstances may require.[1] Mere silence of an encumbrancer does not render him liable, where he has no connection with the transaction in which the purchaser is engaged, is not brought into any relations with the parties, and is not placed under any equitable obligation to make disclosure.[2]

§ 782. Same. Illustrations.— In the two foregoing classes of cases the one who makes himself subject to an equity in favor of the *bona fide* purchaser has knowledge, or at

278; Saunderson v. Ballance, 2 Jones Eq. 322; 67 Am. Dec. 218; Higgins v. Ferguson, 14 Ill. 269; Godeffroy v. Caldwell, 2 Cal. 489; 56 Am. Dec. 360. If a misrepresentation as to his age is made by an infant to a person who knows his actual age, and cannot be misled thereby, the infant will not become bound in equity with respect to such misstatement: Nelson v. Stocker, 4 De Gex & J. 458.

1 Ibbottson v. Rhodes, 2 Vern. 554; Hickson v. Aylward, 3 Molloy, 1; and see Boyd v. Belton, 1 Jones & L. 730. Of course the denial need not be express and positive; any language which would fairly mislead the purchaser, and convince him that there was no lien, would be sufficient to raise this equity. For the same reason, where a trustee who holds the legal title is inquired of by one who intends to purchase from or deal with the *cestui que trust*, and states that the property is unencumbered, he will be held liable to the purchaser with respect to any encumbrance which does exist, provided he had received notice; but the trustee's statements must be clear and unmistakable in their meaning: Burrows v. Lock, 10 Ves. 470, 475; Slim v. Croucher, 1 De Gex, F. & J. 518; 2 Giff. 37 (forgetfulness no excuse);[a] In re Ward, 31 Beav. 1; Stephens v. Venables, 31 Beav. 124.

2 Id.; Osborn v. Lea, 9 Mod. 96, and cases cited under the next paragraph.

(a) But in Low v. Bouverie, [1891] 3 Ch. 82, it was held that since the change in the legal definition of fraud made by Derry v. Peek, L. R. 14 App. Cas. 337, *post*, § 884, note, Slim v. Croucher is no longer law, and the trustee is liable for misrepresentations only if they be fraudulent; while Burrows v. Lock can be supported only on the ground of estoppel.

least notice, of the title or encumbrance with respect to which he incurs liability, or against which the purchaser obtains relief; but the doctrine has been carried one step further. Where a person is actually ignorant of his own right in certain property, but under such circumstances that he might have had notice of it, or ought with reasonable care to have known of it, and he makes a representation untrue in fact to one intending to deal concerning the property, and this party, relying upon the statement, becomes a *bona fide* purchaser, equity will relieve such purchaser as against the one making the untrue representation, although no liability may be incurred at law.[1] The

[1] Teasdale v. Teasdale, Sel. Cas. Ch. 59; Pearson v. Morgan, 2 Brown Ch. 388; Stiles v. Cowper, 3 Atk. 692; West v. Jones, 1 Sim., N. S., 205, 207, 208. In the last case, Lord Cranworth, V. C., said (p. 207): "The plaintiff relies on a principle perfectly familiar, not only to courts of equity, but also to courts of law, namely, that where a party has, by words or conduct, made a representation to another leading him to believe in the existence of a particular fact or state of facts, and that other person has acted on the faith of such representation, then the party who made the representation shall not afterwards be heard to say that the facts were not as he represented them to be. This doctrine is not confined to cases where the original representation was fraudulent. Where, indeed, that is the case,— where a party makes a representation which he knows to be false, in order thereby to induce another to act on the belief that it is true, and that other party does so act,— the whole transaction is, in the strictest and most obvious and popular sense of the word, a fraud. But the doctrine, not only of this court, but also of courts of law, goes much further. Even where a representation is made in the most entire good faith, if it be made in order to induce another to act upon it, or under circumstances in which the party making it may reasonably suppose it will be acted on, then, *prima facie*, the party making the representation is bound by it, as between himself and those whom he has thus misled." Where there is nothing but mere silence or acquiescence, equity requires that the party should be in such a position or relation to the others that a duty to speak rested upon him, in order to create liability therefrom: Strong v. Ellsworth, 26 Vt. 366; Clabough v. Byerly, 7 Gill, 354. Where there is actual procurement, interference, inducement, representations actually untrue, although mistaken and without misleading intent, the principles so admirably explained by Lord Cranworth in the above extract, and stated in the text, must determine the liability: Richardson v. Chickering, 41 N. H. 380; 77 Am. Dec. 769; Wells v. Pierce, 27 N. H. 503; Parker v. Barker, 2 Met. 423; Laurence v. Brown, 5 N. Y. 304: Buchanan v. Moore, 13 Serg. & R. 304; 15 Am. Dec. 601; McKelvey v. Truby, 4 Watts & S. 323; Willis v. Swartz, 28 Pa. St. 413; Beaupland v. McKeen, 28 Pa. St. 124; 70 Am. Dec. 115; and see the peculiar case of McKelway v. Armour, 10 N. J. Eq. 115; 64 Am. Dec. 445.

justice of this rule is plain, for equity often proceeds upon higher motives of morality than those which sometimes underlie legal rules. An innocent purchaser should not suffer loss from relying upon the untrue statements of another, although not made with an intent to mislead or deceive; in adjusting the loss between the two who are both innocent of an *intentional* wrong, equity properly lays it upon him who, by his acts or words, has made the loss possible.

§ 783. **Same. Removing a Cloud from a Title.**— In addition to the foregoing cases, all based upon an element of fraud, actual or constructive, affirmative relief may be granted to a *bona fide* purchaser, under some other circumstances, to remove a cloud upon his title; that is, to set aside judgments, mortgages, and the like, which are apparent liens, but in reality inoperative as against him, where the law would furnish no adequate remedy.[1]

§ 784. **Fifth. Mode and Form of the Defense.**— I shall conclude the discussion of this subject with a very brief consideration of the manner in which the *bona fide* purchaser may avail himself of the defense, the pleadings by which it may be set up, and the necessary contents of those pleadings. Under the system of procedure and pleading peculiar to a court of chancery, and in whatever tribunals that system is still preserved, the defense may be raised in three different manners. If the fact that the defendant is a *bona fide* purchaser for value without notice is clearly shown by the bill of complaint, the defendant may resort to a demurrer.[1] The usual mode of presenting the defense is by a plea; and if it contains the requisite averments, and they are established by evidence, the suit will be dis-

§ 783, [1] Setting aside judgments: Martin v. Hewitt, 44 Ala. 418; Sharp v. Hunter, 7 Cold. 389; Filley v. Duncan, 1 Neb. 134; 93 Am. Dec. 337. Setting aside mortgages: Dillon v. Costelloe, 2 Molloy, 512; Wallace v. Lord Donegal, 1 Dru. & Walsh, 461; Gibson v. Fletcher, 1 Ch. Rep. 59.

§ 784, [1] Mitford's Eq. Pl. 199.

missed without the necessity of an answer on the merits. Instead of resorting to a "plea," the defendant may set out the facts constituting this defense in his answer.[2] [a] If he neglects to put in a plea, and fails to insert the defense in his answer, he cannot raise it or avail himself of it in any subsequent stage of the suit.[3] [b] Wherever the reformed system of procedure prevails, and all remedies, equitable as well as legal, are obtained through the single "civil action," the defense must, of course, be taken advantage of, either by demurrer or by answer. Unless the facts appear on the face of the complaint so as to permit a demurrer, there can be no doubt that in the new system as well as in the old the defense must be pleaded, in order to be available.[4] [c]

§ 785. **Necessary Allegations.**— The allegations of the plea, or of the answer so far as it relates to this defense, must include all those particulars which, as has been shown, are necessary to constitute a *bona fide* purchase.[a] It should

2 With respect to the differences between a "plea" and an "answer," and the advantages of the former, see Att'y-Gen. v. Wilkins, 17 Beav. 285, 291; Lord Rancliffe v. Parkyns, 6 Dow. 149, per Lord Eldon; Lancaster v. Evors, 1 Phill. Ch. 349, 352; Ovey v. Leighton, 2 Sim. & St. 234; Earl of Portarlington v. Soulby, 7 Sim. 28.

3 Phillips v. Phillips, 4 De Gex, F. & J. 208; Lyne v. Lyne, 8 De Gex, M. & G. 553; 21 Beav. 318.

4 The defense seems plainly to be "new matter" within the meaning of the codes, and therefore to be specially pleaded, not being admissible under an answer of denials general or special.

§ 784, (a) Daussell v. King, 7 Leigh (Va.), 393, 401; Rorer Iron Co. v. Trout, 83 Va. 397, 419, 2 S. E. 713, 5 Am. St. Rep. 285.

§ 784, (b) Nelson v. Owen, 113 Ala. 372, 21 South. 75; Rorer Iron Co. v. Trout, 83 Va. 397, 419, 2 S. E. 713, 5 Am. St. Rep. 285; Snyder v. Grandstaff, 96 Va. 473, 31 S. E. 647, 70 Am. St. Rep. 863.

§ 784, (c) The text is cited and followed in Bossick Min. Co. v. Davis, 11 Colo. 130, 17 Pac. 294; Arlington State Bank v. Paulsen (Nebr.), 78 N. W. 303; see, also, Seymour v. McKinstry, 106 N. Y. 238, 12 N. E. 348, 14 N. E. 94; Lupo v. True, 16 S. C. 580. That the defense must be pleaded as fully as under the former equity practice, see Weber v. Rothchild, 15 Oreg. 385, 15 Pac. 650, 3 Am. St. Rep. 162.

§ 785, (a) The text is quoted in Upton v. Betts, 59 Nebr. 724, 82 N. W. 19. See, also, Young v. Schofield, 132 Mo 650, 34 S. W. 497;

state the consideration, which must appear from the averment to be "valuable" within the meaning of the rules upon that subject, and should show that it has actually been paid, and not merely secured.[1 b] It should also deny notice in the fullest and clearest manner, and this denial is necessary, whether notice is charged in the complaint or not.[c] The denial must correspond with the settled rules upon the subject of notice, so as to bring the case within the operation of those rules.[2] Concerning the foregoing

1 See *ante*, subdivision on valuable consideration, cases cited under §§ 746–751. In England the pleading must show that the consideration has all been paid, etc. In this country the allegations on this subject may vary in different states, according to the particular rules prevailing therein, as shown in former paragraphs; but should conform to the rules as settled in the particular state.

2 See *ante*, subdivision on notice, cases cited under §§ 752–756. In England the receipt of notice before the payment of the consideration and the execution of the conveyance must be denied, etc. As very different rules on the subject of notice, the time of giving it, etc., have been adopted in different states, the allegations must, of course, correspond to the rules prevailing in the par-

Graves v. Coutant, 31 N. J. Eq. 763; Cummings v. Coleman, 7 Rich. Eq. (S. C.) 509, 62 Am. Dec. 402; Everts v. Agnes, 4 Wis. 343, 65 Am. Dec. 314.

(b) The text is quoted in Upton v. Betts, 59 Nebr. 724, 82 N. W. 19. See. also, Balfour v. Parkinson, 84 Fed. 855; Eversdon v. Mayhew, 65 Cal. 163, 3 Pac. 641; Petry v. Ambrosher, 100 Ind. 510; American Exch. Nat. Bank v. Fockler, 49 Neb. 713, 68 N. W. 1039; Richards v. Snyder, 11 Oreg. 501, 6 Pac. 186; Weber v. Rothchild, 15 Oreg. 385, 15 Pac. 650, 3 Am. St. Rep. 162; Lamar v. Hale, 79 Va. 147; Everts v. Agnes, 4 Wis. 343, 65 Am. Dec. 314.

(c) The text is quoted in Upton v. Betts, 59 Nebr. 724, 82 N. W. 19; and cited in Gest v. Packwood, 34 Fed. 368; Farmers' & Traders' Bank v. Kimball Milling Co., 1 S. Dak. 388, 47 N. W. 402, 36 Am. St. Rep. 739. See, also, Nelson v. Owen, 113 Ala. 372, 21 South. 75; Young v. Schofield, 132 Mo. 650, 34 S. W. 497; Seymour v. McKinstry, 106 N. Y. 238, 12 N. E. 348, 14 N. E. 94; Rorer Iron Co. v. Trout, 83 Va. 397, 419, 2 S. E. 713, 5 Am. St. Rep. 285 (citing Downman v. Rust, 6 Rand. 660; Johnson v. Toulmin, 18 Ala. 50, 52 Am. Dec. 212); Cummings v. Coleman, 7 Rich. Eq. (S. C.) 509, 62 Am. Dec. 402. It is not incumbent on the plaintiff to allege notice: Farmers' & Traders' Bank v. Kimball Milling Co., 1 S. Dak. 388, 47 N. W. 402, 36 Am. St. Rep. 739; Snyder v. Grandstaff, 96 Va. 473, 31 S. E. 647, 70 Am. St. Rep. 863. *Contra*, Garza v. Scott, 5 Tex. Civ. App. 289, 24 S. W. 89.

averments there has been, and can be, no doubt; there is, however, some confusion, or even conflict, with respect to the allegations concerning the defendant's estate. There are many English decisions which hold in the most positive manner the following requirements: The defendant must allege that the grantor from whom he immediately took his title was seised, or appeared to be seised, or pretended to be seised, of a legal estate at the time of the conveyance, and also that such grantor was in possession, if the conveyance purported to be of a present estate in possession. Consequently the defendant must allege that by the conveyance in question he either actually obtained a legal freehold estate, or else obtained what purported and appeared to be such an estate, and what he at the time purchased as, and supposed and believed to be, such a freehold legal estate,— that he acquired a legal seisin from his immediate grantor. From these decisions, it necessarily follows that while a defendant who really acquires only an equitable estate, which, however, purported to be

ticular state, as heretofore shown. The English cases on the subject of denying notice and alleging consideration would be misleading in some of the states.[d]

(d) That notice prior to, and down to the time of, payment of the consideration, must be denied, see McDonald v. Belding, 145 U. S. 492, 12 Sup. Ct. 892 (Arkansas); Balfour v. Parkinson, 84 Fed. 855; Eversdon v. Mayhew, 65 Cal. 163, 3 Pac. 641; Dean v. Anderson, 34 N. J. Eq. 496; Weber v. Rothchild, 15 Oreg. 385, 15 Pac. 650, 3 Am. St. Rep. 162; Lamar v. Hale, 79 Va. 147; and prior to, and down to the time of, the conveyance, see McDonald v. Belding, 145 U. S. 492, 12 Sup. Ct. 892 (Arkansas: what is a substantial compliance with this rule); Byers v. Fowler, 12 Ark. 218, 54 Am. Dec. 271; Balfour v. Parkinson, 84 Fed. 855; Dean v. Anderson, 34 N. J. Eq. 496 (not sufficient to deny notice down to time of *purchase*, as that expression is ambiguous); Lamar v. Hale, 79 Va. 147. That the denial must be of all the circumstances from which it is claimed that notice can be inferred, see Gest v. Packwood, 34 Fed. 368; Balfour v. Parkinson, 84 Fed. 855; Johnson v. Toulmin, 18 Ala. 50, 52 Am. Dec. 212. That the *good faith* of the purchase should be averred (*ante*, § 762), see Connecticut Mut. Life Ins. Co. v. Smith, 117 Mo. 261, 38 Am. St. Rep. 656; Weber v. Rothchild, 15 Oreg. 385, 15 Pac. 650, 3 Am. St. Rep. 162.

a legal estate, and which he in good faith believed to be such, may be a *bona fide* purchaser within the meaning of the doctrine, a defendant who knowingly and intentionally purchases an equitable estate or interest cannot avail himself of the defense. These English decisions have been followed by numerous American cases.[3 e] This is plainly the same question, under another form, which has been discussed in the preceding subdivisions: how far the subsequent purchaser of a mere equitable interest is entitled to the defense of a *bona fide* purchaser. That discussion need not be renewed, and I simply refer to the paragraphs which contain it, and to the cases heretofore cited in which it is involved.[4] It should be remembered, however, in applying the doctrine, that it has been materially modified by the recording statutes. Whenever, as is commonly the case in this country, the defense of *bona fide* purchase arises in connection with recording, the true rule would seem to be as follows: The defendant must aver in his plea or answer that he has purchased an estate which comes within the protection of the recording acts; or in other words, that he has purchased an estate or interest, legal or equitable, of such a kind that the conveyance or instru-

[3] Story v. Lord Windsor, 2 Atk. 630; Trevanion v. Mosse, 1 Vern. 246; Hughes v. Garth, Amb. 421; Page v. Lever, 2 Ves. 450: Dobson v. Leadbeater, 13 Ves. 230; Jackson v. Rowe, 4 Russ. 514; Ogilvie v. Jeaffreson, 2 Giff. 353, 379; Lady Lanesborough v. Lord Kilmaine, 2 Molloy, 403; Snelgrove v. Snelgrove, 4 Desaus. Eq. 274 (a very full statement of all the requisites for a good plea, and a review of previous authorities); Blake v. Heyward, 1 Bail. Eq. 208; Bush v. Bush, 3 Strob. Eq. 131; Brown v. Wood, 6 Rich. Eq. 155; Tompkins v. Anthon, 4 Sand. Ch. 97; Baynard v. Norris, 5 Gill, 468; 46 Am. Dec. 647; Nantz v. McPherson, 7 T. B. Mon. 597; 18 Am. Dec. 216; Hunter v. Sumrall, 5 Litt. 62; Blight's Heirs v. Banks, 6 T. B. Mon. 198; 17 Am. Dec. 136; Halstead v. Bank of Kentucky, 4 J. J. Marsh. 554; Larrowe v. Beane, 10 Ohio, 498; Jenkins v. Bodley, 1 Smedes & M. Ch. 338; Wailes v. Cooper, 24 Miss. 208; Boone v. Chiles, 10 Pet. 177; Vattier v. Hinde, 7 Pet. 252, 271; Alexander v. Pendleton, 8 Cranch, 462.

[4] See *ante*, §§ 740, 756.

(e) See, also, Balfour v. Parkinson, 84 Fed. 855; Eversdon v. Mayhew, 65 Cal. 163, 3 Pac. 641.

ment constituting his muniment of title *must* or *may* be recorded, so that by his recording it he can obtain the protection which the statutes give to such a *bona fide* purchaser who has first put his instrument of title on record.[5]

SECTION VIII.

CONCERNING MERGER.

ANALYSIS.

§ 786. Origin and nature of the doctrine.
§§ 787, 788. *First.* Merger of estates.
§ 787. I. The legal doctrine.
§ 788. II. The equitable doctrine.
§§ 789-800. *Second.* Merger of charges.
§ 790. I. The owner of the property becomes entitled to the charge.
§ 791. Same. Intention prevents a merger.
§ 792. Time and mode of expressing the intention.
§ 793. Conveyance to the mortgagee; assignment to the mortgagor or to his grantee.
§ 794. Merger never prevented when fraud or wrong would result.
§ 795. Life tenant becomes entitled to the charge.
§ 796. II. The owner of the land pays off a charge upon it.
§ 797. Owner in fee personally liable for the debt pays off a charge.
§ 798. Owner who is not liable for the debt pays off a charge.
§ 799. Life tenant pays off a charge.
§ 800. Priorities affected by merger.

§ 786. **Origin and Nature of the Doctrine.**—The applications of the equitable doctrine concerning merger, although resting upon the same general principle, are various in form, and some of them are of frequent occurrence in this country. The single principle from which the doctrine, in all its modes and forms of application, directly results is the fruitful maxim, that equity, in viewing the transactions of men, and in determining the rights and liabilities arising therefrom, looks at the *real intent* of the parties as con-

[5] See *ante*, §§ 757–761.[f]

(f) That a judgment creditor asserting priority, under the recording acts, over a prior mortgage must show that it was unrecorded at the time when he obtained his judgment, see Laurent v. Lanning, 32 Oreg. 11, 51 Pac. 80.

stituting the essential substance, and not at the mere external form. In this method of viewing the affairs of mankind, equity often establishes different rules, creating different rights and duties from those which, under the same circumstances, prevail at law.[1] The equitable doctrine of merger is a striking illustration of this most righteous principle; and the whole discussion in fact consists in ascertaining when and how a merger, which would have been inevitable at law, will be prevented or not permitted in equity. The subject will be treated of under the two following divisions: 1. Merger of estates in the same land; 2. Merger of charges — liens and encumbrances — on the same land.

§ 787. **First. Merger of Estates.— I. The Legal Doctrine.—** The rule of the common law is well established, and of almost universal application, that where a greater and a less legal estate, held in the same right, meet in the same person, without any intermediate estate, a merger necessarily takes place. The lesser estate ceases to exist, being merged in the greater, which alone remains; as where a tenant for years acquires the fee, the term is merged. For the purposes of a merger, by the common law, every estate of freehold is greater than any term of years. Both estates, however, must be held in the same right, in order that this result may follow.[1 a] There is a well-settled excep-

§ 786, [1] See *ante*, vol. 1, §§ 378–384. "Equity looks to the intent, rather than to the form."

§ 787, [1] 2 Black. Com. 157; 2 Spence's Eq. Jur. 879, 880; White v. Greenish, 11 Com. B., N. S., 209, 233: Jones v. Davies, 7 Hurl. & N. 507; Lady Platt v. Sleap, Cro. Jac. 275. An estate for years will merge in a *reversionary* term of years, even though the latter is of less duration: See Hughes v. Robotham, Cro. Eliz. 302; Stephens v. Bridges, 6 Madd. 66. As illustrations of the general rule, see Welsh v. Phillips, 54 Ala. 309; 25 Am. Rep. 679; Cary v. Warner, 63 Me. 571 (life estate and reversion in fee); Allen v. Anderson, 44 Ind. 395 (life estate and fee).

(a) This section is cited in Boykin v. Ancrum, 28 S. C. 486, 6 S. E. 305, 13 Am. St. Rep. 698; Couch v. Eastham, 29 W. Va. 784, 3 S. E. 23.

The subject of merger of estates, at law and in equity, is treated in the monographic note to Forthman v. Deters, 99 Am. St. Rep. 145, 206 Ill. 159, 69 N. E. 97.

tion to this general rule in the case of estates-tail; these do not merge in the fee, such result being prevented by the operation of the statute *de donis*.[2] Courts of law, under the influence of equitable notions, may now admit of some other exceptions.[3 b] The general doctrine is not confined to the union of two legal estates. Wherever, in like manner, a legal and an equal and co-extensive equitable estate, or a legal and a less equitable estate, meet in the same person, in either instance the equitable estate is merged at law, for the law regards the legal estate as the superior.[4] There is, however, the same exception as above, that an equitable estate-tail will not merge in the legal fee.[5]

§ 788. II. The Equitable Doctrine.— Where the legal estate — for example, the fee — and an equal co-extensive equitable estate unite in the same person, the merger takes place in equity, in the absence of acts showing an intention to prevent it, as certainly and as directly as at the law. Under these circumstances, merger is *prima facie* the equitable as well as legal rule.[1 a] If, however, the holder of an

2 2 Black. Com. 177. Estates-tail in copyholds, however, will merge in the fee, since they are not within the statute: Parker v. Turner, 1 Vern. 458; Dunn v. Green, 3 P. Wms. 9; also an estate-tail, after possibility of issue extinct, or when changed into a determinable fee, may merge: See 3 Preston on Conveyancing, 240.

3 Thus it is held in Malloney v. Horan, 49 N. Y. 111, 10 Am. Rep. 335, that where the fee has been conveyed to A, by a deed fraudulent as against the creditors of the grantor, and the conveyance has been set aside on that ground, the fact that it was valid as between the immediate parties will not cause it to work a merger of a smaller prior estate held by the grantee, A; to the loss of the fee, the law will not add as a penalty the further loss of the prior estate on the ground of a merger.

4 Selby v. Alston, 3 Ves. 339; Brydges v. Brydges, 3 Ves. 125 a; Capel v. Girdler, 9 Ves. 509; Welsh v. Phillips, 54 Ala. 309; 25 Am. Rep. 679.

5 Merest v. James, 6 Madd. 118; Browne v. Blake, 1 Molloy, 382.

1 Selby v. Alston, 3 Ves. 339; Brydges v. Brydges, 3 Ves. 125 a; Wykham v. Wykham, 18 Ves. 418, per Lord Eldon; James v. Morey, 2 Cow. 246; 14 Am.

(b) By the Judicature Act, 1873, § 25, subs. 4, if the circumstances are such that there would be no merger in equity, there is now no merger at law.

(a) See, also, In re Selous, [1901] 1 Ch. 921 (merger, though equitable estate is a tenancy-in-common and legal estate is a joint tenancy).

equitable estate obtains the legal fee, and procures it to be conveyed to a trustee with an express declaration that there shall be no merger, then it seems that a court of equity will not permit a merger in opposition to such a direct intention.[2] Where the owner of a legal estate — as, for example, the fee — acquires by purchase or in any other manner a lesser equitable estate not co-extensive and commensurate with his legal estate, or a lesser legal estate, a distinction exists; the merger, although taking place at law, does not necessarily take place in equity; indeed, it may be said that the leaning of equity is then against any merger, and that, *prima facie,* it does not result. The settled rule of equity is, that the intention of the one acquiring the two interests then controls. If this intention has been expressed by taking the transfer to a trustee, or by language inserted in the instrument of transfer, it will, of course, be followed. If the intention has not been thus expressed, it will be sought for and ascertained in all the circumstances of the transaction. If it appears from all these circumstances to be for the benefit of the party ac-

Dec. 475. In Brydges v. Brydges, 3 Ves. 125 a, Lord Alvanley laid down the equitable doctrine in an accurate manner, which received the strong approval of Lord Eldon, and the decision is a leading authority: "I admit that where a person has the same interest in the legal and equitable estate, he ceases to have the equitable estate, and has the legal estate, upon which this court will not act, but leaves it to the rules of law. But it must always be understood with this distinction, that it holds only where the legal and equitable estates are co-extensive and commensurate; but I do not by any means admit that where a person has the whole legal estate and a partial equitable estate, the latter sinks into the former, for it would be a disadvantage to him. There is no absurdity in saying that a person may have the whole legal estate, and a limited interest in the beneficial interest in that estate, as there is in saying that he has the whole legal fee and a legal remainder."

2 Belaney v. Belaney, L. R. 2 Ch. 138; Tiffin v. Tiffin, 1 Vern. 1. The rule in Shelley's case was so unfavorably regarded by courts of equity that they would not permit a merger of an equitable in a legal estate, in order to render the life interest and the remainder of the same kind, and thus let in the operation of the rule: See Shapland v. Smith, 1 Brown Ch. 76; Lord Say and Seal v. Jones, 3 Brown Parl. C. 113; Venables v. Morris, 7 Term Rep. 342–438; Silvester v. Wilson, 2 Term Rep. 444. No merger will take place in equity where the two interests are held by different rights: Chambers v. Kingham, L. R. 10 Ch. Div. 743. 745.

quiring both interests that a merger shall not take place, but that the equitable or lesser estate shall be kept alive, then his intention that such a result should follow will be presumed, and equity will carry it into execution by preventing a merger, and by treating the equitable or lesser interest as subsisting, and by admitting all the consequences, for the protection of the party with respect to other matters, which necessarily result from the fact of the equitable estate being left in existence.[3 b] The same

[3] Brydges v. Brydges, 3 Ves. 125 a; Chambers v. Kingham, L. R. 10 Ch. Div. 743, 745; Thorn v. Newman, 3 Swanst. 603; Adams v. Angell, L. R. 5 Ch. Div. 634, 645, and cases cited; Forbes v. Moffatt, 18 Ves. 384; St. Paul v. Lord Dudley and Ward, 15 Ves. 167, 173; Andrus v. Vreeland, 29 N. J. Eq. 394; Welsh v. Phillips, 54 Ala. 309; 25 Am. Rep. 679; Fowler v. Fay, 62 Ill. 375; Worcester Bank v. Cheeney, 87 Ill. 602; Hart v. Chase, 46 Conn. 207; Malloney v. Horan, 49 N. Y. 111; 10 Am. Rep. 335; Binsse v. Paige, 1 Abb. App. 138; Sheehan v. Hamilton, 2 Keyes, 304; 4 Abb. App. 211. This case presents an interesting and most important question with respect to the application of the equitable doctrine in legal actions under the reformed procedure. The action was one to recover possession of land,— simple ejectment,— in which the plaintiff only alleged and sought to recover upon his legal title in his complaint. Livingston, the original owner, had demised the land to one Taylor by a perpetual lease, reserving a rent-charge with a clause of re-entry. L. assigned this rent-charge and all his rights to Dr. Clarke, who died in 1846, and the plaintiff is his heir at law. The action is brought to recover the land on account of failure to pay the rent. The defense was as follows: Taylor had given a mortgage on the land, which had been foreclosed, and the land was bought in by Dr. Clarke in 1831, and was by him conveyed to one Risley and from him by mesne conveyances to the defendant. The defendant's contention was, that Dr. Clarke being, in 1831, owner both of the land and of the rent-charge, the latter merged and was extinguished. In reply, the plaintiff proved the intention of Dr. Clarke that the rent-charge should not merge, but should be kept alive. The court below held that the doctrine of nonmerger was purely equitable, and could not be invoked by the plaintiff in this legal action. The court of appeals, on the contrary, decided that in

(b) Ingle v. Vaughn Jenkins, [1900] 2 Ch. 368; Thellusson v. Liddard, [1900] 2 Ch. 635; Capital, etc., Bank, Ltd. v. Rhodes, [1903] 1 Ch. 631; Wettlaufer v. Ames, (Mich.) 94 N. W. 950 (dower interest not merged in fee); Smith v. Roberts, 91 N. Y. 470; Asche v. Asche, 113 N. Y. 232, 21 N E. 70; Sweet v. Henry, 175 N. Y. 268, 67 N. E. 574 (lease for years not merged in fee); Hudson, etc., Co. v. Glencoe, etc., Co., 140 Mo. 103, 41 S. W. 450, 62 Am. St. Rep. 722 (lease for years merged in equity of redemption to carry out intention); Joyner v. Sugg, 132 N. C. 580, 44 S. E. 122 (homestead right of wife merged in fee).

rule may be stated in a negative form. If from all the circumstances a merger would be disadvantageous to the party, then his intention that it should not result will be presumed and maintained. The language of some American cases seems to state the rule so broadly that it would include an equitable interest co-extensive and commensurate with the legal estate, and would thus fail to recognize the distinction heretofore laid down. This may perhaps result from the fact that instances of a legal and an equitable fee uniting in the same person have very rarely come before the American courts for adjudication; and the judges, in stating the equitable doctrine correctly applicable to the facts before them, have naturally expressed it in terms somewhat broader than was necessary for the decision.[4]

§ 789. Second. Merger of Charges.[a]— Whenever the owner of the legal estate in land becomes also the holder of any charge directly resting upon it, the latter merges at law and disappears in the same manner as a lesser estate merges. The equitable doctrine preventing the merger under these circumstances is even stronger and more readily applied than in the case of two estates. The "charges" referred to include mortgages, and other liens and encumbrances, and sometimes easements, servitudes, and similar interests which are not rights of property or estates. There are two principal conditions of fact to be considered:

such a legal action, brought upon a legal title, and seeking a purely legal remedy, the plaintiff may still invoke the aid of an equitable right or title which he holds, and is no longer put to the necessity of establishing and enforcing such equitable right by a separate action in equity.

[4] If A, holding the equitable fee as a *cestui que trust* under a dry, passive trust, should acquire directly to himself the legal fee, there can be no doubt upon the authorities that a merger would take place in equity as well as at law. This case, which is not infrequent in England, where such trusts are common, is very infrequent in the United States. The English authorities seem to hold very distinctly that a mere expressed intention of the party would not prevent the merger.

(a) This section is cited in Donk v. Alexander, 117 Ill. 330, 7 N. E. 672.

1. Where the legal owner of the property becomes, by bequest, devolution, or transfer, holder of the charge; 2. Where the owner of the property voluntarily pays off the charge.

§ 790. I. The Owner of the Property Becomes Entitled to the Charge.— When the owner of the fee becomes absolutely entitled in his own right to a charge or encumbrance upon the same land, with no intervening interest or lien, the charge will, at law, merge in the ownership and cease to exist. Under like circumstances a merger will take place in equity, where no intention to prevent it has been expressed, and none is implied from the circumstances and the interests of the party; and a presumption in such a case arises in favor of the merger.[1] [a] Generally, the same result follows whether a mortgagee assigns a mortgage to the mortgagor, or the mortgagor conveys the land to the mortgagee.[2] [b] The merger of a charge or encumbrance under these circumstances is, however, in most instances only a presumption,

[1] Forbes v. Moffatt, 18 Ves. 384; Lord Compton v. Oxenden, 2 Ves. 261, 264; Swinfen v. Swinfen, 29 Beav. 199; Byam v. Sutton, 19 Beav. 556; Swabey v. Swabey, 15 Sim. 106; Tyler v. Lake, 4 Sim. 351, 358; Brown v. Stead, 5 Sim. 535; Grice v. Shaw, 10 Hare, 76; Smith v. Phillips, 1 Keen, 694; Baldwin v. Sager, 70 Ill. 503; Robins v. Swain, 68 Ill. 197; Lilly v. Palmer, 51 Ill. 331; Gardner v. Astor, 3 Johns. Ch. 53; 8 Am. Dec. 465; Starr v. Ellis, 6 Johns. Ch. 393; James v. Johnson, 6 Johns. Ch. 417; James v. Morey, 2 Cow. 246, 286, 300, 313; 14 Am. Dec. 475; Gregory v. Savage, 32 Conn. 250, 264; Bassett v. Mason, 18 Conn. 131; Wilhelmi v. Leonard, 13 Iowa, 330.

[2] Id. Some recent cases draw a distinction as follows: If the mortgagee assigns the mortgage to the mortgagor, a merger is presumed; but if the mortgagor conveys the land to the mortgagee, especially where there is a subsequent encumbrance, a merger will not be presumed, but will depend upon the interest of the mortgagee as showing the intent: Stantons v. Thompson, 49 N. H. 272; Edgerton v. Young, 43 Ill. 464.c

(a) This section is cited in Donk v. Alexander, 117 Ill. 330, 7 N. E. 672; Title Guarantee Co. v. Wrenn, 35 Or. 62, 56 Pac. 271, 76 Am. St. Rep. 454. The text is quoted in Artz v. Yeager, (Ind. App.) 66 N. E. 917. See, also, In re French-Brewster's Settlements, [1904] 1 Ch. 713.

(b) Quoted in Agnew v. R. R. Co., 24 S. C. 18, 58 Am. Rep. 237.

(c) See, also, Howard v. Clark, 71 Vt. 424, 76 Am. St. Rep. 782.

which can generally be overcome, and which sometimes does not even arise.[3]

§ 791. **Same. Intention Prevents a Merger.**— The equitable doctrine concerning the merger, where the owner of the fee becomes entitled to the charge or encumbrance, may be stated as follows, substantially in the language of most eminent judges. Sir William Grant says: "The question is upon the intention, actual or presumed, of the person in whom the interests are united." Sir George Jessel says: "In a court of equity it has always been held that the mere fact of a charge having been paid off does not decide the question whether it is extinguished. If a charge is paid off by a tenant for life, without any expression of his intention, it is well established that he retains the benefit of it against the inheritance. Although he has not declared his intention of keeping it alive, it is presumed that his intention was to keep it alive, because it is manifestly for his benefit. On the other hand, when the owner of an estate in fee pays off or becomes entitled to a charge, the presumption is the other way, but he can, by expressly declaring his intention, either keep it alive or destroy it. If there is no reason for keeping it alive, then equity will, in the absence of any declaration of his intention, destroy it; *but if there is any reason for keeping it alive,* such as the existence of another encumbrance, *equity will not destroy it.*" In short, where the legal ownership of the land and the absolute ownership of the encumbrance become vested in the same person, the intention governs the merger

[3] There is some discrepancy between the earlier and more recent decisions. In Toulmin v. Steere, 3 Mer. 210, 224, Sir William Grant said: "The cases of Greswold v. Marsham, 2 Ch. Cas. 170, and Mocatta v. Murgatroyd, 1 P. Wms. 393, are express authorities to show that one purchasing an equity of redemption cannot set up a prior mortgage of his own, nor, consequently, a mortgage which he has got in, against subsequent encumbrances of which he had notice"; or in other words, that the mortgage would always merge in equity. This *dictum* has been repeatedly disapproved by the ablest judges, and must be regarded as completely overthrown by modern decisions: See Adams v. Angell, L. R. 5 Ch. Div. 634, 641, 645, and cases cited.

in equity.[a] If this intention has been expressed, it controls; in the absence of such an expression, the intention will be presumed from what appear to be the best interests of the party as shown by all the circumstances; if his interests require the encumbrance to be kept alive, his intention to do so will be inferred and followed; if, on the contrary, his best interests are not opposed to a merger, then a merger will take place according to his supposed intention.[b] This is the general rule, subject, however, to one important exception, to be mentioned in a subsequent paragraph.[1] [c] If the person expressly declares his inten-

1 Forbes v. Moffatt, 18 Ves. 384, per Sir William Grant; Adams v. Angell, L. R. 5 Ch. Div. 634, 645, per Sir George Jessel; Swabey v. Swabey, 15 Sim. 106; Grice v. Shaw, 10 Hare, 76; Bailey v. Richardson, 9 Hare, 734, 736; Tyrwhitt v. Tyrwhitt, 32 Beav. 244; Swinfen v. Swinfen, 29 Beav. 199; Davis v. Barrett, 14 Beav. 542; Simonton v. Gray, 34 Me. 50; Given v. Marr, 27 Me. 212; Holden v. Pike, 24 Me. 427; Clark v. Clark, 56 N. H. 105; Stantons v. Thompson, 49 N. H. 272; Hinds v. Ballou, 44 N. H. 619; Moore v. Beasom, 44 N. H. 215; Drew v. Rust, 36 N. H. 335; Bell v. Woodward, 34 N. H. 90; Weld v. Sabin, 20 N. H. 533; 51 Am. Dec. 240; Bullard v. Leach, 27 Vt. 491; Walker v. Barker, 26 Vt. 710; Slocum v. Catlin, 22 Vt. 137; Evans v. Kimball, 1 Allen, 240, 242; New Eng. J. Co. v. Merriam, 2 Allen, 390; Savage v. Hall, 12 Gray, 363; Grover v. Thatcher, 4 Gray, 526; Loud v. Lane, 8 Met. 517, 518, 519; Brown v. Lapham, 3 Cush. 551; Hunt v. Hunt, 14 Pick. 374; 25 Am. Dec. 400; Gibson v. Crehore, 3 Pick. 475; 5 Pick. 146; Knowles v. Carpenter, 8 R. I. 548; Mallory v. Hitchcock, 29 Conn. 127; Bassett v. Mason, 18 Conn. 131; Lockwood v. Sturdevant, 6 Conn. 373; Campbell v. Vedder, 1 Abb. App. 295; Purdy v. Huntington, 42 N. Y. 334; 1 Am. Rep. 532; Hancock v. Hancock, 22 N. Y. 568; Judd v. Seekins, 62 N. Y. 266; Sheldon v. Edwards, 35 N. Y. 279; Bascom v. Smith, 34 N. Y. 320; Clift v. White, 12 N. Y. 519; Spencer v. Ayrault, 10 N. Y. 202; Vanderkemp v. Shelton, 11 Paige, 28; Skeel v. Spraker, 8 Paige, 182; White v. Knapp, 8 Paige, 173; Millspaugh v. McBride, 7 Paige, 509; 34 Am. Dec. 360; James v. Johnson, 6 Johns. Ch. 417, 423; Starr v. Ellis, 6 Johns. Ch. 393; Gardner v. Astor, 3 Johns. Ch. 53; 8 Am. Dec. 465; Loomer v. Wheelwright, 3 Sand. Ch. 135, 157; Angel v. Boner, 38 Barb. 425; McGiven v.

(a) Quoted in Agnew v. R. R. Co., 24 S. C. 18, 58 Am. Rep. 237.

(b) Quoted in Rorer v. Ferguson, 96 Va. 411, 31 S. E. 817; Title Guarantee Co. v. Wrenn, 35 Or. 62, 56 Pac. 271, 76 Am. St. Rep. 454.

(c) This section is cited in Hanlan v. Doherty, 109 Ind. 37, 9 N. E. 782; Fulkerson v. Taylor, 100 Va. 426, 41 S. E. 863; Boos v. Morgan, 130 Ind. 305, 30 N. E. 141, 30 Am. St. Rep. 237; Woodside v. Lippold, 113 Ga. 877, 39 S. E. 400, 84 Am. St. Rep. 267. See, also, Thorne v. Cann, [1895] App. Cas. 11.

tion that the charge shall be kept on foot, no question can generally arise, for he can, with the single exception mentioned, always prevent a merger in this manner.[2 d] The presumption of an intent to preserve the encumbrance alive may, on the other hand, be inferred from the circumstances of the case, from the position of the owner's property, and especially from the fact that a merger would let in other charges or encumbrances.[3 e]

Wheelock, 7 Barb. 22; James v. Morey, 2 Cow. 246; 14 Am. Dec. 475; Hoppock v. Ramsey, 28 N. J. Eq. 413; Mulford v. Petersen, 35 N. J. L. 127; Duncan v. Smith, 31 N. J. L. 325; Van Wagenen v. Brown, 26 N. J. L. 196; Hinchman v. Emans, 1 N. J. Eq. 100; Duncan v. Drury, 9 Pa. St. 332; 49 Am. Dec. 565; Moore v. Harrisburg Bank, 8 Watts, 138; Wallace v. Blair, 1 Grant Cas. 75; Polk v. Reynolds, 31 Md. 106; Bell v. Tenny, 29 Ohio St. 240; Jordan v. Forlong, 19 Ohio St. 89; Tower v. Divine, 37 Mich. 443; Snyder v. Snyder, 6 Mich. 470; Richardson v. Hockenhull, 85 Ill. 124; Baldwin v. Sager, 70 Ill. 503; Huebsch v. Scheel, 81 Ill. 281; Robins v. Swain, 68 Ill. 197; Fowler v. Fay, 62 Ill. 375; Clark v. Laughlin, 62 Ill. 278; Lilly v. Palmer, 51 Ill. 331; Edgerton v. Young, 43 Ill. 464; Aiken v. Milwaukee etc. R. R., 37 Wis. 469; Webb v. Meloy, 32 Wis. 319; Lyon v. McIlvaine, 24 Iowa, 9; Welhelmi v. Leonard, 13 Iowa, 330; White v. Hampton, 13 Iowa, 259; Davis v. Pierce, 10 Minn. 376; Christian v. Newberry, 61 Mo. 446; Grellet v. Heilshorn, 4 Nev. 526; Carter v. Taylor, 3 Head, 30; Besser v. Hawthorn, 3 Or. 129; Atkinson v. Morrissy, 3 Or. 332; Knowles v. Lawton, 18 Ga. 476; 63 Am. Dec. 290; Tucker v. Crowley, 127 Mass. 400; Delaware etc. Co. v. Bonnell, 46 Conn. 9; Hart v. Chase, 46 Conn. 207; New Jersey Ins. Co. v. Meeker, 40 N. J. L. 18; Ætna Life Ins. Co. v. Corn, 89 Ill. 170; Meacham v. Steele, 93 Ill. 135; Dunphy v. Riddle, 86 Ill. 22; Worcester Bank v. Cheeney, 87 Ill. 602; Smith v. Ostermeyer, 68 Ind. 432; Shimer v. Hammond, 51 Iowa, 401; 1 N. W. 656; Waterloo Bank v. Elmore, 52 Iowa, 541; 3 N. W. 547; Scott v. Webster, 44 Wis. 185. The exception referred to in the text is the case where the owner of land who is primarily bound to pay the debt secured pays off or takes an assignment of the mortgage. See *post*, § 797.

2 Bailey v. Richardson, 9 Hare, 734, 736; Tyrwhitt v. Tyrwhitt, 32 Beav. 244.

3 Swinfen v. Swinfen, 29 Beav. 199; Davis v. Barrett, 14 Beav. 542; Tyrwhitt v. Tyrwhitt, 32 Beav. 244; Stantons v. Thompson, 49 N. H. 272; Warren v. Warren, 30 Vt. 530; Hancock v. Hancock, 22 N. Y. 568; Campbell v. Vedder, 1 Abb. App. 295; Hill v. Pixley, 63 Barb. 200; Loud v. Lane, 8 Met. 517. To effect a merger in any case, the person must be owner of the land and of the charge at the same time. If a mortgagee has assigned his mort-

(d) Agnew v. R. R. Co., 24 S. C. 18, 58 Am. Rep. 237.

(e) Lowman v. Lowman, 118 Ill. 582, 9 N. E. 245; Hospes v. Almstedt, 83 Mo. 473; Fenton v. Fenton, (Pa.) 57 Atl. 758.

§ 792. **Time and Mode of the Intention.**[a]— While the intention controls, it must be understood as the intention existing at the time the two interests came together. If there was then no intention to keep the encumbrance alive, a merger cannot be prevented by an intention afterwards formed and expressed, or from a subsequent change of circumstances from which an intention might be inferred.[1] [b] Where the intention is expressed, it may be by the manner in which the encumbrance is transferred, as to a trustee for the owner of the land, or by recitals or other language in the assignment of the security or conveyance of the land; no particular mode is requisite, provided the intention is sufficiently declared.[2] [c] If there is no expression of an intention at the time, then all the circumstances will be considered, in order to discover what is for the best interests of the party. He will be presumed to have intended that the charge should be kept alive or should merge according to the benefit resulting from either. If a merger would let in other encumbrances *which he was not already bound to pay,* this is a circumstance almost decisive of an intention

gage, and afterwards takes a conveyance of the land, there will be no merger, even though the assignment of the mortgage be not recorded: Campbell v. Vedder, 1 Abb. App. 295; Purdy v. Huntington, 42 N. Y. 334; 1 Am. Rep. 532. A mortgage assigned to the wife of the mortgagor will not merge under modern state statutes: Faulks v. Dimock, 27 N. J. Eq. 65; Model Lodging H. Ass'n v. Boston, 114 Mass. 133; Bemis v. Call, 10 Allen, 512; Bean v. Boothby, 57 Me. 295: nor will the marriage of the mortgagor and mortgagee produce a merger: Power v. Lester, 23 N. Y. 527; and see Gillig v. Maass, 28 N. Y. 191. Taking a new mortgage on the same land, or other security, for the same debt does not generally merge the old one:[f] Christian v. Newberry, 61 Mo. 446.

[1] Cole v. Edgerly, 48 Me. 108; Given v. Marr, 27 Me. 212; Hunt v. Hunt, 14 Pick. 374, 383; Gardner v. Astor, 3 Johns. Ch. 53; 8 Am. Dec. 465; Loomer v. Wheelwright, 3 Sand. Ch. 135, 157; Champney v. Coope, 34 Barb. 539; Aiken v. Milwaukee etc. R. R., 37 Wis. 469.

[2] Bailey v. Richardson, 9 Hare, 734; Tyrwhitt v. Tyrwhitt, 32 Beav. 244;

(f) McElhaney v. Shoemaker, 76 Iowa, 416, 41 N. W. 58; Hutchinson v. Swartsweller, 31 N. J. Eq. 205.

(a) This section is cited in Boos v. Morgan, 130 Ind. 305, 30 N. E. 141, 30 Am. St. Rep. 237.

(b) Woodside v. Lippold, 113 Ga. 877, 39 S. E. 400, 84 Am. St. Rep. 267; Weidner v. Thompson, 69 Iowa, 36, 28 N. W. 422.

(c) Gresham v. Ware, 79 Ala. 132.

not to permit a merger.[3] [d] Parol evidence of all the surrounding circumstances of the transaction and of the property is therefore admissible, for the purpose of discovering the intention, or to show that a merger must take place,[4] [f] and also to show fraud,[5] but not to prove the intention directly.[6]

§ 793. Conveyance to the Mortgagee — Assignment to the Mortgagor or to his Grantee.— Where a mortgagee takes a conveyance of the land from the mortgagor or from a grantee of the mortgagor, if the transaction is fair, the presumption of an intention to keep the security alive is very strong. It is generally for the interests of the party in this position that the mortgage should not merge, but should be preserved to retain a priority over other encumbrances. As the mortgagee acquiring the land is not the debtor party bound to pay off either the mortgage or the other encumbrances on the land, there is nothing to prevent equity from carrying out his presumed intent, by decreeing against

Spencer v. Ayrault, 10 N. Y. 202. And see, as to the effect of such recitals, Bean v. Boothby, 57 Me. 295; Campbell v. Knights, 24 Me. 332; Crosby v. Chase, 17 Me. 369; Crosby v. Taylor, 15 Gray, 64; 77 Am. Dec. 352.

[3] Swinfen v. Swinfen, 29 Beav. 199; Davis v. Barrett, 14 Beav. 542; Hatch v. Skelton, 20 Beav. 453; Earl of Clarendon v. Barham, 1 Younge & C. Ch. 688; and cases *ante*, under § 791. If, after the ownership and the charge have become united, the party does any act which clearly shows that he regards the encumbrance as still subsisting, this is strong, even if not conclusive, evidence of an intent that there should be no merger;[e] as, for example, he transfers the mortgage: Powell v. Smith, 30 Mich. 451; he bequeaths the encumbrance in specific terms; Blundell v. Stanley, 3 De Gex & S. 433; and see Wilkes v. Collin, L. R. 8 Eq. 338; or devises the land subject to the charge: Hatch v. Skelton, 20 Beav. 453; but see, for a limitation, Johnson v. Webster, 4 De Gex, M. & G. 474; Astley v. Milles, 1 Sim. 298. A devise of the land without mentioning the encumbrance is some evidence of an intention that it should merge: Swinfen v. Swinfen, 29 Beav. 199, 204.

[4] Fiske v. McGregory, 34 N. H. 414; Miller v. Fichthorn, 31 Pa. St. 252, 259; Frey v. Vanderhoof, 15 Wis. 397.

[5] Astley v. Milles, 1 Sim. 298, 345; Wade v. Howard, 11 Pick. 289; 6 Pick. 492; Howard v. Howard, 3 Met. 548.

[6] McCabe v. Swape, 14 Allen, 188.

(d) Smith v. Roberts, 91 N. Y. 470.

(e) This statement in the note is quoted in Clark v. Glos, 180 Ill. 556, 54 N. E. 631, 72 Am. St. Rep. 223.

(f) Smith v. Roberts, 91 N. Y. 470.

a merger.[1] [a] On the other hand, an assignment of the mortgage to the mortgagor himself raises a contrary presumption. At least, the presumption of a merger is much stronger in this case; it is generally the intention, and is often the duty, of the mortgagor to pay off and discharge the encumbrance by thus becoming the holder of it, and there is a clear distinction between the two cases.[2] An assignment of a mortgage to a grantee of the mortgagor, unless he has expressly assumed to pay it and thus made himself the principal debtor, does not generally create a merger.[b] It generally being for the interest of such grantee to keep the mortgage alive, and to maintain by its means a priority over any subsequent encumbrance or title, such an intention will be presumed and carried into effect by a court

[1] Stantons v. Thompson, 49 N. H. 272; Edgerton v. Young, 43 Ill. 464; Freeman v. Paul, 3 Me. 260; 14 Am. Dec. 237; Walker v. Barker, 26 Vt. 710; Slocum v. Catlin, 22 Vt. 137; Mallory v. Hitchcock, 29 Conn. 127; Mulford v. Peterson, 35 N. J. L. 127; Thompson v. Boyd, 21 N. J. L. 58; 22 N. J. L. 543; Duncan v. Smith. 31 N. J. L. 325; Fithin v. Corwin, 17 Ohio St. 118; Knowles v. Lawton, 18 Ga. 476; 63 Am. Dec. 290; Dunphy v. Riddle, 86 Ill. 22; Worcester Bank v. Cheeney, 87 Ill. 602; Scott v. Webster, 44 Wis. 185; Ætna L. Ins. Co. v. Corn, 89 Ill. 170; Meacham v. Steele, 93 Ill. 135.

[2] Id.

(a) This section is cited in Forthman v. Deters, 206 Ill. 159, 99 Am. St. Rep. 145, 69 N. E. 97; Coburn v. Stephens, 137 Ind. 683, 36 N. E. 132, 45 Am. St. Rep. 218. See in support of the text Factors', etc., Ins. Co. v. Murphy, 111 U. S. 738, 4 Sup. Ct. 679; Raymond v. Whitehouse, 119 Iowa, 132, 93 N. W. 292; Baker v. Northwestern Guaranty Loan Co., 36 Minn. 185, 30 N. W. 464; Wead v. Gray, 78 Mo. 59; Mathews v. Jones, 47 Neb. 616, 66 N. W. 622; Harron v. DuBois, 64 N. J. Eq. 657, 54 Atl. 857; Glenn v. Rudd, (S. C.) 46 S. E. 555; Carpenter v. Gleason, 58 Vt. 244, 4 Atl. 706; Howard v. Clark, 71 Vt. 424, 76 Am. St. Rep 782. Of course there is no merger when the mortgagee has assigned the mortgage before taking the conveyance: Curtis v. Moore, 152 N. Y. 159, 46 N. E. 168, 57 Am. St. Rep. 506; Lime Rock Nat. Bank v. Mowry, 66 N. H. 598, 22 Atl. 555, 13 L. R. A. 294; Case v. Fant, 53 Fed. 41, 3 C. C. A. 418, 10 U. S. App. 415.

(b) This portion of the text is quoted in Clark v. Glos, 180 Ill. 556, 54 N. E. 631, 72 Am. St. Rep. 223. The text is cited in Forthman v. Deters, 206 Ill. 159, 69 N. E. 97, 99 Am. St. Rep. 145 (merger, where grantee had expressly assumed to pay the mortgage).

of equity.[3] [c] When a mortgage upon the whole land is assigned to one of two or more tenants in common, it is not merged, but may be retained and enforced by him against his co-tenants.[4] [d]

§ 794. **Merger never Prevented when Fraud or Wrong would Result.**— Whatever may be the circumstances, or between whatever parties, equity will never allow a merger to be prevented and a mortgage or other security to be kept alive, when this result would aid in carrying a fraud or other unconscientious wrong into effect, under the color of legal forms. Equity only interposes to prevent a merger, in order thereby to work substantial justice.[1] [a]

§ 795. **Life Tenant becomes Entitled to the Charge.**[a]— When a life tenant becomes entitled to a mortgage or other charge upon the entire inheritance, no presumption of a merger arises. The transaction is presumed to be for his own benefit. The security does not merge, but remains in his hands a valid encumbrance which he may enforce against the inheritance.[1] The same rule applies to every one who

§ 793, [3] Adams v. Angell, L. R. 5 Ch. Div. 634, disapproving of some early decisions; Watts v. Symes, 1 De Gex, M. & G. 240; Mobile Branch Bank v. Hunt, 8 Ala. 876; Loud v. Lane, 8 Met. 517; Pitts v. Aldrich, 11 Allen, 39; Savage v. Hall, 12 Gray, 363.

§ 793, [4] Titsworth v. Stout, 49 Ill. 78; 95 Am. Dec. 577; Barker v. Flood, 103 Mass. 474; and conversely when the owner of the land becomes devisee of an undivided interest in the mortgage: Clark v. Clark, 56 N. H. 105.

§ 794, [1] Worthington v. Morgan, 16 Sim. 547; Hutchins v. Carleton, 19 N. H. 487; McGiven v. Wheelock, 7 Barb. 22; Hinchman v. Emans, 1 N. J. Eq. 100.

§ 795, [1] Countess of Shrewsbury v. Earl of Shrewsbury, 1 Ves. 227, 233; Drinkwater v. Combe, 2 Sim. & St. 340, 345; Pitt v. Pitt, 22 Beav. 294; Burrell v. Earl of Egremont, 7 Beav. 205; Morley v. Morley, 5 De Gex, M. & G. 610; Adams v. Angell, L. R. 5 Ch. Div. 634, 645; and see *post*, cases on mortgages paid off by a doweress or other life tenant, § 799.

§ 793, (c) See, also, Liquidation Estates Purchase Co. v. Willoughby, [1898] App. Cas. 321, 67 Law J. Ch. 251, 78 Law T. (N. S.) 329, reversing [1896] 1 Ch. 726; Fellows v. Dow, 58 N. H. 21; Green v. Currier, 63 N. H. 563, 3 Atl. 428.

§ 793, (d) McDaniel v. Stroud, 106 Fed. 486, 45 C. C. A. 446; Saint v. Cornwall, 207 Pa. St. 270, 56 Atl. 440.

§ 794, (a) This section is quoted in Forthman v. Deters, 206 Ill. 159, 99 Am. St. Rep. 145, 69 N. E. 97.

§ 795, (a) This section is cited in Ohmer v. Boyer, 89 Ala. 273, 7 South. 663.

has only a partial interest in the land subject to a charge, such as a tenant in common or a lessee.[2]

§ 796. II. The Owner of the Land Pays off a Charge upon It.[a] — The questions now to be considered are quite different from those already discussed. In the preceding subdivision (I.) the ownership of the land and of the charge have become united in any manner in the same person, either by the owner of the land acquiring the charge, or by the holder of the charge acquiring title to the land. Assuming it possible that the two interests *may* be kept distinct, the questions discussed are, whether the charge merges or does not merge; when it is kept alive and when it disappears. In the present division we have the single condition of fact, that the owner of the land which is subject to a charge, mortgage, or other encumbrance pays it off; whether upon so doing he takes a formal assignment or not is often immaterial. Under these circumstances the distinctive question to be now examined is, whether it is possible for the party thus paying off a charge to keep it alive as a subsisting encumbrance in any manner, by any form of proceeding; or whether the charge must necessarily merge in the ownership, and cease to exist. If it cannot possibly be kept alive, then all further questions of the party's intention, expressed or presumed, are meaningless. If a merger is not necessary, and the charge *can* be kept alive, then the questions concerning the party's intention, expressed or presumed, and of the benefit to himself, will, of course, arise, and will be governed by the rules formulated in the preceding subdivision. If a merger *can* be prevented when the owner of the land pays off a charge, the question whether there is a merger or not depends upon his intention, in the manner already explained. There are two cases to be considered: 1. When the owner

[2] Id.; Titsworth v. Stout, 49 Ill. 78; 95 Am. Dec. 577; Barker v. Ford, 103 Mass. 474; Clark v. Clark, 56 N. H. 105.

(a) This section is cited in Jones v. Lamar, 34 Fed. 454.

in fee pays off a charge; 2. When a life tenant or other owner of a partial interest pays off a charge.

§ 797. 1. **Owner in Fee Pays off a Charge.**— An owner of the fee subject to a charge, who is himself the principal and primary debtor, and is liable personally and primarily for the debt secured, cannot pay off the charge, and in any manner or by any form of transfer keep it alive. Payment by such a person and under such circumstances necessarily amounts to a discharge. The encumbrance cannot be prevented from merging by an assignment taken directly to the owner himself, or to a third person as trustee. This rule applies especially to a mortgagor who continues to be the primary and principal debtor.[1][a] The rule also applies to a grantee of the mortgagor who takes a conveyance of the land subject to the mortgage, and ex-

[1] Johnson v. Webster, 4 De Gex, M. & G. 474; Otter v. Lord Vaux, 6 De Gex, M. & G. 638; Brown v. Lapham, 3 Cush. 551, 554; Wedge v. Moore, 6 Cush. 8; Kilborn v. Robbins, 8 Allen, 466, 471; Strong v. Converse, 8 Allen, 557; 85 Am. Dec. 732; Butler v. Seward, 10 Allen, 466; Bemis v. Call, 10 Allen, 512; Eaton v. Simonds, 14 Pick. 98; Crafts v. Crafts, 13 Gray, 360; Wadsworth v. Williams, 100 Mass. 126; Cherry v. Monro, 2 Barb. Ch. 618; Robinson v. Urquhart, 12 N. J. Eq. 515; Commonwealth v. Chesapeake etc. Co., 32 Md. 501; Swift v. Kraemer, 13 Cal. 526; 73 Am. Dec. 603. The rule does not necessarily apply to every mortgagor. If a mortgagor has conveyed the land to a grantee, who has expressly assumed and promised to pay the mortgage as a part of the consideration, such grantee becomes the principal debtor, primarily liable, and the mortgagor assumes the position of a surety. If the mortgagor then pays off the mortgage, he may preserve its lien alive as a security against the land for his own reimbursement:[b] Stillman v. Stillman, 21 N. J. Eq. 126; Jumel v. Jumel, 7 Paige, 591; Cox v. Wheeler, 7 Paige, 248, 257; Halsey v. Reed, 9 Paige, 446; Kinnear v. Lowell, 34 Me. 299; Fletcher v. Chase, 16 N. H. 38, 42; Robinson v. Leavitt, 7 N. H. 73, 100; Funk v. McReynold, 33 Ill. 481, 495; Baker v. Terrill, 8 Minn. 195, 199.

(a) This section is cited in Birke v. Abbott, 103 Ind. 1, 1 N. E. 485, 53 Am. Rep. 474; Columbus, S. & H. R. Co. Appeals, (C. C. A.) 109 Fed. 177, 208; Forthman v. Deters, 206 Ill. 159, 69 N. E. 97, 99 Am. St. Rep. 145; Clark v. Glos, 180 Ill. 556, 54 N. E. 631, 72 Am. St. Rep. 223; Boos v. Morgan, 130 Ind. 305, 30 Am. St. Rep. 237, 30 N. E. 141. See in support of the text Jones v. Lamar, 34 Fed. 454.

(b) Birke v. Abbott, 103 Ind. 1, 1 N. E. 485, 53 Am. Rep. 474; Orrick v. Durham, 79 Mo. 174; Bensieck v. Cook, 110 Mo. 173, 19 S. W. 642, 33 Am. St. Rep. 422; Fretwell v. Branyon, (S. C.) 45 S. E. 157.

pressly assumes and promises to pay it as a part of the consideration. He is thereby made the principal debtor, and the land is the primary fund for payment. If he pays off the mortgage, it is extinguished.[2] [c]

§ 798. Owner Who is not Liable for the Debt Pays off the Mortgage.— On the other hand, when an owner of the premises who is not personally and primarily liable to pay the debt secured pays off a mortgage or other charge upon it, he *may* keep the lien alive as a security for himself against other encumbrances or titles, and thus prevent a merger. Whether he does so is a question of intention, governed by the rules laid down in the previous paragraphs. When it is evidently for his benefit, the intention will be presumed. He may thus be entitled to preserve the lien, even without a formal assignment of the security to him-

[2] Mickles v. Townsend, 18 N. Y. 575; Russell v. Pistor, 7 N. Y. 171; 57 Am. Dec. 509; Fitch v. Cotheal, 2 Sand. Ch. 29; Lilly v. Palmer, 51 Ill. 331; Frey v. Vanderhoof, 15 Wis. 397; and cases cited at end of the last preceding note. See, however, Kellogg v. Ames, 41 N. Y. 259. Taking a conveyance subject to the mortgage, or with words simply to that effect, does not render the grantee the principal debtor, so as to bring him within the operation of this rule: Pike v. Goodnow, 12 Allen, 472; Strong v. Converse, 8 Allen, 557; 85 Am. Dec. 732; Campbell v. Knights, 24 Me. 332; Weed etc. Co. v. Emerson, 115 Mass. 554; Belmont v. Coman, 22 N. Y. 438; 78 Am. Dec. 213; Trotter v. Hughes, 12 N. Y. 74; 62 Am. Dec. 137; Fowler v. Fay, 62 Ill. 375; Hull v. Alexander, 26 Iowa, 569. If a person who has conveyed land with a covenant warranting against encumbrances afterwards pays off or takes an assignment of a mortgage upon the premises, the same becomes extinguished; he cannot keep it alive as a subsisting lien, for to do so would be a direct violation of his own covenant:[d] Mickles v. Townsend, 18 N. Y. 575; Stoddard v. Rotton, 5 Bosw. 378; Butler v. Seward, 10 Allen, 466; Mickles v. Dillaye, 15 Hun, 296.

(c) The text is cited to this effect in Forthman v. Deters, 206 Ill. 159, 69 N. E. 97, 99 Am. St. Rep. 145. See, also, Columbus, S. & H. R. Co. Appeals, (C. C. A.) 109 Fed. 177, 208; Kilpatrick v. Haley, 66 Fed. 133, 13 C. C. A. 480, 27 U. S. App. 752; Clark v. Glos, 180 Ill. 556, 54 N. E. 631, 72 Am. St. Rep. 223; Goodyear v. Goodyear, 72 Iowa, 329, 33 N. W. 142; Byington v. Fountain, 61 Iowa, 512, 14 N. W. 220, 16 N. W. 534. And this remains true although an assignment is taken in the name of another: Kilpatrick v. Haley, 66 Fed. 133, 13 C. C. A. 480, 27 U. S. App. 752; Drury v. Holden, 121 Ill. 130, 13 N. E. 547.

(d) Jones v. Lamar, 34 Fed. 454. This portion of the author's note is quoted in Brosseau v. Lowry, (Ill.) 70 N. E. 901.

self. Among those who are thus regarded as equitable assignees are grantees of the mortgagor not having assumed payment of the mortgage, heirs, devisees, and in fact all parties entitled to redeem, and not personally liable as principal debtors.[1 a]

§ 799. 2. Life Tenant Pays off a Charge.— The rule is well settled that when a life tenant, or any other person having a partial interest only in the inheritance or in the land, pays off a charge, mortgage, or encumbrance on the entire premises, he is presumed to do so for his own benefit. The lien is not discharged unless he intentionally release it. He can always keep the encumbrance alive for his own protection and reimbursement. His intention to do so will be presumed even though he has taken no assignment. In fact, his payment constitutes him an equitable assignee.[1 a] The rule is most frequently applied in this country to widows entitled to dower in premises subject to a mortgage. If they pay off the mortgage in order to

§ 798, [1] Parry v. Wright, 1 Sim. & St. 369; 5 Russ. 142; Watts v. Symes, 1 De Gex, M. & G. 240, 244; 16 Sim. 640; Squire v. Ford, 9 Hare, 47, 60; Anderson v. Pignet, L. R. 8 Ch. 180, 187; Gunter v. Gunter, 23 Beav. 571; Rawiszer v. Hamilton, 51 How. Pr. 297; Binsse v. Paige, 1 Abb. App. 138; Powell v. Smith, 30 Mich. 451; Brown v. Lapham, 3 Cush. 551, 554; Pool v. Hathaway, 22 Me. 85; Hatch v. Kimball, 16 Me. 146; Aiken v. Gale, 37 N. H. 501, 505; Drew v. Rust, 36 N. H. 335; Spaulding v. Crane, 46 Vt. 292; Walker v. King, 45 Vt. 525; 44 Vt. 601; Wheeler v. Willard, 44 Vt. 640; Warren v. Warren, 30 Vt. 530; Cheeseborough v. Millard, 1 Johns. Ch. 409; 7 Am. Dec. 494; Bell v. Mayor, 10 Paige, 49; Skeel v. Spraker, 8 Paige, 182; Millspaugh v. McBride, 7 Paige, 509; 34 Am. Dec. 360; Abbott v. Kasson, 72 Pa. St. 183.

§ 799, [1] Shrewsbury v. Shrewsbury, 1 Ves. 233; Drinkwater v. Combe, 2 Sim. & St. 340, 345; Burrell v. Earl of Egremont, 7 Beav. 205; Pitt v. Pitt, 22 Beav. 294; Morley v. Morley, 5 De Gex, M. & G. 610.

§ 798, (a) This section is cited in Estate of Freud, 131 Cal. 667, 63 Pac. 1080, 82 Am. St. Rep. 407. See, also, Wadsworth v. Lyon, 93 N. Y. 201, 45 Am. Rep. 190; Boos v. Morgan, 130 Ind. 305, 30 N. E. 141, 30 Am. St. Rep. 237.

§ 799, (a) Quoted in Ohmer v. Boyer, 89 Ala. 273, 7 South. 663. Cited in Estate of Freud, 131 Cal. 667, 63 Pac. 1080, 82 Am. St. Rep. 407. See, also, In re Harvey, [1896] 1 Ch. 137 (presumption is not rebutted by fact that tenant for life is the mother of the remainderman); In re Pride, [1891] 2 Ch. 135.

protect their dower, they become equitable assignees, and may preserve and enforce the lien against the inheritance for reimbursement over and above the proportion of the debt which they are bound to contribute.[2] The rule extends in like manner to tenants for years[3] and to tenants in common.[4]

§ 800. **Priorities Affected by Merger.**— It is plain from the foregoing discussion that the doctrine of merger, in its application to encumbrances, has an intimate connection with the general subject of priorities. Whether a certain mortgage or other charge is still subsisting, and retains its priority, or whether it is in reality, though not perhaps in form, extinguished, so as to let in subsequent liens, must often be determined by the rules concerning merger. The doctrine has therefore a twofold application,— between the immediate parties, the owner of the land or the debtor on one side, and the holder of the lien on the other, and between the holders of successive encumbrances and partial interests.

[2] Foster v. Hilliard, 1 Story, 77; Swaine v. Perine, 5 Johns. Ch. 490; 9 Am. Dec. 318; Bell v. Mayor etc., 10 Paige, 49; Lamson v. Drake, 105 Mass. 567; Newhall v. Savings Bank, 101 Mass. 431; 3 Am. Rep. 387; McCabe v. Swap, 14 Allen, 191; Davis v. Wetherell, 13 Allen, 63; 90 Am. Dec. 177; McCabe v. Bellows, 7 Gray, 148; 66 Am. Dec. 467; Gibson v. Crehore, 3 Pick. 475; Houghton v. Hapgood, 13 Pick. 158; Carll v. Butman, 7 Me. 102, 105; Spencer v. Waterman, 36 Conn. 342.

[3] Averill v. Taylor, 8 N. Y. 44; Loud v. Lane, 8 Met. 517; Bacon v. Bowdoin, 22 Pick. 401.

[4] See *ante*, § 795, and cases cited in note.

SECTION IX.

CONCERNING EQUITABLE ESTOPPEL.

ANALYSIS.

§ 801. Nature of the rights created by estoppel.
§ 802. Origin of equitable estoppel.
§ 803. How far fraud is essential in equitable estoppels.
§ 804. Definition.
§ 805. Essential elements constituting the estoppel.
§ 806. Theory that a fraudulent intent is essential.
§ 807. Fraudulent intent necessary in an estoppel affecting the legal title to land.
§§ 808–812. Requisites further illustrated.
§ 808. The conduct of the party estopped.
§ 809. Knowledge of the truth by the party estopped.
§ 810. Ignorance of the truth by the other party.
§ 811. Intention by the party who is estopped.
§ 812. The conduct must be relied upon, and be an inducement for the other party to act.
§ 813. Operation and extent of the estoppel.
§ 814. As applied to married women.
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§§ 816–821. Important applications in equity.
§ 816. Acquiescence.
§ 817. Same: as preventing remedies.
§ 818. Same: as an estoppel to rights of property and contract.
§ 819. As applied to corporations and stockholders.
§ 820. Other instances of acquiescence.
§ 821. Owner estopped from asserting his legal title to land.

§ 801. **Nature of the Rights Created by Estoppel.**— It has been said by some writers and judges that the doctrine of equitable estoppel is a branch merely of the law of evidence. This is, however, an entirely mistaken and by no means harmless view. Nothing can tend to produce more confusion of mind in the correct understanding of legal rules, and in their proper application to the affairs of life, than the exhibition of them under wrong divisions of the law, and the consequent representation of them as connected with relations which do not exist. It is undoubtedly true that authors of works on evidence intended for pro-

fessional use do often treat of matters which form no legitimate part of that subject. This may be convenient, but it is not an accurate and scientific method, and should never be pursued when the purpose is to define and describe the nature of legal doctrines and of the rights and duties which flow therefrom. Rules which determine and regulate primary rights of property and of contract constitute a part of the substantive law, and do not belong to the law of evidence, which is simply a branch of the law concerning procedure.[1] The rights and corresponding duties created by estoppels are primary,— rights of property or of contract. This is certainly true of common-law estoppels, and it is no less true of equitable estoppels; the effect of the latter is substantially the same as that of the former, the difference being in the facts from which the estoppel arises, and not in the consequences produced by it. An estoppel determines the right which a person may enforce by action or rely on in defense, and not the mere mode and means by which those rights may be proved.[2] In

[1] This truth is clearly and most conclusively shown by Sir James Fitzjames Stephen, in the introduction to his admirable work entitled a Digest of the Law of Evidence (pp. xiii., xiv.).

[2] One or two illustrations will clearly show the correctness of this statement. A tenant is estopped from denying his landlord's title. This is certainly a right of property, enabling the landlord to recover rent, or perhaps the land itself, *although he has in fact no title, and no other right of property than that created by the estoppel.* An acceptor is estopped from denying the genuineness of the prior signatures on the bill. This is a right of contract, whereby the holder may be enabled to recover the amount of the bill from the acceptor, and it may possibly be the only ground upon which a recovery can be rested. One other illustration of an estoppel, regarded as more distinctively equitable, and having more the *appearance* of being only a rule of evidence: A is owner of land. He stands by and knowingly permits B to expend money and make improvements on the land, under the innocent but mistaken assumption of a right to do so, and interposes no objection, asserts no claim of title. A is then estopped from setting up his title as against B's right to the improvements. This is clearly a right of property in B. In strictness, A has the whole title, and B has no right of property by the ordinary rules of law applicable in the absence of the estoppel. The estoppel *creates* a right in B, which is as much a right of property as though it had resulted from a conveyance, or from a statutory adverse possession; it is his only right of property; it may not be absolute, but is no less a right of prop-

fact, the principle which underlies the doctrine of the implied authority of an agent in most of its applications, and which prevents the principal from denying the authority which, by his conduct, he has held the agent out to the world as possessing, is identically the same principle which constitutes the essence of all equitable estoppels; and if the rules concerning these estoppels are merely a part of the law of evidence, we should, for the same reason and to the same extent, regard the rules concerning the nature and effects of implied agency as also belonging to evidence. Many similar illustrations might be selected from various departments of the law. Equitable estoppel is, therefore, a particular doctrine, based upon justice and conscience, which is the origin, wherever it may be invoked, of primary rights of property or of contract.

§ 802. **Origin of Equitable Estoppel.**[a]— Estoppel was recognized by the common law at a very early day. The original legal rules concerning it were arbitrary and sometimes unjust, and are still, to a certain extent, technical and strict. Lord Coke gave a very harsh definition of estoppel as it existed in his time: "An estoppel is where a man is concluded by his own act or acceptance to say the truth." He added: "Touching estoppels, which are a curious and excellent sort of learning, it is to be observed that there are three kinds of estoppels, viz., by matter of record, by matter in writing, and by matter *in pais*." His discussion shows clearly that "by matter in writing" he meant only a deed,— a writing under seal. The instances which he gave of estoppels *in pais* were: "By matter *in pais*, as by livery, by entry, by acceptance of rent, by parti-

erty. One mode of acquiring title is by the common-law estoppel resulting from a covenant of warranty. It is a pure fiction to say that the covenantee does not acquire a title by the estoppel.

(a) The text, §§ 802–804, is cited in Wampol v. Kountz, 14 S. Dak. 334, 85 N. W. 595, 86 Am. St. Rep. 765. This section is cited in Tracy v. Roberts, 88 Me. 310, 34 Atl. 68, 51 Am. St. Rep. 394; Hyatt v. Zion, (Va.) 48 S. E. 1.

tion, and by acceptance of an estate." These instances of legal estoppels *in pais* are not included within the "equitable estoppels" which form the subject-matter of the present section. Although the facts from which equitable estoppels arise are all matters *in pais* as distinguished from records and deeds, yet the whole doctrine is an expansion of and addition to the original legal estoppels *in pais,* and embraces rules unknown to the law when Lord Coke wrote. Equitable estoppel in the modern sense arises from the *conduct* of a party, using that word in its broadest meaning as including his spoken or written words, his positive acts, and his silence or negative omission to do anything.[b] Its foundation is justice and good conscience. Its object is to prevent the unconscientious and inequitable assertion or enforcement of claims or rights which might have existed or been enforceable by other rules of the law, unless prevented by the estoppel; and its practical effect is, from motives of equity and fair dealing, to create and vest opposing rights in the party who obtains the benefit of the estoppel.[1] The

[1] Horn v. Cole, 51 N. H. 287, 289; 12 Am. Rep. 111. The opinion of Perley, C. J., in this case, is such an admirable and accurate presentation of the true reasons and grounds of the doctrine, pointing out so clearly the distinctions between estoppel from conduct as a creature of equity, and estoppel *in pais* at law, establishing so firmly, on the solid foundation of justice and good conscience, the equitable conception, and sustaining so completely the various positions of the text, both as to the nature of estoppel as a rule of property, contract, or remedy, rather than a mere rule of evidence, and as to the essential requisites, that I cannot refrain from quoting it at some length. Mr. Chief Justice Perley says: "The ground on which a party is precluded from proving that his representations on which another has acted were false is, that to permit it would be contrary to equity and good conscience. . . . . It thus appears that what has been called an equitable estoppel, and sometimes with less propriety an estoppel *in pais,* is properly and peculiarly a doctrine of equity, originally introduced there to prevent a party from taking a dishonest and unconscientious advantage of his strict legal rights, though now with us, like many other doctrines of equity, habitually administered at law. . . . . It would have a tendency to mislead us in the present inquiry, as there is reason to suspect that it has sometimes misled others, if we should confound this doctrine of equity with

(b) This portion of the text is quoted in Martin v. Maine Cent. R. Co., 93 Me. 100, 21 Atl. 740.

doctrine of equitable estoppel is pre-eminently the creature of equity. It has, however, been incorporated into the law, and is constantly employed by courts of law at the present day in the decision of legal controversies. Preserving its original character, and depending upon equitable principles,

the *legal estoppel by matter in pais.* The equitable estoppel and legal estoppel agree indeed in this, that they both preclude from showing the truth in the individual case. The grounds, however, on which they do it are not only different, but directly opposite. The legal estoppel shuts out the truth, and *also the equity and justice* of the individual case, on account of the supposed paramount importance of rigorously enforcing a certain and unvarying maxim of the law. For reasons of general policy, a record is held to import incontrovertible verity; and for the same reason, a party is not permitted to contradict his solemn admission by deed. And the same is equally true of legal estoppels by matter *in pais.* . . . . Legal estoppels exclude evidence of the truth, and the equity of the particular case, to support a strict rule of law on grounds of public policy. Equitable estoppels are admitted on the exactly opposite ground of promoting the equity and justice of the individual case by preventing a party from asserting his rights under a general technical rule of law, when he has so conducted himself that it would be contrary to equity and good conscience for him to allege and prove the truth. The facts upon which equitable estoppels depend are usually proved by oral evidence; and the evidence should doubtless be carefully scrutinized and be full and satisfactory before it should be admitted to estop the party from showing the truth, *especially in cases affecting the title to land.* But where the facts are clearly proved, the maxim that estoppels are odious — which was used in reference to legal estoppels, because they shut out the truth and justice of the case — ought not to be applied to these equitable estoppels, as it has sometimes been, inadvertently as I think, from a supposed analogy with the legal estoppel by matter *in pais,* to which they have, in this respect, no resemblance whatever. . . . . In this equitable estoppel the party is forbidden to set up his legal title, because he has so conducted himself that to do it would be contrary to equity and good conscience. As in other cases of fraud and dishonesty, the circumstances out of which the question may arise are of infinite variety, and unless courts of law are willing to abdicate the duty of administering the equitable doctrine effectually in the suppression of fraud and dishonesty, the application of it cannot be confined within the limit of any narrow technical definition, such as will relieve courts from looking, as in other cases depending on fraud and dishonesty, to the circumstances of each individual case. Certain general rules will doubtless apply, as in other cases where relief is sought on such grounds. But I find myself unable to agree with the authorities, where the old maxim that legal estoppels are odious has been applied to this equitable estoppel, and where attempts have been made to lay down strict definitions such as would *defeat the remedy in a large proportion of the cases that fall within the principle* on which the doctrine is founded. The doctrine having been borrowed from equity, courts at law that have

it is administered in the same manner, and in conformity with the same rules, by the courts both of law and of equity, so that the decisions of either class of tribunals may be quoted as authorities in the subsequent discussion. The particular applications of the doctrine are so various and

adopted it should obviously look to the practice in equity for their guide in the application of it, and in equity the doctrine has been liberally applied to suppress fraud and enforce honesty and fair dealing, without any attempt to confine the doctrine within the limits of a strict definition. For instance, *the doctrine has not in equity been limited to cases where there was an actual intention to deceive.* The cases are numerous where the party, who was estopped by his declarations or his conduct to set up his legal title, was ignorant of it at the time, and of course could have had no actual intention to deceive by concealing his title. Yet if the circumstances were such that *he ought to have informed himself,* it has been held to be contrary to equity and good conscience to set up his title, though he was in fact ignorant of it when he made the representations. *Nor is it necessary in equity that the intention should be to deceive any particular individual or individuals.* If the representations are such, and made in such circumstances, that all persons interested in the subject have the right to rely on them as true, their truth cannot be denied by the party that has made them against any one who has trusted to them and acted on them." After citing and commenting on numerous decisions, the chief justice concludes (p. 300): "Though I do not find that the precise point taken here for the plaintiff has been directly decided in any of our cases, yet the general current of our decisions on the subject tends to a liberal application of the doctrine for the suppression of fraud and dishonesty, and the promotion of justice and fair dealing. No disposition has been shown in the courts of this state to treat this equitable estoppel as odious, and embarrass its application by attempts to confine it within the limits of a narrow technical definition. We are content to follow where the spirit and general tone of these decisions lead; and they lead plainly to the conclusion, that where a man makes a statement disclaiming his title to property, in a manner and under circumstances such as he must understand those who heard the statement would believe to be true, and if they had an interest in the subject would act on as true, and one, using his own means of knowledge with due diligence, acts on the statement as true, the party who makes the statement cannot show that his representation was false, to the injury of the party who believed it to be true and acted on it as such; that he will be liable for the natural consequences of his representation, and cannot be heard to say that the party actually injured was not the one he meant to deceive, or that his fraud did not take effect in the manner he intended." These views will, in my opinion, reconcile much apparent conflict of judicial decision; they certainly furnish the basis of principle upon which the administration of the doctrine by courts of equity must be rested. See also Stevens v. Dennett, 51 N. H. 324, 333, per Foster, J.; *post,* in note under § 805.

so numerous, that no attempt will be made to discuss them with any fullness. I shall confine myself simply to an explanation of the general principles which determine the nature, essential elements, operation, and effect of the equitable estoppel, and to a brief statement of a few important applications which frequently come before courts of equity. For a more exhaustive discussion the reader is referred to treatises on the law of estoppel.

§ 803. How Far Fraud is Essential in Equitable Estoppels.[a]— There is a theory which makes the essence of equitable estoppel to consist of fraud. In accordance with this view, the language used by some courts in defining and describing the general doctrine has been so sweeping and positive that, taken literally, it does not admit the possibility of such an estoppel unless the party has been guilty of actual intentional fraud in law; and thus the whole doctrine is represented as virtually a mere instance of legal fraud. This theory is not sustained by principle, and it cannot be made universal. There are well-settled cases of equitable estoppel, familiar to courts of equity, which do not rest upon fraud, and instances are admitted, even by the courts which maintain this theory, which cannot be said to involve any element of fraud unless by a complete perversion and misuse of language. It is undoubtedly in accordance with the methods long pursued by courts of equity to apply the term " fraudulent " to the party estopped, in the following manner: It is in strict agreement with equitable notions to say of such party that his repudiation of his own prior conduct which had amounted to an estoppel, and his assertion of claims notwithstanding his former acts or words, would be *fraudulent,*— would be a *fraud* upon the rights of the person benefited by the estoppel. It is accurate, therefore, to describe equitable estoppel, in general terms, as such conduct by a party that it would be fraudulent, or a fraud upon

(a) This section is cited in Hyatt v. Zion, (Va.) 48 S. E. 1.

the rights of another, for him afterwards to repudiate and to set up claims inconsistent with it. This use of the term has long been familiar to courts of equity, which have always treated the word "fraud" in a very elastic manner. The meaning here given to fraud or fraudulent is virtually synonymous with "unconscientious" or "inequitable." In exactly the same manner, and with exactly the same signification given to the word, the doctrine of specific enforcement of verbal contracts for the sale of land when part performed by the plaintiff has been explained by saying that it would be fraudulent for the defendant to contest his liability by setting up the statute of frauds after he had permitted the plaintiff, without objection, to go on and part perform the verbal agreement. In this explanation courts of equity do not mean that the defendant's conduct in denying the validity of the agreement is *actual* fraud,— a willful deception,— but simply that it is unconscientious; much less do they assert that there was actual fraud — willful deception — in the act of entering into the verbal contract. In exactly the same manner it is in strict accordance with equitable conceptions and equitable terminology to describe as fraud or fraudulent the act of repudiating conduct which had constituted an estoppel, and of asserting claims inconsistent therewith; it is entirely another thing to say that the conduct itself — the acts, words, or silence of the party — constituting the estoppel is an actual fraud, done with the actual intention of deceiving. I would venture the suggestion that the theory which regards fraud as the essence of equitable estoppel originated in courts possessing only a partial and limited jurisdiction. Such courts, administering nearly the whole jurisprudence by means of legal actions, and being able to admit equitable notions only so far as they could be harmonized with legal dogmas and legal procedure, would naturally formulate the doctrine of equitable estoppel in such a manner that it should become a rule of law not inconsistent with the legal system as a

whole. This could only be done by giving prominence to the element of fraud, and by making it in fact essential. By this method equitable estoppel was made to be a branch or application of the legal rules concerning fraud. The theory, having been thus formulated by tribunals of great ability and high authority, was perhaps adopted by other courts without a careful examination of its occasion and origin. When all the varieties of equitable estoppel are compared, it will be found, I think, that the doctrine rests upon the following general principle: When one of two innocent persons — that is, persons each guiltless of an intentional, moral wrong — must suffer a loss, it must be borne by that one of them who by his conduct — acts or omissions — has rendered the injury possible. This is confessedly the foundation of the rules concerning the implied authority of agents, which are declared by judges of the highest ability to be applications of the doctrine of equitable estoppel.[1] This most righteous principle is sufficient, and alone sufficient, to explain all instances of such estoppel, and although fraud may be, and often is, an ingredient in the conduct of the party estopped, it is not an essential element, if the word is used in its true legal meaning.

§ 804. Definition.— From the foregoing general description it will appear, I think, that the following definition is accurate, and covers all phases and applications of the doctrine: Equitable estoppel is the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed, either of property, of contract, or of remedy, as against another person, who has in good faith relied upon such conduct, and has been led

[1] See North River Bank v. Aymar, 3 Hill, 262; Farmers' and Mechanics' Bank v. Butchers' and Drovers' Bank, 16 N. Y. 125; 69 Am. Dec. 678; Griswold v. Haven, 25 N. Y. 595; 82 Am. Dec. 380; Exchange Bank v. Monteath, 26 N. Y. 505.

thereby to change his position for the worse, and who on his part acquires some corresponding right, either of property, of contract, or of remedy.[1] [a]

[1] This definition, it will be observed, differs somewhat in form from that often given by text-writers. It is based upon an abandonment of the fiction that estoppel is a mere rule of evidence not affecting the real rights of parties, and it incorporates the truth that the party estopped loses, and the party having the benefit of the estoppel obtains, a right, which may be of property, of contract, or sometimes simply of remedy. In his Digest of the Law of Evidence (p. 124), Sir James Fitzjames Stephen thus formulates the doctrine: "When one person, by anything which he does or says, or abstains from doing or saying, intentionally causes or permits another person to believe a thing to be true, and to act upon such belief otherwise than but for that belief he would have acted, neither the person first mentioned nor his representative in interest is allowed, in any suit or proceeding between himself and such person or his representative in interest, to deny the truth of that thing.

"When any person, under a legal duty to any other person to conduct himself with reasonable caution in the transaction of any business, neglects that duty, and when the person to whom the duty is owing alters his position for the worse because he is misled as to the conduct of the negligent person by a fraud, of which such neglect is in the natural course of things the proximate cause, the negligent person is not permitted to deny that he acted in the manner in which the other person was led by such fraud to believe him to act."

The first clause states the rule in its ordinary applications, and the author cites, as examples, Pickard v. Sears, 6 Ad. & E. 469, 474; Freeman v. Cooke, 2 Ex. 654, 661; Howard v. Hudson, 2 El. & B. 1; Knights v. Wiffen, L. R. 5 Q. B. 660. The second clause states the rule in its application to the case of a negligent act causing fraud. As examples, he cites Young v. Grote, 4 Bing. 253, where A signed blank checks and gave them to his wife to fill up as she wanted money. She filled up a check for £50 2*s*. so carelessly that room was left for the insertion of figures before the "50" and of words before the "fifty." She gave the check to A's clerk to get it cashed. He inserted a 3 before the 50, and "three hundred and" before the "fifty," and A's banker in good faith paid the check so altered to the clerk. Held, that A was estopped as against the banker to claim that the check was not valid: Swan v. North Br. etc. Co., 2 Hurl. & C. 175, 181, per Blackburn, J. A man carelessly leaves his door unlocked, whereby his goods are stolen. He is not estopped from denying the title of an innocent purchaser from the thief. The author also cites, on the doctrine generally, Bank of Ireland v. Evans's Charities, 5 H. L. Cas. 389; Swan v. British Austr.

(a) Quoted in Martin v. Maine Cent. R. Co., 93 Me. 100, 21 Atl. 740; Wilkins v. Gibson, 113 Ga. 31, 38 S. E. 374, 84 Am. St. Rep. 204; Whiteselle v. Texas Loan Agency, (Tex. Civ. App.) 27 S. W. 309; and cited in Galbraith v. Lunsford, 87 Tenn. 89, 9 S. W. 365, 1 L. R. A. 522.

§ 805. Essential Elements Constituting the Estoppel.— In conformity with the principle already stated which lies at the basis of the doctrine, and upon the authority of decisions which have recognized and adopted that principle, the following are the essential elements which must enter into and form a part of an equitable estoppel in all of its phases and applications. One caution, however, is necessary, and very important. It would be unsafe and misleading to rely on these general requisites as applicable to every case, without examining the instances in which they have been modified or limited. 1. There must be conduct — acts, language, or silence — amounting to a representation or a concealment of material facts. 2. These facts must be known to the party estopped at the time of his said conduct, or at least the circumstances must be such that knowledge of them is necessarily imputed to him. 3. The truth concerning these facts must be unknown to the other party claiming the benefit of the estoppel, at the time when such conduct was done, *and at the time when it was acted upon by him.* 4. The conduct must be done with the intention, or at least with the *expectation,* that it will be acted upon by the other party, or under such circumstances that it is both natural and probable that it will be so acted upon. There are several familiar species in which it is simply *impossible* to ascribe any *intention* or even *expectation* to the party estopped that his conduct will be acted upon by the one who afterwards claims the benefit of the estoppel. 5. The conduct must be relied upon by the other party, and, thus relying, he must be led to act upon it. 6. He must in fact act upon it in such a manner as to change his position for the worse; in other words, he must so act that he would suffer a loss if he were compelled to surrender or forego or alter what he has done by reason of the first party being permitted to repudiate his

Co., 7 Com. B., N. S., 400, 448; 7 Hurl. & N. 603; 2 Hurl. & C. 175; Halifax Guardians v. Wheelwright, L. R. 10 Ex. 183; Carr v. London & N. W. R'y, L. R. 10 Com. P. 307, 316, 317.

conduct and to assert rights inconsistent with it.[1a] It will be seen that *fraud* is not given as an essential requisite in the foregoing statement. It is not absolutely necessary that the conduct mentioned in the first subdivision should

[1] I shall cite only a few of the leading and ablest decisions which illustrate the text, and especially those which do not admit fraud as a necessary element of the conduct by which a party is estopped. Pickard v. Sears, 6 Ad. & E. 469, 474, is the leading case. The facts substantially were: A, the owner of chattels in B's possession, which were taken in execution by C, abstained from claiming them for several months, and conversed with C's attorney about them without mentioning his own claim, and thus impressed C with the belief that the goods belonged to B. C sold them, and this was held sufficient to sustain a finding that A was estopped. In giving the opinion of the court Lord Denman thus stated the rule: "The rule of the law is clear, that where one, by his words or conduct, willfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time." The word "willfully," in this statement, might imply that fraud was a necessary ingredient in the conduct which creates an estoppel. The word was, however, explained in subsequent decisions, and this interpretation completely abandoned. In Freeman v. Cooke, 2 Ex. 654, Parke, B., said: "The rule laid down in Pickard v. Sears, 6 Ad. & E. 469, was to be considered as established; but that by the term 'willfully,' in that rule, must be understood, if not that the party represents that to be the truth which he knows to be untrue, at least that he means his representation to be acted upon, and that it is acted upon accordingly; and if, *whatever a man's real meaning may be,* he so conducts himself that a reasonable man would take the representation to be true, and believe that it

(a) This section is cited generally in Great West Min. Co. v. Woodman, 12 Colo. 46, 20 Pac. 771, 13 Am. St. Rep. 204; Martin v. Maine Cent. R. Co., 83 Me. 100, 21 Atl. 740; quoted, as to the first and third elements of the estoppel, in Estis v. Jackson, 111 N. C. 145, 32 Am. St. Rep. 784, 16 S. E. 7; cited to the effect that fraudulent intent is not essential in Galbraith v. Lunsford, 87 Tenn. 89, 9 S. W. 365, 1 L. R. A. 522; and to the effect that there must be knowledge when mere silence is relied upon in Dugan v. Lyman, (N. J. Eq.) 23 Atl. 657; and to the effect that the conduct must be relied upon as an inducement to act by the party claiming the benefit of the estoppel, in Pocahontas Light & Water Co. v. Browning, 53 W. Va. 436, 44 S. E. 267. See, also, Chase's Appeal, 57 Conn. 236, 18 Atl. 96, reviewing many cases, and fully supporting the conclusions of the text; Hill v. Blackwelder, 113 Ill. 283 (fraudulent intention not required); Stevens v. Ludlum, 46 Minn. 160, 24 Am. St. Rep. 210, 48 N. W. 771, 13 L. R. A. 270 (same). The change in the legal definition of fraud effected in England by the decision in Derry v. Peek, 14 App. C. (H. L.) 337, has not touched the doctrine of estoppel: Low v. Bouverie, [1891] 3 Ch. 82.

be done with a fraudulent purpose or intent, or with an actual and fraudulent intention of deceiving the other party; nor is this meaning implied by any of the language which I have used. The adoption of such an element as

was meant that he should act upon it, and did act upon it, as true, the party making the representation would be equally precluded from contesting its truth; and conduct by negligence or omission, when there is a duty cast upon a person, by usage of trade or otherwise, to disclose the truth, may often have the same effect; as, for instance, a retiring partner, omitting to inform his customers of the firm, in the usual mode, that the continuing partners were no longer authorized to act as his agents, is bound by all contracts made by them with third persons on the faith of their being authorized." In the still later case of Cornish v. Abington, 4 Hurl. & N. 549, Pollock, C. B., said that the term "willfully," as used in Pickard v. Sears, 6 Ad. & E. 469, meant simply "voluntarily," and that this was its established signification. He added the following statement of the general rule: "If a party uses language which, in the ordinary course of business and the general sense in which words are understood, conveys a certain meaning, he cannot afterwards say that he is not bound, if another, so understanding it, has acted upon it. *If any person, by a course of conduct, or by actual expressions, so conducts himself that another may reasonably infer the existence of an agreement or license, whether the party intends that he should do so or not, it has the effect that the party using that language, or who has so conducted himself, cannot afterwards gainsay the reasonable inference to be drawn from the words or conduct.*" This mode of stating the general rule is absolutely necessary to explain numerous well-settled and even familiar applications of the estoppel, where it is not only impossible to impute to the party estopped any actual intention that his conduct should be acted upon by the other party, but even where the conduct was done without any knowledge or expectation that it ever would be so acted upon by the person who does afterwards act upon it and thus obtains the benefit of the estoppel. In the quite recent case In re Bahia etc. R'y, L. R. 3 Q. B. 584, the necessity of fraud as an essential ingredient of the conduct was again denied, the court holding that if a representation is made with the intention that it shall be acted upon by another, and he does so act upon it, there is an estoppel. Finally, in the rule as carefully formulated by Mr. Stephen upon the basis of the latest English decisions, as quoted in the previous note, the element of fraud is clearly omitted. In fact, the second paragraph of his rule includes cases, covered by the foregoing language of Chief Baron Pollock, where there is even no intention on the part of the one estopped that his conduct should be acted upon.

American cases of the highest authority are no less explicit. In Continental Bank v. Bank of the Commonwealth, 50 N. Y. 575, 581, 582, Folger, J., said: "Is the plaintiff estopped from maintaining that the certificate was a forgery, and the admission of its teller an innocent mistake? There is no disagreement as to the general definition of an estoppel *in pais*. It is agreed that there must have been some act or declaration of the plaintiff or of its agent to the defendant's assignor which so affected the conduct of the

always essential would at once strike out some of the most familiar and best established instances of equitable estoppel. Undoubtedly a fraudulent design to mislead is often present as an ingredient of the conduct working an estop-

latter to their injury as that it would be unjust now to permit the plaintiff to set up the truth of the case to the contrary of its mistaken act or declaration. But the plaintiff insists that there are certain limitations to be put upon this generality. The plaintiff claims that it is necessary that its act or declaration must have been made with the intent to mislead. [The judge examines the English cases above quoted.] We hold that there need not be, upon the part of the person making a declaration or doing an act, an intention to mislead the one who is induced to rely upon it. There are cases in which parties have been estopped, when their acts or declarations have been done or made in ignorance of their own rights, not knowing that the law of the land gave them such rights. Here certainly there could be no purpose to mislead others, for there was not the knowledge to inform the purpose, and both parties were equally and innocently misled. Indeed, it would limit the rule much, within the reason of it, if it were restricted to cases where there was an element of fraudulent purpose. In very many of the cases in which the rule has been applied, there was no more than negligence on the part of him who was estopped. And it has long been held that when it is a breach of good faith to allow the truth to be known, there an admission will estop: Gaylord v. Van Loan, 15 Wend. 308. There are decisions where the rule has been stated as the plaintiff claims it. We have looked at those cited. It was not necessary to the conclusion of the court in them, that such a restriction should be put upon the rule." The court further held that it is not necessary that a party should act *affirmatively* upon a declaration, in order to claim an estoppel. It is sufficient if he had the means in his possession of protecting his rights or of restoring himself to his original position, and in reliance upon the declaration, and in consequence of it, he refrains from using those means, and is thereby injured; his claim to the estoppel is good. In Blair v. Wait, 69 N. Y. 113, 116, the court said: "It is not necessary to an equitable estoppel that the party should design to mislead. It is enough that the act was calculated to mislead and actually did mislead the defendants while acting in good faith and with reasonable care and diligence, and that thereby they might be placed in a position which would compel them to pay a demand which they had every reason to expect was canceled and discharged." To exactly the same effect is Manufacturers' and Traders' Bank v. Hazard, 30 N. Y. 226, 230, per Johnson, J.; Barnard v. Campbell, 55 N. Y. 456, 462, 463, where the real owner of chattels is estopped from setting up his own title as against a purchaser from a third person who was in possession and sold them under a claim of ownership. This decision expressly rests the doctrine of equitable estoppel upon the general principle mentioned in a foregoing paragraph (§ 802). Allen, J., said: "The defendants can only resist the claim of the plaintiffs to the merchandise by establishing an equitable estoppel founded upon the acts of the plaintiffs, and in application of the rule by which, as between two persons equally innocent, a loss resulting from

pel; but this only renders the result more clearly just, and, if I may use the expression, more conclusive. There is, however, a class of cases, of which an example is given in the foot-note, where fraudulent conduct *is* essential,— cases

the fraudulent acts of another shall rest upon him by whose act or omission the fraud has been made possible. . . . . In such a case, for obvious reasons, the law raises an equitable estoppel. It is not every parting with the possession of chattels or the documentary evidence of title that will enable the possessor to make good a title to one who may purchase from him. The owner must go further, and do some act of a nature to mislead third persons as to the true nature of the title. Two things must concur to create an estoppel by which an owner may be deprived of his property by the act of a third person without his assent, under the rule now considered: 1. The owner must clothe the person assuming to dispose of the property with the apparent title to or authority to dispose of it; 2. The person alleging the estoppel must have acted and parted with value upon the faith of such apparent ownership or authority, so that he will be the loser if the appearances to which he trusted are not real. In this respect it does not differ from other estoppels *in pais*." See also, in support of the text and of the general requisites there stated, Waring v. Somborn, 82 N. Y. 604; Hurd v. Kelly, 78 N. Y. 588, 597; 34 Am. Rep. 567; Malloney v. Horan, 49 N. Y. 111, 115; 10 Am. Rep. 135; Jewett v. Miller, 10 N. Y. 402, 406; 61 Am. Dec. 751; Shapley v. Abbott, 42 N. Y. 443, 448; 1 Am. Rep. 548; St. John v. Roberts, 31 N. Y. 441; 88 Am. Dec. 287; Brown v. Bowen, 30 N. Y. 519, 541; 86 Am. Dec. 406; Lawrence v. Brown, 5 N. Y. 394, 401; Frost v. Saratoga Mut. Ins. Co., 5 Denio, 154, 158; 49 Am. Dec. 234; Welland Canal Co. v. Hathaway, 8 Wend. 480, 483; 24 Am. Dec. 51. In this connection, it will be instructive, by way of contrast, to quote a passage from a very recent decision by the New York court of appeals, involving a particular application of estoppel *in pais* in which a fraudulent intent, or what amounts to such an intent, is an essential element of the conduct which creates the estoppel, in pursuance of an equitable principle long settled by such cases as Evans v. Bicknell, 6 Ves. 174, 182, and Slim v. Croucher, 1 De Gex, F. & J. 518, — a principle which has been erroneously, I think, regarded as the foundation of all equitable estoppel, and therefore to be extended to every instance of it. The case is Trenton Banking Co. v. Duncan, 86 N. Y. 221. The estoppel alleged would affect the title to land. The action was brought to charge certain land of the defendant with the payment of a judgment. Andrews, J., said: "As a general rule, it would seem to be just that if a person does an act at the suggestion of another, the other shall not be permitted to avoid the act when it turns out to the prejudice of an antecedent right or interest of his own, although the advice on which the other party acted *was given innocently and in ignorance of his claim.* The authorities establish the doctrine that the owner of land may by an act *in pais* preclude himself from asserting his legal title. But it is obvious that the doctrine should be carefully and sparingly applied, and only on the disclosure of clear and satisfactory grounds of justice and equity. It is opposed to the letter of the statute of frauds, and it would greatly tend to

in which an owner of *land* is precluded from asserting his legal title by reason of intentionally false representations or concealments, by which another has been induced to deal with the land. These cases are at the present day sometimes treated as examples of equitable estoppel. The principle, however, upon which they depend was well settled by

the insecurity of titles if they were allowed to be affected by parol evidence of light or doubtful character. To authorize the finding of an estoppel *in pais* against *the legal owner of lands*, there must be shown, we think, either actual fraud, or fault or negligence equivalent to fraud, on his part in concealing his title; or that he was silent when the circumstances would impel an honest man to speak; or such actual intervention on his part, as in Storrs v. Barker, 6 Johns. Ch. 166, 10 Am. Dec. 316,— so as to render it just that as between him and the party acting upon his suggestion he should bear the loss. Moreover the party setting up the estoppel must be free from the imputation of *laches* in acting upon the belief of ownership by one who has no right." There is no inconsistence between this view and the decisions before quoted. In the first sentence of the extract, Andrews, J., states the rule ordinarily applicable in exact conformity with those authorities; he then passes to the particular case controlled by a special equity. Dezell v. Odell, 3 Hill, 215, 38 Am. Dec. 628, is a leading case on the general doctrine. A sheriff levied on goods by execution against A, and delivered them to B, the latter giving a receipt promising to redeliver them to the sheriff by a certain day. Held, that B was estopped from claiming as against the sheriff that the goods belonged to himself, and not to A. Bronson, J., dissented, not with respect to the law of estoppel, but only as to its application to the facts. His opinion contains an accurate *résumé* of some necessary elements belonging to the estoppel, and I shall quote some portions. He says (p. 221): "When a party, either by his declaration or conduct, has induced a third person to act in a particular manner, he will not afterwards be permitted to deny the truth of the admission, if the consequence would be to work an injury to such third person, or to some one claiming under him. Before the party is concluded it must appear,— 1. That he has made an admission which is clearly inconsistent with the evidence he proposes to give, or the title or claim which he proposes to set up; 2. That the other party has acted upon the admission; and 3. That he will be injured by allowing the truth of the admission to be disproved." After quoting several cases, he proceeds (p. 224): "The conduct or admission which precludes the party must be plainly inconsistent and irreconcilable with the right which he afterwards sets up. If the act can be referred to an honest and proper motive, the party will not be concluded: Heane v. Rogers, 9 Barn. & C. 577. So, too, the admission, however unequivocal it may be, will not operate as an estoppel unless the other party has acted upon it; and then it will only be conclusive in favor of the party who has so acted, and persons claiming under him, and not in favor of a stranger: Heane v. Rogers, 9 Barn. & C. 577; Wallis v. Truesdell, 6 Pick. 455." The decisions of the Pennsylvania courts have generally leaned

courts of equity long before the doctrine of equitable estoppel in its modern form was first announced, and goes in its remedial operation far beyond that doctrine, as will more fully appear in subsequent paragraphs. I would again remark that although fraud is not an essential element of the original conduct working the estoppel, it may with perfect

strongly in favor of the theory that an actual fraud is the very essence of every such estoppel by conduct. In a very late case, however (Bidwell v. Pittsburgh, 85 Pa. St. 412, 417; 27 Am. Rep. 662, per Mercur, J.), it is held: "It may now be declared as a general rule that where an act is done or a statement made by a party, the truth or efficacy of which it would be a fraud on his part to controvert or impair, the character of an estoppel shall be given to what otherwise would be mere matter of evidence. It is not necessary that the party against whom an estoppel is alleged should have intended to deceive; it is sufficient if he intended that his conduct should induce another to act upon it, and the other, relying on it, did so act." In Stevens v. Dennett, 51 N. H. 324, 330, Foster, J., after reciting the essential elements according to what he calls "the common definitions," and substantially as given above in the text, adds: "The doctrine seems to be established by authority that the conduct and admissions of a party operate against him in the nature of an estoppel, wherever, in good conscience and honest dealing, he ought not to be permitted to gainsay them. Thus negligence becomes constructive fraud, although, strictly speaking, the actual intention to mislead or deceive may be wanting, and the party may be innocent, if innocence and negligence may be deemed compatible. In such cases, the maxim is justly applied to him, that when one of two innocent persons must suffer, he shall suffer who by his own acts occasioned the confidence and loss." In the last sentence the judge has struck the "bedrock" of universal principle, upon which all instances of equitable estoppel must be founded, if they are to stand with any firmness. See also Horn v. Cole, 51 N. H. 287, 289; 12 Am. Rep. 111, per Perley, C. J. (quoted *ante*, note under § 802); Morgan v. Railroad Co., 96 U. S. 716; Holmes v. Crowell, 73 N. C. 613, 627; Anderson v. Armstead, 69 Ill. 452, 454; Voorhees v. Olmstead, 3 Hun, 744; Clark v. Coolidge, 8 Kan. 189, 195; Kuhl v. Mayor etc., 23 N. J. Eq. 84, 85; Rice v. Bunce, 49 Mo. 231, 234; 8 Am. Rep. 129 (in a very instructive opinion, Wagner, J., while using the general expression that fraud is an essential element, explains it by showing that the "fraud" need not be an actual intent to deceive in the representation which creates the estoppel; the "fraud" may, and generally does, consist in the subsequent attempt to controvert the representation and to get rid of its effects, and thus to injure the one who has relied on it. The same explanation would doubtless apply to and show the real meaning of many other decisions which have used the general formula that fraud is essential); McCabe v. Raney, 32 Ind. 309; Simpson v. Pearson, 1 Ind. 65; Hartshorn v. Potroff, 89 Ill. 509; Talcott v. Brackett, 5 Ill. App. 60; Michigan etc. Co. v. Parsell, 38 Mich. 475, 480.

propriety be said that it would be fraudulent for the party to repudiate his conduct, and to assert a right or claim in contravention thereof. Using the term in the sense frequently given to it by courts of equity, and as explained in a preceding paragraph, this statement is not only proper, but furnishes an accurate criterion for determining the existence of an equitable estoppel.

§ 806. **Theory that a Fraudulent Intent is Essential.**— There is, as has already been mentioned, a theory approved and adopted by the courts of some states, which makes the very essence of every equitable estoppel or estoppel by conduct to consist of fraud, and affirms that an actual fraudulent intention to deceive or mislead is a necessary requisite in the conduct of the party,— whether acts, words, or silence, — in order that it may create an equitable estoppel. I cannot better state this theory than in the language of an eminent and able judge, which has frequently been adopted as being an accurate exposition of the general doctrine.[1] In

[1] Boggs v. Merced Min. Co., 14 Cal. 279, 367, 368, per Field, J., adopted in Martin v. Zellerbach, 38 Cal. 300, 99 Am. Dec. 365, and cases cited. It should be remarked that in the great case of Boggs v. Merced Min. Co., 14 Cal. 279, Mr. Justice Field was not treating of equitable estoppel in general. He was discussing the particular question, When is the owner of land precluded by his conduct from setting up his legal title? In formulating the rules quoted in the text, he did not announce them as governing all cases of equitable estoppel; he expressly confined them to the class of cases under consideration by saying: In order to estop a person by his admissions or declarations from setting up "title to land." The authorities which he quoted were Adams's Equity, 151, and Story's Eq. Jur., sec. 391. The reference to Adams clearly indicates the doctrine which Judge Field was following. The general subject there treated of by Adams is, "the equity of a party who has been misled is superior to his who has willfully misled him." The particular rule referred to is: "If a person interested in an estate knowingly misleads another into dealing with the estate as if he were not interested, he will be postponed to the party misled, and *compelled to make his representation specifically good.*" This rule is illustrated by such cases as Evans v. Bicknell, 6 Ves. 174; Philling v. Armitage, 12 Ves. 78, 84; Williams v. Earl of Jersey, 1 Craig & P. 91; Martinez v. Cooper, 2 Russ. 198; Slim v. Croucher, 1 De Gex, F. & J. 518, 525. This equitable rule has been explained and illustrated in the foregoing sections on priorities, §§ 686, 731, and on *bona fide* purchase, §§ 779–782. In the subsequent case of Martin v.

order to estop a party by his conduct, admissions, or declarations, the following are essential requisites: It must appear,— 1. That the party making his admission by his declaration or conduct was apprised of the true state of his

Zellerbach, 38 Cal. 300, 99 Am. Dec. 365, the court adopted the exact requisites of Mr. Justice Field, but omitted his restriction of them to cases involving the legal title to land, announced them as governing all instances of equitable estoppel, and applied them to a case involving the ownership of chattels.[a] The following are additional examples of decisions which sustain the same theory: Brant v. Virginia Coal Co., 93 U. S. 326, 335, per Field, J.: "It is difficult to see where the doctrine of equitable estoppel comes in here. For the application of that doctrine there must generally be some intended deception in the conduct or declarations of the party to be estopped, or such gross negligence on his part as amounts to constructive fraud, by which another has been misled to his injury. [He quotes a passage from Story's Eq. Jur., sec. 391.] Thus it is said by the supreme court of Pennsylvania that the primary ground of this doctrine is, that it would be fraud in a party to assert what his previous conduct had denied, when on the faith of that denial others had acted. The element of fraud is essential *either in the intention* of the party estopped, *or in the effect of the evidence* which he sets up. It would seem that in the enforcement of an estoppel of this character, with respect to the title of property, such as will prevent a party from asserting his legal rights, and the effect of which will be to transfer the enjoyment of the property to another, the intention to deceive and mislead, or negligence so gross as to be culpable, should be clearly established. There are undoubtedly cases where a party may be concluded from asserting his original rights to property in consequence of his acts or conduct in which the presence of fraud actual or constructive is wanting; as where one of two innocent parties must suffer from the negligence of another, he through whose agency the negligence was occasioned will be held to bear the loss; and where one has received the profits of a transaction, he is not permitted to deny its validity while retaining its benefits. But such cases are generally referable to other principles than that of equitable estoppel, although the same result is produced." With great deference to the opinion of so able a judge, I think his error in this passage is evident. It consists in taking a special rule, established from motives of policy for a particular condition of fact, and raising it to the position of a universal rule. Where an estoppel by conduct is alleged to prevent a legal owner of land from asserting his legal title, courts of equity, in order to avoid the literal requirements of the statute of frauds, were driven to the element of fraud in the conduct as essential: See the text, §§ 805, 807. The passage quoted from Judge Story is dealing with this long-settled rule of equity, and not with the subject of equitable estoppel in general. When this special rule is made universal, its inconsistency with many familiar instances of equitable estoppel

(a) See, also, Griffeth v. Brown, 76 Cal. 260, 18 Pac. 372.

own title; 2. That he made the admission *with the express intention to deceive,* or with such careless or culpable negligence *as to amount to constructive fraud;* 3. That the other party was not only destitute of all knowledge of the true state of the title, but of all means of acquiring such knowledge; 4. That he relied directly upon such admission, and will be injured by allowing its truth to be disproved.[c]

§ 807. **Fraudulent Intent Necessary in an Estoppel Affecting the Legal Title to Land.**— The particular case referred to in the foregoing foot-note requires a fuller explanation. It is a purely equitable doctrine settled long before the modern rules of equitable estoppel by conduct. It is confined to estates in land. The general rule is, that if a person interested in an estate knowingly misleads another into dealing with the estate as if he were not interested, he will be postponed to the party misled, and compelled to make his representation specifically good. It applies to one who denies his own title or encumbrance when inquired of by another who is about to purchase the land or to loan money upon its security; to one who knowingly suffers another to deal with the land as though it were his own; to one who knowingly suffers another to expend money in improvements without giving notice of his own claim, and the like. This equity, being merely an instance of fraud, requires intentional deceit, or at least that gross negligence which is evidence of

becomes apparent, and Judge Field is forced to escape from the antagonism by denying that these instances do in fact belong to the doctrine. If this conclusion be correct, then some of the most important and well-settled species of the estoppel, uniformly regarded as such by text-writers and courts, must be abandoned, and the beneficent doctrine itself must be curtailed in its operation, to one particular class of cases. This result is in direct opposition to the tendency of judicial decision and of the discussions of text-writers. See also Dorlarque v. Cress, 71 Ill. 380, 381, 382; McKinzie v. Steele, 18 Ohio St. 38, 41 (a *dictum*); Eldred v. Hazlett's Adm'r, 33 Pa. St. 307; Rhodes v. Childs, 64 Pa. St. 18; White v. Langdon, 30 Vt. 500.[b]

(b) The latter part of this note is quoted in Galbraith v. Lunsford, 87 Tenn. 89, 9 S. W. 365, 1 L. R. A. 522.

(c) This paragraph of the text is cited in Pocahontas Light & Water Co. v. Browning, 53 W. Va. 436, 44 S. E. 267.

an intent to deceive. In the language of a most recent decision, to preclude the owner of land from asserting his legal title or interest under such circumstance, "there must be shown either actual fraud, or fault or negligence equivalent to fraud, on his part in concealing his title; or that he was silent when the circumstances would impel an honest man to speak; or such actual intervention on his part, as in *Storrs* v. *Barker,* 6 Johns. Ch. 166,— so as to render it just that, as between him and the party acting upon his suggestion, he should bear the loss." What is the reason of this rule? It is accurately explained in the same decision. While the owner of land may by his acts *in pais* preclude himself from asserting his legal title, "it is obvious that the doctrine should be carefully and sparingly applied, and only on the disclosure of clear and satisfactory grounds of justice and equity. *It is opposed to the letter of the statute of frauds,* and it would greatly tend to the insecurity of titles if they were allowed to be affected by parol evidence of light or doubtful character." The most important "ground of justice and equity" admitted by courts of equity to uplift and displace the statute of frauds concerning legal titles to land, by fastening a liability upon the wrong-doer, is fraud. There are many instances in which equity thus compels the owner of land to forego the benefits of his legal title and to admit the equitable claims of another, in direct contravention of the literal requirements of the statute, but they all depend upon the same principle. The rule under consideration is strictly analogous to another familiar rule that a legal owner of land cannot be turned into a trustee *ex delicto* by any *mere* words or conduct. A constructive trust *ex delicto* can never be impressed upon land as against the legal title by any verbal stipulation, however definite, nor by any mere conduct; such trust can only arise where the verbal stipulation and conduct together amount to fraud in the contemplation of equity. Both the rule under consideration and the rule concerning trusts rest upon the same reasons. The doctrine

had its origin, as has been said, prior to and independently of the modern doctrine of equitable estoppel by conduct, and was confined in its operation to courts of equity. Even at the present day, this particular instance of the equitable estoppel by which the owner of land is precluded from asserting his legal title is distinctively equitable; it is not admitted and enforced at law, except in states where the principles of equity are administered through the means of legal actions and remedies, and in those where legal and equitable rights and reliefs are combined in the administration of justice under the reformed procedure.[1] [a]

[1] Trenton Banking Co v. Sherman, 24 Alb. L. J. 390; Boggs v. Merced M. Co., 14 Cal. 279, 367, 368; Brant v. Va. Coal Co., 93 U. S. 326, 335; Evans v. Bicknell, 6 Ves. 174; Pilling v. Armitage, 12 Ves. 78, 84; Martinez v. Cooper, 2 Russ. 198; Nicholson v. Hooper, 4 Mylne & C. 179; Williams v. Earl of Jersey, Craig & P. 91; East India Co. v. Vincent, 2 Atk. 83; Hungerford v. Earle, 2 Vern. 261; Wendell v. Van Rensselaer, 1 Johns. Ch. 344; Storrs v. Barker, 6 Johns. Ch. 166; 10 Am. Dec. 316; actual intent to deceive not always necessary; gross negligence in forgetting a fact contrary to the statement acted upon: Slim v. Croucher, 1 De Gex, F. & J. 518, 525, 528.[b] But see Spencer v. Carr, 45 N. Y. 406; 6 Am. Rep. 112; Sulphine v. Dunbar, 55 Miss. 255; and see Southard v. Sutton, 68 Me. 575; Kirkpatrick v. Brown, 59 Ga. 450; Stewart v. Mix, 30 La. Ann., pt. 2, 1036; Lippmins v. McCranie, 30 La. Ann., pt. 2, 1251; Lamar Co. v. Clements, 49 Tex. 347; Bloomstein v. Clees, 3 Tenn. Ch. 433; Hart v. Giles, 67 Mo. 175; Godfrey v. Thornton, 46 Wis. 677; Gregg v. Von Phul, 1 Wall. 274, per Davis, J.; Breeding v. Stamper, 18 B. Mon. 175; Hill v. Epley, 31 Pa. St. 331, 334. This species of equitable estoppel belongs to the jurisdiction of equity, and is not available at law:[c] Wimmer v. Ficklin, 14 Bush, 193; Kelly v. Hendricks, 57 Ala. 193; Hayes v. Livingston, 34 Mich. 384; 22 Am. Rep. 533.

(a) The text is cited in Breeze v. Brooks, 71 Cal. 169, 182, 9 Pac. 670; Lower Latham Ditch Co. v. Louden Irrigating Canal Co., 27 Colo. 267, 83 Am. St. Rep. 80, 60 Pac. 629; Parkey v. Ramsey, (Tenn.) 76 S. W. 812. See, also, Pitcher v. Dove, 99 Ind. 175; Pocahontas Light & Water Co. v. Browning, 53 W. Va. 436, 44 S. E. 267.

(b) In Low v. Bouverie, [1891] 3 Ch. 82, it was held that Slim v. Croucher, *supra*, was really an action for damages for deceit, and hence was overruled by the decision of the House of Lords in Derry v. Peek, L. R. 14 App. Cas. 337; though it is pointed out that Derry v. Peek did not affect the law of estoppel. See also § 912, note.

(c) Equitable estoppel no defense to ejectment: Harney v. Breeden, (Va.) 42 S. E. 916. See, however, Cheatham v. Edgefield Mfg. Co., 131 Fed. 118.

§ 808. Requisites Further Illustrated — The Conduct.— My limits of space do not permit a detailed discussion of these general requisites. I can only state them in the briefest manner, and must refer to the cases cited in the foot-note, and to treatises upon estoppel, for an ampler treatment. In fact, the more specific rules, the varying phases of opinion, and the partial conflict of decision have arisen in actions at law rather than in equity. The treatment of the subject by courts of equity has generally been simple, uniform, and consistent. The conduct creating the estoppel must be something which amounts either to a representation or a concealment of the existence of facts; and these facts must be material to the rights or interests of the party affected by the representation or concealment, and who claims the benefit of the estoppel. The conduct may consist of external acts, of language written or spoken, or of silence.[1] The facts represented or concealed must, in gen-

[1] *Examples by acts or by words:* Cairncross v. Lorimer, 7 Jur., N. S., 149; Pulsford v. Richards, 17 Beav. 87; Bridger's Case, L. R. 9 Eq. 74; Mitchell's Case, L. R. 9 Eq. 363; Ebbett's Case, L. R. 5 Ch. 302 (cases where a person has allowed his name to appear as a stockholder in a company); Tilton v. Nelson, 27 Barb. 595; Horn v. Cole, 51 N. H. 287, 290; 12 Am. Rep. 111; Stevens v. Dennett, 51 N. H. 324; Zuchtmann v. Roberts, 109 Mass. 53; 12 Am. Rep. 663; Continental Bank v. Bank of Commonwealth, 50 N. Y. 575; Barnard v. Campbell, 55 N. Y. 456; Dezell v. Odell, 3 Hill, 215; 38 Am. Dec. 628; Oakland P. Co. v. Rier, 52 Cal. 270; Dresbach v. Minnis, 45 Cal. 223; Comstock v. Smith, 26 Mich. 306; Peters v. Jones, 35 Iowa, 512; Thomas v. Pullis, 56 Mo. 211; Rice v. Groffman, 56 Mo. 434, 435; People v. Brown, 67 Ill. 435; Connihan v. Thompson, 111 Mass. 270 (not estopped); McKinzie v. Steele, 18 Ohio St. 38, 41 (not estopped); Eaton v. New England Tel. Co., 68 Me. 523; Southard v. Sutton, 68 Me. 575; Reed v. Crapo, 127 Mass. 39; Taylor v. Brown, 31 N. J. Eq. 163 (not estopped); Board of Trustees etc. v. Serrett, 31 L. Ann. 719; Jeffries v. Clark, 23 Kan. 448; Hartshorn v. Potroff, 89 Ill. 509; Talcott v. Brackett, 5 Ill. App. 60.[a]

Examples by silence: Cairncross v. Lorimer, 7 Jur., N. S., 149; Gregg v. Wells, 10 Ad. & E. 90; Gregg v. Von Phul, 1 Wall. 274; Railroad Co. v.

[a] See Hoene v. Pollak, 118 Ala. 617, 24 South. 349, 72 Am. St. Rep. 189; Mann v. Bergmann, 203 Ill. 406, 67 N. E. 814; Hill v. Wand, 47 Kan. 340, 27 Pac. 988, 27 Am. St. Rep. 288; Baker v. Seavey, 163 Mass. 522, 40 N. E. 863, 47 Am. St. Rep. 475; Great Hive of L. of M. v. Supreme Hive of L. of M., (Mich.), 97 N. W. 779; Guffey v. O'Reiley, 88 Mo. 418, 57 Am. Rep. 424; Borden v. Hutchinson, (N. J.) 49 Atl. 1088;

eral, be either existing or past, or at least represented to be so. A statement concerning future facts would either be a mere expression of opinion, or would constitute a contract and be governed by rules applicable to contracts.[2] [c]

§ 809. Same. Knowledge of the Truth by the Party Estopped. — The truth concerning these material facts represented or concealed must be known to the party at the time when his conduct, which amounts to a representation or concealment, takes place; *or else the circumstances must be such that a knowledge of the truth is necessarily imputed to him.*[1] [a]

Dubois, 12 Wall. 47; Rubber Co. v. Goodyear, 9 Wall. 788; Niven v. Belknap, 2 Johns. 573; Hall v. Fisher, 9 Barb. 17, 31; Hope v. Lawrence, 50 Barb. 258; Chapman v. Chapman, 59 Pa. St. 214; Lawrence v. Luhr, 65 Pa. St. 236; Hill v. Epley, 31 Pa. St. 331, 334; Ives v. North Canaan, 33 Conn. 402; Taylor v. Ely, 25 Conn. 250; Guthrie v. Quinn, 43 Ala. 561; Abrams v. Seale, 44 Ala. 297; Young v. Vough, 23 N. J. Eq. 325; Weber v. Weatherby, 34 Md. 656; Silloway v. Neptune Ins. Co., 12 Gray, 73; Society etc. v. Lehigh Valley R. R., 32 N. J. Eq. 329; Viele v. Judson, 82 N. Y. 32, 39; Hamlin v. Sears, 82 N. Y. 327. [b]

2 Jorden v. Money, 5 H. L. Cas. 185; Langdon v. Doud, 10 Allen, 433; 6 Allen, 423; 83 Am. Dec. 641; White v. Walker, 31 Ill. 422, 437; White v. Ashton, 51 N. Y. 280.

1 Holmes v. Crowell, 73 N. C. 613; Stevens v. Dennett, 51 N. H. 324, 333; Smith v. Hutchinson, 61 Mo. 83; Clarke v. Coolidge, 8 Kan. 189; Second Nat. Bank v. Walbridge, 19 Ohio St. 419; 2 Am. Rep. 408; Adams v. Brown, 16 Ohio St. 75; Bank of Hindustan, L. R. 6 Com. P. 54, 222; Laverty v. Mattes v. Frankel, 157 N. Y. 603, 52 N. E. 585, 68 Am. St. Rep. 804; In re Lewis, [1904] 2 Ch. 656 (representation not precise enough to give rise to an estoppel); Ward v. Ward, 131 Fed. 946, 954 (expression of opinion as to law does not create estoppel, when all parties have knowledge of the facts).

(b) See, also, In re Lart, [1896] 2 Ch. 789; Kirk v. Hamilton, 102 U. S. 68; Lindsay v. Cooper, 94 Ala. 170, 11 South. 325, 33 Am. St. Rep. 105, 16 L. R. A. 813; Barton v. Pioneer S. & L. Co., 69 Minn. 85, 71 N. W. 906, 65 Am. St. Rep. 549; McClare v. Lockard, 121 N. Y. 308, 24 N. E. 453; Wampol v. Kountz, 14 S. Dak. 334, 85 N. W. 595, 86 Am. St. Rep. 765.

(c) Chadwick v. Manning, [1896] App. Cas. 231; Maddison v. Alderson, 8 App. Cas. (H. L.) 467, 473; Elliott v. Whitmore, 23 Utah, 342, 65 Pac. 70, 90 Am. St. Rep. 700; Attkisson v. Plumb, 50 W. Va. 104, 40 S. E. 587, 58 L. R. A. 788. See, also, § 877, last note.

(a) The text is cited in Cantley v. Morgan, 51 W. Va. 304, 41 S. E. 201. See McCaskill v. Connecticut Savings Bank, 60 Conn. 300, 25 Am. St. Rep. 323, 22 Atl. 568, 13 L. R. A. 737; Smith v. Sprague, 119 Mich. 148, 77

The rule has sometimes been stated as though it were universal, that an actual knowledge of the truth is always indispensable. It is, however, subject to so many restrictions and limitations as to lose its character of universality. It applies in its full force only in cases where the conduct creating the estoppel consists of silence or acquiescence.[2] It does not apply where the party, although ignorant or mistaken as to the real facts, was in such a position that he *ought* to have known them, so that knowledge will be imputed to him. In such case, ignorance or mistake will not prevent an estoppel.[3] [b] Nor does the rule apply to a party who has not simply acquiesced, but who has actively interfered by acts or words, and whose affirmative conduct has thus misled another.[4] Finally, the rule does not apply, even

Moore, 33 N. Y. 658; Reed v. McCourt, 41 N. Y. 435; Raynor v. Timerson, 51 Barb. 517; Strong v. Ellsworth, 26 Vt. 366; Thrall v. Lathrop, 30 Vt. 307; 73 Am. Dec. 306; Whitaker v. Williams, 20 Conn. 98; Liverpool Wharf v. Prescott, 7 Allen, 494; 4 Allen, 22; Kincaid v. Dormey, 51 Mo. 552; Rutherford v. Tracy, 48 Mo. 325; 8 Am. Rep. 104; Dorlarque v. Cress, 71 Ill. 380, 382; Graves v. Blondell, 70 Me. 190.

2 See cases in last note.

3 Irving Nat. Bank v. Alley, 79 N. Y. 536, 540; Pulsford v. Richards, 17 Beav. 87; Lefever v. Lefever, 30 N. Y. 27; Horn v. Cole, 51 N. H. 287; 12 Am. Rep. 111, per Perley, C. J.; Mut. Life Ins. Co. v. Norris, 31 N. J. Eq. 583, 585, 586.

4 In such a case the party might not only be ignorant or mistaken, but he might even believe his own statements to be true. This is a plain application of the principle that where one of two innocent persons must suffer, the loss will fall upon him whose conduct made it possible: Hurd v. Kelly, 78 N. Y. 588, 597; Irving Nat. Bank v. Alley, 79 N. Y. 536, 540; Cloud v. Whiting, 38 Ala. 57; Beaupland v. McKeen, 28 Pa. St. 124, 131; 70 Am. Dec. 115; Millingar v. Sorg, 55 Pa. St. 215, 225.

N. W. 689, 75 Am. St. Rep. 384; Foote v. Hambrick, 70 Miss. 157, 11 South. 567, 35 Am. St. Rep. 631; Pocahontas Light & Water Co. v. Browning, 53 W. Va. 436, 44 S. E. 267. No representations can be relied upon as estoppels if they have been induced by the concealment of any material fact on the part of those who seek to use them as such: Porter v. Moore, [1904] 2 Ch. 367; George Whitechurch, Ltd. v. Cavanagh, [1902] App. Cas. 117, 145.

(b) The text is cited in Weinstein v. National Bank, 69 Tex. 38, 6 S. W. 171, 5 Am. St. Rep. 23; Bausman v. Kelley, 38 Minn. 197, 36 N. W. 333, 8 Am. St. Rep. 661. See, also, Chase's Appeal, 57 Conn. 236, 18 Atl. 96.

in cases of mere acquiescence, when the ignorance of the real facts was occasioned by culpable negligence.[5]

§ 810. Same. Ignorance of the Truth by the Other Party.—The truth concerning these material facts must be unknown to the other party claiming the benefit of the estoppel, not only at the time of the conduct which amounts to a representation or concealment, but also at the time when that conduct is acted upon by him. If, at the time when he acted, such party had knowledge of the truth, or had the means by which with reasonable diligence he could acquire the knowledge so that it would be negligence on his part to remain ignorant by not using those means, he cannot claim to have been misled by relying upon the representation or concealment.[1 a] If, therefore, at the time of the representa-

[5] Sweezey v. Collins, 40 Iowa, 540; Rice v. Bunce, 49 Mo. 231, 234; 8 Am. Rep. 129; Calhoun v. Richardson, 30 Conn. 210; Preston v. Mann, 25 Conn. 118; Smith v. Newton, 38 Ill. 230; Stone v. Gr. West. Oil Co., 41 Ill. 85; Slim v. Croucher, 1 De Gex, F. & J. 518;[c] and see Adams v. Brown, 16 Ohio St. 75.

[1] Davenport v. Turpin, 52 Cal. 270; Brant v. Virginia Coal etc. Co., 93 U. S. 326; Holmes v. Crowell, 73 N. C. 613; Plummer v. Mold, 22 Minn. 15; Clark v. Coolidge, 8 Kan. 189; Bigelow v. Topliff, 25 Vt. 273; 60 Am. Dec. 264; Odlin v. Gove, 41 N. H. 465; 77 Am. Dec. 773; Wallis v. Truesdell, 6 Pick. 455; Carter v. Champion, 8 Conn. 548, 554; 21 Am. Dec. 695; Rapalee v. Stewart, 27 N. Y. 310; Hill v. Epley, 31 Pa. St. 331; Fisher v. Mossman, 11 Ohio St. 42; Bales v. Perry, 51 Mo. 449; Rennie v. Young, 2 De Gex & J. 136; Wythe v. City of Salem, 4 Saw. 88; Stevens v. Dennett, 51 N. H. 324, 333; Rice v. Bunce, 49 Mo. 231, 234; 8 Am. Rep. 129; Mut. Life Ins. Co. v. Norris, 31 N. J. Eq. 583.

(c) See, as to this case, notes §§ 807, 912.

(a) See, also, City of Ft. Scott v. W. G. Eads Brokerage Co., (C. C. A.) 117 Fed. 51; Lux v. Haggin, 69 Cal. 255, 10 Pac. 674; Merchants' Ad-Sign Co. v. Sterling, 124 Cal. 429, 57 Pac. 468, 71 Am. St. Rep. 94, 46 L. R. A. 142; Gray v. Bartlett, 20 Pick. 186, 32 Am. Dec. 208; Underwood v. Deckard, (Ind. App.) 70 N. E. 383; Schaidt v. Bland, 66 Md. 141, 6 Atl. 669; Estis v. Jackson, 111 N. C. 145, 32 Am. St. Rep. 784, 16 S. E. 7; Bright v. Allan, 203 Pa. St. 394, 93 Am. St. Rep. 769, 53 Atl. 251; Attkisson v. Plumb, 50 W. Va. 104, 40 S. E. 587, 58 L. R. A. 788; Pocahontas Light & Water Co. v. Browning, 53 W. Va. 436, 44 S. E. 267. If the party claiming the benefit of the estoppel has notice of the true state of facts, but is mistaken as to the legal rights derived therefrom, there is no estoppel: Estis v. Jackson, 111 N. C. 145, 32 Am. St. Rep. 784, 16 S. E. 7.

tion the party to whom it was made was ignorant of the real facts, but before he acted upon it the statement was contradicted by its author, or he became informed of the truth, he could not claim an estoppel.[2] It has been said that, in cases of alleged estoppel by conduct affecting the title to land, the record of the real title would furnish a means by which the other party might ascertain the truth, so that he could not claim to be misled, and could not insist upon an estoppel.[3 b] This conclusion, if correct at all, is correct only within very narrow limits, and must be applied with the greatest caution. It must be strictly confined to cases where the conduct creating the alleged estoppel is mere silence. If the real owner resorts to any affirmative acts or words, or makes any representation, it would be in the highest degree inequitable to permit him to say that the other party, who had relied upon his conduct and had been misled

2 Freeman v. Cooke, 2 Ex. 654; and see Howard v. Hudson, 2 El. & B. 1.

3 Hill v. Epley, 31 Pa. St. 331; Knouff v. Thompson, 16 Pa. St. 357; Goundie v. Northampton W. Co., 7 Pa. St. 233; Fisher v. Mossman, 11 Ohio St. 42.

(b) Wiser v. Lawler, 189 U. S. 260, 23 Sup. Ct. 624 (mere silence will not estop in such a case); Neal v. Gregory, 19 Fla. 356 (silence); Thor v. Oleson, 125 Ill. 365, 17 N. E. 780; Stewart v. Matheny, 66 Miss. 21, 5 South. 587, 14 Am. St. Rep. 538; Clark v. Parsons, 69 N. H. 147, 39 Atl. 898, 76 Am. St. Rep. 157 (mere silence will not estop in such a case); Brinckerhoff v. Lansing, 4 Johns. Ch. 65, 8 Am. Dec. 538 (silence). In Gray v. Zelmer, 66 Kan. 514, 72 Pac. 228, the principle stated in the text was extended so as to apply to notice by possession. There was no active misrepresentation. In Sumner v. Seaton, 47 N. J. Eq. 103, 19 Atl. 884, it was held that where the true owner knew or had reason to know that the other was acting in good faith on an erroneous supposition as to the title, the fact that the latter might have ascertained the true state of the title by examination of the records is no excuse for the former's silence. It is pointed out that the first four cases cited in the author's note the essential element of knowledge of the second party's motives was absent. This section of the text is cited. In Kingman v. Graham, 51 Wis. 232, 8 N. W. 181, it is said that the existence of the record will ordinarily prevent an estoppel; but where the owner is apprised of the ignorance of the buyer he cannot take advantage of the principle.

thereby, might have ascertained the falsity of his representations.[4] [c]

§ 811. Same. Intention of the Party Who is Estopped.— It has frequently been said, in most general terms, that the conduct amounting to a representation, in order to constitute an estoppel, must be done with the intention, by the one who is to be estopped, that it shall be acted upon by the very person who claims the benefit of the estoppel, or, as is sometimes said, that it shall be acted upon by another person. In short, there must always be the intention that the conduct shall be acted upon either by some person, or by the very person who afterwards relies upon the estoppel.[1] [a]

[4] The principle upon which this conclusion depends is fully discussed in the subsequent chapter upon fraud, under the head of representations. See Storrs v. Barker, 6 Johns. Ch. 166; 10 Am. Dec. 316; Davis v. Handy, 37 N. H. 65; Hill v. Epley, 31 Pa. St. 331; Proctor v. Keith, 12 B. Mon. 252; Colbert v. Daniel, 32 Ala. 314, 316; Clapham v. Shillito, 7 Beav. 146, 149, 150, per Lord Langdale; Drysdale v. Mace, 2 Smale & G. 225, 230; Price v. Macauley, 2 De Gex, M. & G. 339, 346, per Knight Bruce, L. J.; Wilson v. Short, 6 Hare, 366, 378; Harnett v. Baker, L. R. 20 Eq. 50. Although these cases are not decided upon the doctrine of estoppel, yet they well illustrate the question how far a person may avoid the effect of his own positive representations by insisting that the other party should not have relied on them. [d]

[1] Turner v. Coffin, 12 Allen, 401; Pierce v. Andrews, 6 Cush. 4; 52 Am. Dec. 748; Kuhl v. Mayor etc., 23 N. J. Eq. 84, 85; Wilcox v. Howell, 44 N. Y. 398; Brown v. Bowen, 30 N. Y. 519; 86 Am. Dec. 406; Holdane v. Cold

(c) See, also, Graham v. Thompson, 55 Ark. 296, 18 S. W. 58, 29 Am. St. Rep. 40 (actual notice is necessary); Hill v. Blackwelder, 113 Ill. 283; Robbins v. Moore, 129 Ill. 30, 21 N. E. 934; Thompson v. Borg, (Minn.) 95 N. W. 896; Borden v. Hutchinson, (N. J.) 49 Atl. 1088 (owner of recorded judgment who, at an auction sale, states that the only incumbrance is a mortgage, is estopped).

(d) See §§ 891, 895, 896.

(a) See, also, De Berry v. Wheeler, 128 Mo. 84, 49 Am. St. Rep. 538, 30 S. W. 338; Attkisson v. Plumb, 50 W. Va. 104, 40 S. E. 587, 58 L. R. A. 788; Pocahontas Light & Water Co. v. Browning, 53 W. Va. 436, 44 S. E. 267. The representations, in order to effect an estoppel, need not be made directly to the party acting on them. "It is enough if they were made to another, and intended or expected to be communicated as the representations of the party making them to the party acting on them, for him to rely and act on": Stevens v. Ludlum, 46 Minn. 160, 24 Am. St. Rep. 210, 48 N. W. 771, 13 L. R. A. 270 (representations made to a commercial agency with the expectation that they would be communicated by the agency to its patrons).

While such intention must sometimes exist, and while the proposition is therefore true in certain cases, it would be very misleading as a universal rule. In many familiar species of estoppels no intention can possibly exist. The requisite, as applicable to them, is well expressed by an eminent judge in a recent decision: It is not "necessary, in equity, that the intention should be to deceive any particular individual or individuals. If the representations are such, and made in such circumstances, that all persons interested in the subject have the right to rely on them as true, their truth cannot be denied by the party that has made them, against any one who has trusted to them and acted on them. . . . . Where a man makes a statement in a manner and under circumstances such as he must understand those who heard the statement would believe to be true, and if they had an interest in the subject-matter would act on as true; and one, using his own means of knowledge with due diligence, acts on the statement as true, the party who makes the statement cannot show that his representation was false, to the injury of the party who believed it to be true, and acted on it as such; that he will be liable for the natural consequences of his representation, and cannot be heard to say that the party actually injured was not the one he meant should act."[2b] This mode of stating the doctrine

Spring, 21 N. Y. 474; Carroll v. Manchester etc. R. R., 111 Mass. 1; Clark v. Coolidge, 8 Kan. 189, 195; Stevens v. Dennett, 51 N. H. 324, 333; McCabe v. Raney, 32 Ind. 309; Simpson v. Pearson, 31 Ind. 1, 5; 99 Am. Dec. 577; Eaton v. New Eng. Tel. Co., 68 Me. 63; Southard v. Sutton, 68 Me. 575.

2 Horn v. Cole, 51 N. H. 287; 12 Am. Rep. 111, per Perley, C. J. The same doctrine was laid down in Cornish v. Abington, 4 Hurl. & N. 549, by Pollock, C. B.: "If any person, by a course of conduct or by actual expressions, so conducts himself that another may reasonably infer the existence of an agreement or license, whether the party intends that he should do so or not, it has the effect that the party using that language, or who has so conducted himself, cannot afterwards gainsay the reasonable inference to be drawn from his words or conduct." To the same effect are Freeman v. Cooke, 2 Ex. 654, per Parke, B.; Howard v. Hudson, 2 El. & B. 1; In re Bahia & S. F.

(b) See Trustees, etc. v. Smith, 118 N. Y. 634, 23 N. E. 1002, 7 L. R. A. 755.

may in equity apply to every kind of estoppel, even to those by which an owner of land is precluded from asserting his legal title. There is, however, a large class in which not only an intention directed towards a particular individual or towards individuals in general is absent, but a contrary intention that the party's representation is not to be acted upon at all may be present. The class includes all those instances where an owner of things in action or of chattels has, either designedly or negligently, clothed a third person with the *apparent* title and power of disposition, and this person transfers them to a purchaser in good faith who relies upon the apparent power of sale they conferred upon him.[c] The original owner is estopped by his conduct from asserting his right of property, and the *bona fide* purchaser acquires a perfect title by estoppel, in direct contravention of the rules of law which would otherwise control. It is a complete misconception to say that these instances do not depend upon the doctrine of equitable estoppel, but upon that of negligence. On the contrary, they have been uniformly rested by courts upon the theory of estoppel, and are among the strongest and most distinctive illustrations of the efficacy of that theory. In fact, *it is only by means of the doctrine of estoppel* that the original owner can be divested of his title in opposition to the rules of the law concerning the transfer and acquisition of property. *There is no rule of law or of equity by which an owner, through mere negligence, can be divested of his legal title to things*

R'y, L. R. 3 Q. B. 584 per Cockburn, C. J. As illustrations, see Young v. Grote, 4 Bing. 253; Bank of Ireland v. Evans, 5 H. L. Cas. 389; Swan v. Br. and Austr. Co., 7 Com. B., N. S., 400; 7 Hurl. & N. 603; 2 Hurl. & C. 175; Halifax Guardians v. Wheelwright, L. R. 10 Ex. 183; Carr v. London & N. W. R'y, L. R. 10 Com. P. 307, 316, 317; Anderson v. Armstead, 69 Ill. 452, 454; Rice v. Bunce, 49 Mo. 231, 234; 8 Am. Rep. 129, per Wagner, J.; Mut. Life Ins. Co. v. Norris, 31 N. J. Eq. 583, 585; Manufacturers' and Traders' Bank v. Hazard, 30 N. Y. 226, 230.

(c) This portion of the text is quoted in Morris v. Joyce, 63 N. J. Eq. 549, 53 Atl. 139.

in action or chattels.[3] The cases where the particular intention mentioned in the general rule seems to be the most essential are those in which an owner or one having an interest in property, especially in land, deals concerning it directly with a third person, and by his words, acts, or silence, when he ought to speak, makes representations with respect to his title or interest. In order to be estopped from asserting his title or interest, he must intend that his representation should be acted upon by the party influenced by his conduct.[4]

§ 812. Same. The Conduct must be Relied upon, and be an Inducement for the Other Party to Act.— Whatever may be the real intention of the party making the representation, it is absolutely essential that this representation, whether consisting of words, acts, or silence, should be believed and relied upon as the inducement for action by the party who claims the benefit of the estoppel, and that, so relying upon it and induced by it, he should take some action. The cases all agree that there can be no estoppel, unless the party who alleges it relied upon the representation, was induced to act by it, and thus relying and induced, did take some action.[1] [a] Finally, this action must be of such a nature that it

[3] Examples of this rule as applied to certificates of stock and other things in action: McNeil v. Tenth Nat. Bank, 46 N. Y. 325; 7 Am. Rep. 341; Moore v. Metropolitan Bank, 55 N. Y. 41; 14 Am. Rep. 173; Combes v. Chandler, 33 Ohio St. 178; and see *ante*, § 710, where these and other cases are fully stated. *As applied to other property:* Barnard v. Campbell, 55 N. Y. 456, 462; Manufacturers' and Traders' Bank v. Hazard, 30 N. Y. 226, 230; Anderson v. Armstead, 69 Ill. 452, 454; Hamlin v. Sears, 82 N. Y. 327. This class of estoppels is virtually the same as that described by Sir James Fitzjames Stephen, in the second paragraph of his general formula quoted *ante*, in note under § 804, except that *negligence* of the owner is not always a necessary element. See the English cases there cited, and also in the last preceding note.

[4] See *ante*, § 807, and cases cited in note.

[1] Howard v. Hudson, 2 El. & B. 1; Curnen v. Mayor, 79 N. Y. 511, 514; Waring v. Somborn, 82 N. Y. 604; Grissler v. Powers, 81 N. Y. 57; 37 Am. Rep. 204; Boulder Val. Ditch Min. & Mill. Co. v. Farnham, (Mont.) 29 Pac. 277. See, also, Bell v. Marsh, [1903]

(a) The text is cited to this effect in Great West Min. Co. v. Woodmas, 12 Colo. 46, 20 Pac. 771, 13 Am. St.

would have altered the legal position of the party for the worse, unless the estoppel is enforced. He must have placed himself in such a situation that he would suffer a loss as the consequence of his action, if the other party were allowed to deny the truth of his representation, or repudiate the effects of his conduct.[2 b] Although this action is usually affirmative, yet such affirmative action is not indispensable. It is enough if the party has been induced to *refrain* from using such means or taking such action as lay in his power,

Rep. 475; Kent v. Quicksilver M. Co., 78 N. Y. 159, 187; Hurd v. Kelly, 78 N. Y. 588, 597; 34 Am. Rep. 567; Barnard v. Campbell, 55 N. Y. 456, 462; Malloney v. Horan, 49 N. Y. 111, 115; 10 Am. Rep. 335; Jewett v. Miller, 10 N. Y. 402, 406; 61 Am. Dec. 751; Manufacturers' etc. Bank v. Hazard, 30 N. Y. 226, 230; Van Deusen v. Sweet, 51 N. Y. 378; Davenport v. Turpin, 43 Cal. 597, 602; Wheelock v. Town of Hardwick, 48 Vt. 19; St. Jo. Mfg. Co. v. Daggett, 84 Ill. 556; Dorlarque v. Cress, 71 Ill. 380; Anderson v. Armstead, 69 Ill. 452; Carroll v. Manchester etc. R. R., 111 Mass. 1; Voorhees v. Olmstead, 3 Hun, 744; Horn v. Cole, 51 N. H. 287; 12 Am. Rep. 111; Stevens v. Dennett, 51 N. H. 324, 333; Clark v. Coolidge, 8 Kan. 189, 195; Kuhl v. Mayor, 23 N. J. Eq. 84; Rice v. Bunce, 49 Mo. 231, 234; 8 Am. Rep. 129; State v. Laies, 52 Mo. 396; McCabe v. Raney, 32 Ind. 309; Simpson v. Pearson, 31 Ind. 1, 5; 99 Am. Dec. 577; McKinzie v. Steele, 18 Ohio St. 38, 41; Eaton v. N. E. Tel. Co., 68 Me. 63; Southard v. Sutton, 68 Me. 575; Graves v. Blondell, 70 Me. 190; Mut. Life Ins. Co. v. Norris, 31 N. J. Eq. 583; Eitel v. Bracken, 38 N. Y. Sup. Ct. 7.

2 Cases cited in last note; also Forsyth v. Day, 46 Me. 176, 197; Cummings v. Webster, 43 Me. 192; Holden v. Torrey, 31 Vt. 690; Bitting's Appeal, 17 Pa. St. 211; Cole v. Bolard, 22 Pa. St. 431; Newman v. Edwards, 34 Pa. St. 32; Truan v. Keiffer, 31 Ala. 136; Railroad Co. v. Dubois, 12 Wall. 47; East v. Dolihite, 72 N. C. 562.

1 Ch. 528; In re Lewis, [1904] 2 Ch. 656; Porter v. Moore, [1904] 2 Ch. 367; Low v. Bouverie, [1891] 3 Ch. 82, 113 ("Where no fraud is alleged, it is essential to show that the statement was of such a nature that it would have misled any reasonable man, and, that plaintiff was in fact misled by it"); Boylston v. Rankin, 114 Ala. 408, 21 South. 995, 62 Am. St. Rep. 111; First Nat. Bank v. Maxwell, 123 Cal. 360, 55 Pac. 980, 69 Am. St. Rep. 64; Supreme Tent Knights of Maccabees v. Stensland, 206 Ill. 124, 68 N. E. 1098, 99 Am. St. Rep. 137; Evans v. Odom, 30 Ind. App. 207, 65 N. E. 755; Geiler v. Littlefield, 148 N. Y. 603, 43 N. E. 66; Gjerstadengen v. Van Duzen, 7 N. Dak. 612, 76 N. W. 233, 66 Am. St. Rep. 679; Pocahontas Light & Water Co. v. Browning, 53 W. Va. 436, 44 S. E. 267.

(b) See Ketchum v. Duncan, 96 U. S. 659; Supreme Tent Knights of Maccabees v. Stensland, 206 Ill. 124, 68 N. E. 1098, 99 Am. St. Rep. 137; Nell v. Dayton, 43 Minn. 242, 45 N. W. 229.

by which he might have retrieved his position and saved himself from loss.[3] [c]

§ 813. Operation and Extent of the Estoppel.— The measure of the operation of an estoppel is the extent of the representation made by one party and acted on by the other. The estoppel is commensurate with the thing represented, and operates to put the party entitled to its benefit in the same position as if the thing represented were true.[1] [a] With respect to the persons who are bound by or who may claim the benefit of the estoppel, it operates between the immediate parties and their privies, whether by blood, by estate, or by contract. A stranger, who is not a party nor a privy, can neither be bound nor aided.[2] [b] Since the whole doctrine is a creature of equity and governed by equitable principles, it necessarily follows that the party who claims the benefit of an estoppel must not only have been free from fraud in the transaction, but must have acted with good faith and reasonable diligence; otherwise no equity will arise in his favor.[3] [c]

§ 812, [3] Continental Bank v. Bank of Commonwealth, 50 N. Y. 575, and cases cited by Folger, J.; Voorhees v. Olmstead, 3 Hun, 744.

§ 813, [1] Grissler v. Powers, 81 N. Y. 57; 37 Am. Rep. 475, per Andrews, J.; Tilton v. Nelson, 27 Barb. 595; Pickett v. Merchants' Nat. Bank, 32 Ark. 346; Murray v. Jones, 50 Ga. 109; Campbell v. Nichols, 33 N. J. L. 81; Philadelphia v. Williamson, 10 Phila. 176; Dunston v. Paterson, 2 Com. B., N. S., 495.

§ 813, [2] Simpson v. Pearson, 31 Ind. 1; 99 Am. Dec. 577, per Elliott, C. J.; Eaton v. New England Tel. Co., 68 Me. 63; Southard v. Sutton, 68 Me. 575; Wright v. Hazen, 24 Vt. 143; Parker v. Crittenden, 37 Conn. 148; McCravey v. Remson, 19 Ala. 430; 54 Am. Dec. 194; Kinnear v. Mackey, 85 Ill. 96; Murray v. Sells, 53 Ga. 257; Peters v. Jones, 35 Iowa, 512; Thistle v. Buford, 50 Mo. 278; Gould v. West, 32 Tex. 338.

§ 813, [3] Thorne v. Mosher, 20 N. J. Eq. 257; Royce v. Watrous, 73 N. Y. 597; Wilcox v. Howell, 44 N. Y. 398; Moore v. Bowman, 47 N. H. 494.

§ 812, (c) See, also, Dixon v. Kennaway & Co., [1900] 1 Ch. 833; Weinstein v. National Bank, 69 Tex. 38, 6 S. W. 171, 5 Am. St. Rep. 23.

§ 813, (a) The text is cited in Boulder Val. Ditch Min. & Mill Co. v. Farnham, 21 Mont. 1, 29 Pac. 277.

§ 813, (b) The text is cited in Williamson v. Jones, 43 W. Va. 563, 64 Am. St. Rep. 891, 27 S. E. 411, 38 L. R. A. 694, 702. See, also, Hodge v. Ludlum, 45 Minn. 290, 47 N. W. 805.

§ 813, (c) Porter v. Moore, [1904] 2 Ch. 367; George Whitechurch, Ltd. v. Cavanagh, [1902] App. Cas. 117, 145.

§ 814. Same. As Applied to Married Women.[a]— Upon the question how far the doctrine of equitable estoppel by conduct applies to married women, there is some conflict among the decisions. The tendency of modern authority, however, is strongly towards the enforcement of the estoppel against married women as against persons *sui juris,* with little or no limitation on account of their disability. This is plainly so in states where the legislation has freed their property from all interest or control of their husbands, and has clothed them with partial or complete capacity to deal with it as though they were single.[1 b] Even independently of this legislation there is a decided preponderance of authority sustaining the estoppel against her, either when she is attempting to enforce an alleged right

1 Wherever statutes have gone further, and enabled married women to enter into contracts as though single, there is, of course, no reason why the doctrine of estoppel should not apply to them without any limitation: Dingens v. Clancey, 67 Barb. 566; Fryer v. Rishell, 84 Pa. St. 521; Towles v. Fisher, 77 N. C. 437; Godfrey v. Thornton, 46 Wis. 677; and even she may thus be estopped by the acts of her husband: McCaa v. Woolf, 42 Ala. 389; Bodine v. Killeen, 53 N. Y. 93; Treman v. Allen, 15 Hun, 4; Hockett v. Bailey, 86 Ill. 74; but see, for circumstances in which she has been held not estopped, Oglesby Coal Co. v. Pasco, 79 Ill. 164; Upshaw v. Gibson, 53 Miss. 341; McBeth v. Trabue, 69 Mo. 642.

(a) The text, §§ 814–818, is cited in Galbraith v. Lumsford, 87 Tenn. 89, 9 S. W. 365, 1 L. R. A. 522. This paragraph is quoted in Wilder v. Wilder, 89 Ala. 414, 7 South. 767, 18 Am. St. Rep. 130, 9 L. R. A. 97.

(b) The text is cited in Dobbin v. Cordiner, 41 Minn. 165, 42 N. W. 870, 16 Am. St. Rep. 683, 4 L. R. A. 333; Warner v. Watson, 35 Fla. 402, 17 South. 654. The text is cited in Williamson v. Jones, 43 W. Va. 563, 64 Am. St. Rep. 891, 27 S. E. 411, 38 L. R. A. 694, holding that, as to her personal estate, being enabled to contract as if single, she is bound by estoppel *in pais* touching her contracts; quoted in Johnson v. Mutual Life Ins. Co., (Ky.) 69 S. W. 751. See, also, Noel v. Kinney, 106 N. Y. 74, 12 N. E. 351, 60 Am. Rep. 423; Temples v. Equitable Mortgage Co., 100 Ga. 503, 28 S. E. 232, 62 Am. St. Rep. 326; Webb v. John Hancock Mut. Life Ins. Co., (Ind.) 66 N. E. 470, and cases cited (statute makes married woman bound by estoppel *in pais*); Trimble v. State, 145 Ind. 154, 44 N. E. 260, 57 Am. St. Rep. 163, and note; Newman v. Moore, 94 Ky. 147, 21 S. W. 759, 42 Am. St. Rep. 343.

or to maintain a defense.[2 c] There are, however, decisions which hold, in effect, that since a married woman cannot be directly bound by her contracts or conveyances, even when accompanied with fraud, so she cannot be indirectly bound through means of an estoppel; and the operation of the estoppel against her must be confined to cases where she is attempting affirmatively to enforce a right inconsistent with her previous conduct, upon which the other party has relied.[3 d] These decisions seem to be in opposition to the general current of authority.

§ 815. **Same. As Applied to Infants.**— The disability of infancy seems to have limited the operation of the equitable estoppel more than that of coverture. Since an infant is not directly bound by his ordinary contracts, unless ratified after he becomes of age, so obligations in the nature of contract will not be indirectly enforced against him by means of an estoppel created by his conduct while still a minor. On the other hand, an equitable estoppel arising from his conduct may be interposed, with the same effect as though he were adult, to prevent him from affirmatively asserting a right of property or of contract in contraven-

[2] This is certainly the effect of modern English decisions: Stafford v. Stafford, 1 De Gex & J. 193; Skottowe v. Williams, 7 Jur., N. S., 118; Jones v. Higgens, L. R. 2 Eq. 538, 544; Jones v. Frost, L. R. 7 Ch. 773, 776; Bigelow v. Foss, 59 Me. 162; Frazier v. Gelston, 35 Md. 298; Brinkerhoff v. Brinkerhoff, 23 N. J. Eq. 477, 483; Carpenter v. Carpenter, 25 N. J. Eq. 194; Drake v. Glover, 30 Ala. 382; Connolly v. Branstler, 3 Bush, 702; 96 Am. Dec. 278; Couch v. Sutton, 1 Grant Cas. 114; McCullough v. Wilson, 21 Pa. St. 436; and see the cases cited in the last note.

[3] Lowell v. Daniels, 2 Gray, 161; 61 Am. Dec. 448; Merriam v. Boston R. R., 117 Mass. 241; Bemis v. Call, 10 Allen, 512; Oglesby Coal Co. v. Pasco,

(c) Quoted in Brooks v. Laurent, (C. C. A.) 98 Fed. 647. See, also, Smith v. Willard, 174 Ill. 538, 51 N. E. 835, 66 Am. St. Rep. 313; Boyd v. Turpin, 94 N. C. 137, 55 Am. Rep. 597; Brown v. Thompson, 31 S. C. 436, 10 S. E. 95, 17 Am. St. Rep. 40.

(d) The text is cited in Williamson v. Jones, 43 W. Va. 563, 64 Am. St. Rep. 891, 27 S. E. 411, 38 L. R. A. 694, holding that as respects title to land, she cannot be barred even by fraudulent conduct. Married women were held not estopped in Bank of America v. Banks, 101 U. S. 247; Innis v. Templeton, 95 Pa. St. 262, 40 Am. Rep. 643; McNeeley v. South Penn. Oil Co., (W. Va.) 44 S. E. 508 (mere silence will not estop).

tion of his conduct upon which the other party has relied and been induced to act.[1] [a]

§ 816. Important Applications in Equity — Acquiescence.— In addition to the foregoing discussion of principles, I shall state very briefly some of the applications which have most frequently been made by courts of equity. Acquiescence is an important factor in determining equitable rights and remedies, in obedience to the maxims, He who seeks equity must do equity, and He who comes into equity must come with clean hands. Even when it does not work a true estoppel upon rights of property or of contract, it may operate in analogy to estoppel — may produce a *quasi* estoppel — upon the rights of remedy. These two effects will be described separately.[a]

§ 817. Acquiescence as Preventing Rights of Remedy.— Acquiescence in the wrongful conduct of another by which one's rights are invaded may often operate, upon the principles of and in analogy to estoppel, to preclude the injured party from obtaining many distinctively equitable remedies to which he would otherwise be entitled. This

79 Ill. 164; Kane Co. v. Herrington, 50 Ill. 232; Williams v. Baker, 71 Pa. St. 476; Glidden v. Strupler, 52 Pa. St. 400; Rumfelt v. Clemens, 46 Pa. St. 455; Keen v. Hartman, 48 Pa. St. 497; 86 Am. Dec. 606; 88 Am. Dec. 472. In Lowell v. Daniels, 2 Gray, 161, 61 Am. Dec. 448, this view was maintained with great force and ability.

1 Dorlarque v. Cress, 71 Ill. 380; McBeth v. Trauhe, 69 Mo. 642; Montgomery v. Gordon, 51 Ala. 377; Upshaw v. Gibson, 53 Miss. 341; Handy v. Noonan, 51 Miss. 166; Padfield v. Pierce, 72 Ill. 500; Wilkinson v. Filby, 24 Wis. 441; Wilie v. Brooks, 45 Miss. 542; Drake v. Wise, 36 Iowa, 476; Tantum v. Coleman, 26 N. J. Eq. 128; Overton v. Banister, 3 Hare, 503; Ex parte Unity etc. Ass'n, 3 De Gex & J. 63; Nelson v. Stocker, 4 De Gex & J. 458; Esron v. Nicholas, 1 De Gex & S. 118; Stikeman v. Dawson, 1 De Gex & S. 90; Wright v. Snowe, 2 De Gex & S. 321; Thompson v. Simpson, 2 Jones & L. 110.

§ 815, (a) The text is cited in Wilder v. Wilder, 89 Ala. 414, 7 South. 767, 18 Am. St. Rep. 130, 9 L. R. A. 97; Hayes v. Parker, 41 N. J. Eq. 632, 7 Atl. 511; Williamson v. Jones, 43 W. Va. 563, 64 Am. St. Rep. 891, 27 S. E. 411, 38 L. R. A. 694, 703. See, also, Sims v. Everhardt, 102 U. S. 300; Wieland v. Kobick, 110 Ill. 16, 51 Am. Rep. 676; Kastner v. Pibilinski, 96 Ind. 229; Rundle v. Spencer, 67 Mich. 89, 34 N. W. 548; Burke v. Adams, 80 Mo. 504, 50 Am. Rep. 510.

§ 816, (a) The text is cited in Gunnison v. Chicago, M. & St. P. Ry Co., 117 Fed. 629.

form of *quasi* estoppel does not cut off the party's title, nor his remedy at law; it simply bars his right to equitable relief, and leaves him to his legal actions alone. In order that this effect may be produced, the acquiescence must be with knowledge of the wrongful acts themselves, and of their injurious consequences; it must be voluntary, not the result of accident, nor of causes rendering it a physical, legal, or moral necessity, and it must last for an unreasonable length of time, so that it will be inequitable even to the wrong-doer to enforce the peculiar remedies of equity against him, after he has been suffered to go on unmolested, and his conduct apparently acquiesced in. It follows that what will amount to a sufficient acquiescence in any particular case must largely depend upon its own special circumstances. The equitable remedy to which this *quasi* estoppel by acquiescence most frequently applies is that of injunction, preliminary or final, when sought by a proprietor to restrain a defendant from interference with easements, from committing nuisances, from trespasses, or other like acts in derogation of the plaintiff's proprietary rights.[1] [a] This effect of delay is

[1] See vol. 1, §§ 418, 419, and cases there cited.[b] The following cases furnish illustrations of the rule and of its limitations, when it does or does not

(a) The text is quoted in St. Louis S. D. & S. Bank v. Kennett Estate, (Mo. App.) 74 S. W. 474; Rigney v. Tacoma Light & Water Co., 9 Wash. 576, 38 Pac. 147, 26 L. R. A. 425, 429; and cited in Kessler v. Ensley Co., 123 Fed. 546; Lower Latham Ditch Co. v. Louden Irrigating Canal Co., 27 Colo. 267, 83 Am. St. Rep. 80, 60 Pac. 629; Holt v. Parsons, (Ga.) 45 S. E. 690; Hayes v. Carroll, (Minn.) 76 N. W. 1017 (laches not imputed to one in peaceable possession under an equitable title for failure to resort to equity for protection against the legal title); Bausman v. Kelley, 38 Minn. 197, 36 N. W. 333, 8 Am. St. Rep. 661; Wolf v. Great Falls Water Power, etc., Co., (Mont.) 38 Pac. 115 (suit for specific performance); Dennis v. Jones, 44 N. J. Eq. 513, 14 Atl. 913, 6 Am. St. Rep. 899; Trout v. Lucas, 54 N. J. Eq. 361, 35 Atl. 153: Lozier v. Hill, (N. J. Eq.) 59 Atl. 234 (suit for specific performance); Moorman v. Arthur, 90 Va. 455, 18 S. E. 869 (must be actual knowledge of the wrongful act and its injurious consequences). §§ 817–819 are cited in Washington v. Opie, 145 U. S. 214, 12 Sup. Ct. 822. See, also, Beardsley v. Cram, 137 Cal. 328, 70 Pac. 175; Powers's Appeal, 125 Pa. St. 175, 17 Atl. 254, 11 Am. St. Rep. 882.

(b) See also § 1359.

subject to the important limitation that it is properly confined to claims for purely equitable remedies to which the party has no strict legal right. Where an injunction is asked in support of a strict *legal* right, the party is entitled to it if his legal right is established; mere delay and acquiescence will not, therefore, defeat the remedy, unless it has continued so long as to defeat the right itself.[2] [c] The same rule applies, and for the same reasons, to a party seeking purely equitable relief against fraud, such as the surrender or cancellation of securities, the annulling of a transaction, and the like. Upon obtaining knowledge of the facts, he should commence the proceedings for relief as soon as reasonably possible. Acquiescence consisting of unnecessary delay after such knowledge will defeat the equitable relief.[3] [d]

operate: Coles v. Sims, 5 De Gex, M. & G. 1; Great Western R'y v. Oxford etc. R'y, 3 De Gex, M. & G. 341; Attorney-General v. Sheffield Gas Co., 3 De Gex, M. & G. 304; Child v. Douglas, 5 De Gex, M. & G. 739; Graham v. Birkenhead etc. R'y, 2 Macn. & G. 146; Buxton v. James, 5 De Gex & S. 80; Attorney-General v. Eastlake, 11 Hare, 205, 228; 17 Jur. 801; Wood v. Sutcliffe, 2 Sim., N. S., 163; Rochdale Canal Co. v. King, 2 Sim., N. S., 78; Cooper v. Hubbuck, 30 Beav. 160; 7 Jur., N. S., 457; Bankart v. Houghton, 27 Beav. 425; Gordon v. Cheltenham R'y, 5 Beav. 229, 237; Mitchell v. Steward, L. R. 1 Eq. 451; Western v. McDermott, L. R. 1 Eq. 499; 2 Ch. 72; Senior v. Pawson, L. R. 3 Eq. 330; Smith v. Smith, L. R. 20 Eq. 500; Attorney-General v. Lunatic Asylum, L. R. 4 Ch. 146; Lee v. Haley, L. R. 5 Ch. 155; Gaunt v. Fynney, L. R. 8 Ch. 8; Bassett v. Salisbury Mfg. Co., 47 N. H. 426, 439; Odlin v. Gove, 41 N. H. 465; 77 Am. Dec. 773; Peabody v. Flint, 6 Allen, 52, 57; Fuller v. Melrose, 1 Allen, 166; Tash v. Adams, 10 Cush. 252; Briggs v. Smith, 5 R. I. 213; Grey v. Ohio etc. R. R., 1 Grant Cas. 412; Little v. Price, 1 Md. Ch. 182; Burden v. Stein, 27 Ala. 104; 62 Am. Dec. 758; Pillow v. Thompson, 20 Tex. 206; Borland v. Thornton, 12 Cal. 440; Phelps v. Peabody, 7 Cal. 50; Wilson v. Cobb, 28 N. J. Eq. 177.

[2] Fullwood v. Fullwood, L. R. 9 Ch. Div. 176; and see Gaunt v. Fynney, L. R. 8 Ch. 8.

[3] Jennings v. Broughton, 5 De Gex, M. & G. 126; Farebrother v. Gibson, 1 De Gex & J. 602; Kempson v. Ashbee, L. R. 10 Ch. 15; Turner v. Collins,

(c) The text is quoted and followed in Rigney v. Tacoma L. & W. Co., 9 Wash. 576, 38 Pac. 147, 26 L. R. A. 425; Brush v. Manhattan Ry. Co., (C. P. N. Y.) 13 N. Y. Suppl. 908.

(d) This portion of the text is quoted in Evans v. Duke, 140 Cal. 22, 73 Pac. 732; Van Beck v. Milbrath, 118 Wis. 42, 94 N. W. 657; and cited in National Mut. B. & L. Ass'n v. Blair, 98 Va. 490, 36 S. E. 513; Calhoun v. Millard, 121 N. Y. 69, 24 N. E. 27, 8 L. R. A. 248. See §§ 897, 917, 965, 1376, note.

§ 818. Acquiescence as an Estoppel to Rights of Property or of Contract.— Acquiescence consisting of mere silence may also operate as a true estoppel in equity to preclude a party from asserting legal title and rights of property, real or personal, or rights of contract. The requisites of such estoppel have been described. A fraudulent intention to deceive or mislead is not essential. All instances of this class, in equity, rest upon the principle: If one maintain silence when in conscience he ought to speak, equity will debar him from speaking when in conscience he ought to remain silent.[1] A most important application includes all cases where an owner of property, A, stands by and knowingly permits another person, B, to deal with the property as though it were his, or as though he were rightfully dealing with it, without interposing any objection, as by expending money upon it, making improvements, erecting buildings. and the like. Of course, it is essential that B should be acting in ignorance of the real condition of the title, and in the supposition that he was rightful in his own dealing.[2 a]

L. R. 7 Ch. 329; Payne v. Evens, L. R. 18 Eq. 356; Peek v. Gurney, L. R. 13 Eq. 79; Kent v. Freehold etc. Co., L. R. 3 Ch. 493; Oakes v. Turquand, L. R. 2 H. L. 325; Parks v. Evansville R. R., 23 Ind. 567; Gatling v. Newell, 9 Ind. 572. The same rule may be applied to other equitable remedies under analogous circumstances: See Reimers v. Druce, 23 Beav. 145; Hicks v. Hunt, Johns. 372; Chapman v. Railroad Co., 6 Ohio St. 119; Hathaway v. Noble, 55 N. H. 508; and see cases cited *post*, under § 819.

[1] Mich. etc. Co. v. Parcell, 38 Mich. 475, 480, per Cooley, J.

[2] Crook v. Corporation of Seaford, L. R. 6 Ch. 551; L. R. 10 Eq. 678; Thornton v. Ramsden, 4 Giff. 519; Nunn v. Fabian, 11 Jur., N. S., 868; Rennie v. Young, 2 De Gex & J. 136; Bankart v. Tennant, L. R. 10 Eq. 141; Davies v. Sear, L. R. 7 Eq. 427; Davies v. Davies, 6 Jur., N. S., 1320; Somersetshire etc. Co. v. Harcourt, 2 De Gex & J. 596; Duke of Beaufort v. Patrick,

(a) The text is cited in Hanner v. Moulton, 138 U. S. 486, 11 Sup. Ct. 408; Kessler v. Ensley Co., 123 Fed. 546; Hogan v. Ellis, 39 Fla. 463, 22 South. 727, 63 Am. St. Rep. 167. See, also, Atlanta Nat. B. & L. Ass'n v. Gilmer, 128 Fed. 293; Alabama, etc., R. R. Co. v. S. & N. A. R. R. Co., 84 Ala. 570, 3 South. 286, 5 Am. St. Rep. 401; Lindsay v. Cooper, 94 Ala. 170, 33 Am. St. Rep. 105, 11 South. 325, 16 L. R. A. 813; Hendrix v. Southern R.

§ 819. Estoppel as Applied to Corporations and Stockholders. — This species of estoppel, as well as other kinds which consist of affirmative acts or representations, applies to corporations in their dealings with third persons, and with their own stockholders.[1 a] Thus a corporation may be estopped by statements contained in a prospectus or circular, on behalf of a stockholder who has purchased shares upon the faith of such statements.[2] Conversely, stockholders may be estopped by their acquiescence from objecting to the acts of the corporation which are not illegal nor *mala prohibita,* but *ultra vires,* when the rights of innocent third persons have intervened. Express assent is not necessary to estop the stockholders; " when they neglect to promptly and actively condemn the unauthorized act, and to seek judicial relief after knowledge of its being done, they will

17 Beav. 60; Schaefer v. Gildea, 3 Col. 15; Mich. etc. Co. v. Parcell, 38 Mich. 475; Cumberland V. R. R. v. McLanahan, 59 Pa. St. 23; Martin v. Righter, 10 N. J. Eq. 510; Blackwood v. Jones, 4 Jones Eq. 54; Donovan v. Fireman's Ins. Co., 30 Md. 155; Evansville v. Pfisterer, 34 Ind. 36; 7 Am. Rep. 214; Millingar v. Sorg, 61 Pa. St. 471; Raritan Water P. Co. v. Veghte, 21 N. J. Eq. 463; Brooks v. Curtis, 4 Lans. 283; Vicksburg etc. R. R. v. Ragsdale, 54 Miss. 200; Broyles v. Nowlen, 53 Tenn. 191; Hart v. Giles, 67 Mo. 175; Hayes v. Livingston, 34 Mich. 384; 22 Am. Rep. 533; Ford v. Loomis, 33 Mich. 121.

1 Curnen v. Mayor etc., 79 N. Y. 511, 514; Continental Bank v. Bank of the Commonwealth, 50 N. Y. 575; Wilson v. West Hartlepool R'y, 11 Jur., N. S., 124; Hill v. South Stafford R'y, 11 Jur., N. S., 192; Ins. Co. v. Eggleston, 96 U. S. 572.

2 New Brunswick etc. Co. v. Muggeridge, 7 Jur., N. S., 132. And it is not necessary that the officers of the company should have known the falsity of the statements, or disbelieved them.

Co., 130 Ala. 305, 30 South. 596, 89 Am. St. Rep. 27; Southern Ry. Co. v. Hood, 126 Ala. 312, 28 South. 662, 85 Am. St. Rep. 32; Beardsley v. Clem, 137 Cal. 328, 70 Pac. 175; Schafer v. Wilson, 113 Iowa, 475, 85 N. W. 789; Tracy v. Roberts, 88 Me. 310, 34 Atl. 68, 51 Am. St. Rep. 394; Barchent v. Selleck, 89 Minn. 513, 95 N. W. 455; Thompson v. Borg, (Minn.) 95 N. W. 896; Minton v. New York El. R. Co., 130 N. Y. 332, 29 N. E. 319; Redmond v. Excelsior Sav. etc. Assn., 194 Pa. St. 643, 45 Atl. 422, 75 Am. St. Rep. 714. See, also, §§ 731, 1241, note.

(a) See Breslin v. Fries-Breslin Co., (N. J. Eq.) 58 Atl. 313; West Seattle Land & Imp. Co. v. Novelty Mill Co., 31 Wash. 435, 72 Pac. 69; Coolidge v. Schering, 32 Wash. 557, 73 Pac. 682 (delay in suing to set aside unauthorized conveyance).

be deemed to have acquiesced, and will be estopped as against innocent third persons.'' [3b]

§ 820. Other Instances of Acquiescence.— It is in conformity with the same principle that parties who have long acquiesced in settlements of accounts or of other mutual dealings are not permitted to reopen or disturb them; and this is true, even though the parties stood in confidential relations towards each other, as trustee and *cestui que trust*, principal and agent, and the like, and the settlement embraced matters growing out of such relations.[1] Another familiar instance of the estoppel arises from the conduct of the debtor party towards the intended assignee of a thing in action. If a mortgagor, obligor, or other debtor, by keeping silence under circumstances when he ought to speak, leads the intended assignee to believe that there is no defense, he will be estopped from afterwards setting up any defense which might otherwise be available as against the assignee who has thus been induced to purchase the demand. The estoppel will be even more obvious when the debtor, instead of simply keeping silent, resorts to affirmative and misleading acts or representations.[2]

§ 821. Owner Estopped from Asserting his Legal Title to Land.— The most striking instance of the estoppel recognized by courts of equity is that already described in a

3 Kent v. Quicksilver Min. Co., 78 N. Y. 159, 187, 188, and cases cited; Zabriskie v. Cleveland R. R., 23 How. 381, 395, 398; Parks v. Evansville R. R., 23 Ind. 567; Evans v. Smallcombe, L. R. 3 H. L. 249; L. R. 3 Eq. 769; Brotherhood's Case, 31 Beav. 365; In re Magdalena etc. Co., 6 Jur., N. S.; 975; and see Sharpley v. Louth etc. R'y, L. R. 2 Ch. Div. 663, 681; Scholey v. Central etc. Co., L. R. 9 Eq. 266, note; Ashley's Case, L. R. 9 Eq. 263; Denton v. Macniel, L. R. 2 Eq. 352; Hallows v. Fernie, L. R. 3 Ch. 467.

1 Bright v. Legerton, 6 Jur., N. S., 1179; Clarke v. Hart, 5 Jur., N. S., 447. See the remarks of Lord Chelmsford in this case upon the different effects of delay and acquiescence upon executed and executory interests.

2 Lee v. Kirkpatrick, 14 N. J. Eq. 264; Grissler v. Powers, 81 N. Y. 57; 37 Am. Rep. 475; and see cases cited *ante*, § 704.

(b) The text is cited in Kessler v. Ensley Co., 123 Fed. 546. See, also, Memphis, etc., R. R. Co. v. Grayson, 88 Ala. 572, 7 South. 122, 16 Am. St. Rep. 69; Sheldon H. B. Co. v. Eickemeyer H. B. Co., 90 N. Y. 607.

former paragraph, wherein by intentional misrepresentation, misleading conduct, or wrongful concealment a party may preclude himself from asserting his legal title to land, or from enforcing an encumbrance on or maintaining an interest in real estate.[1] This doctrine was established in equity long before the modern rules concerning equitable estoppel by conduct had been developed; and its operation is somewhat more extensive than the effects produced by the ordinary forms of estoppel. A person may not only be prevented from asserting his title or interest, he may even be compelled, at the suit of an innocent purchaser, to make good and specifically perform his representations. Fraud, actual or constructive, is the essential and central element.

[1] See *ante*, § 807, and cases cited; Vicksburg etc. R. R. Co. v. Ragsdale, 54 Miss. 200; Sulphine v. Dunbar, 55 Miss. 255; Wilber v. Goodrich, 34 Mich. 84; Sherrill v. Sherrill, 73 N. C. 8; Mayor v. Ramsey, 46 Tex. 371; Hayes v. Livingston, 34 Mich. 384; 22 Am. Rep. 533; Willmott v. Barber, L. R. 15 Ch. Div. 96, 106.

CHAPTER THIRD.

CERTAIN FACTS AND EVENTS WHICH ARE THE OCCASIONS OF EQUITABLE PRIMARY OR REMEDIAL RIGHTS.

§ 822. Introductory.— In the first volume, while speaking of the jurisdiction, I stated that certain facts and events were most important *occasions* of equitable rights and duties.[1] Since these same facts are also recognized by courts of law as giving rise to legal rights and duties within a limited extent, it has sometimes been said that they form a part of the concurrent jurisdiction of equity. The erroneous character of this theory has been shown in earlier sections.[a] The rights and duties of which they are the occasions, whether of property, of contract, or of remedy, belong partly to the exclusive and partly to the concurrent jurisdiction. The facts and events referred to, and which form the subject-matter of this chapter, are accident, mistake, and fraud. In the present discussion I shall not describe in an exhaustive manner all their consequences and effects, for this would produce needless confusion. I shall, in the first place, define them as they are conceived of by equity, and explain with some care the equitable notions concerning their nature, and the equitable doctrines concerning their essential elements and attributes. In the second place, I shall enumerate their effects, the instances of equitable jurisdiction of which they are the occasions, and the equitable rights and duties which are maintained and enforced by these phases of the jurisdiction. The doctrines which determine and govern the most important of these rights will be more fully discussed under subsequent and appropriate heads.[2]

[1] See *ante*, §§ 359, 362.

[2] For example, many instances of trusts by operation of law spring from fraud; their full discussion will be found in the sections on trusts. All the distinctive remedies, such as cancellation, reformation, etc., will be examined in the division which deals with remedies.

(a) See §§ 138, 140, note, 175, note, 188.

SECTION I.

ACCIDENT.

ANALYSIS.

§ 823. Definition.
§ 824. *Rationale* of the jurisdiction.
§ 825. General limitations on the jurisdiction.
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§ 826. Non-performance of contracts.
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§ 831. 1. Suits on lost instruments.
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§ 834. 3. Defective execution of powers.
§ 835. Powers held in trust will be enforced.
§ 836. 4. Relief against judgments at law.
§ 837. 5. Other special instances.

§ 823. Definition.— It is confessedly difficult to define accident so as to include all the elements essential to the equitable conception, and to exclude all others; and many writers have not attempted to give a definition. The following expresses, I think, the true meaning given by equity to the term as an occasion for the exercise of jurisdiction: Accident is an unforeseen and unexpected event, occurring external to the party affected by it, *and of which his own agency is not the proximate cause,* whereby, contrary to his own intention and wish, he loses some legal right or becomes subjected to some legal liability, and another person acquires a corresponding legal right, which it would be a violation of good conscience for the latter person, under the circumstances, to retain.[1] [a] If the party's own

[1] Jeremy, in his Equity Jurisdiction, defines accident as "an occurrence in relation to a contract which was not anticipated by the parties when the same was entered into, and which gives an undue advantage to one of them over the other in a court of law"; Bk. 3, pt. 2. Judge Story justly objects to this

(a) Quoted in Kopper v. Dyer, 59 Vt. 477, 9 Atl. 4, 59 Am. Rep. 742.

agency is the proximate cause of the event, it is a mistake rather than an accident. This definition purposely excludes all fortuitous occurrences which do not occasion any exercise of jurisdiction, since they are not "accidents" within the equitable conception.

§ 824. Rationale of the Jurisdiction.[a]— Accident is one of the oldest heads of equity jurisdiction. There is reason to believe that, at an early day, this jurisdiction was much more undefined and comprehensive than it is at present; but for a long time it has been, and is now, settled within certain and somewhat narrow limits. Its existence and exercise involve two essential requisites. The first and principal requisite is, that, by the event not expected nor foreseen, one party, A, has without fault and undesignedly undergone some legal loss or liability, and the other party, B, has acquired a corresponding legal right, which it is contrary to good conscience for him to retain and enforce against A. In other words, because of the unexpected character of the occurrence by which A's legal relations towards B have been unintentionally changed, A is in good conscience entitled to relief which shall restore those relations

definition as defective and too narrow. He gives the following: "By the term 'accident' is intended, not merely inevitable casualty, or the act of Providence, or what is technically called *vis major*, or irresistible force; but such unforeseen events, misfortunes, losses, acts, or omissions, as are not the result of any negligence or misconduct of the party": Story's Eq. Jur., sec. 78. This definition is more inaccurate than that of Mr. Jeremy. It not only includes cases which are not accidents at all, but mistakes, but it omits the very central element of the equitable conception. So far as it is a definition, it is one of the word in its popular and not its technical sense. Another author, with a nearer approach to its true signification in equity, calls it "an unforeseen and injurious occurrence not attributable to mistake, neglect, or misconduct": Smith's Manual of Eq. Jur. 36. Few judges have attempted any definition. In Earl of Bath v. Sherwin, 10 Mod. 1, 3, Lord Chancellor Cowper said: "By accident is meant, when a case is distinguished from others of a like nature by usual circumstances." This statement as a definition is so imperfect and inaccurate as to be entirely worthless.

(a) This section is cited in Kopper v. Dyer, 59 Vt. 477, 9 Atl. 4, 59 Am. Rep. 742.

to their original character, and replace him in his former position. In the second place, this relief, to which A is conscientiously entitled, must be such as cannot be adequately conferred by courts of law. Upon these two essential requisites the jurisdiction was based: the party's conscientious right to relief; and the impossibility of obtaining adequate remedy at law. If the party, although clearly entitled to relief, can obtain adequate and certain remedy at law, then, in accordance with the fundamental principles of equitable jurisdiction, the concurrent jurisdiction does not exist, and the exclusive jurisdiction is not exercised.[1] This doctrine, it should be remembered, refers to the origin of the equity jurisdiction, and not to its subsequent and present condition. Its operation is controlled and modified by the other most important principle, fully discussed heretofore, that when the equitable jurisdiction, either concurrent or exclusive, has once been established with respect to any subject-matter, it is not destroyed or abridged by a jurisdiction subsequently acquired by the courts of law to give the same or other adequate relief under the same circumstances. The jurisdiction of equity originally existing and exercised on the occasion of accident has not, therefore, been theoretically affected by the powers given to or assumed by the courts of law to confer complete remedy in many cases which formerly belonged to the cognizance of equity alone.[2]

§ 825. **Limitations.**— While the jurisdiction occasioned by accident is clearly limited, and the instances in which it is

[1] See vol. 1, §§ 216–222. As Sir William Blackstone shows, courts of law could always give adequate relief in certain instances of accident, viz., in cases of "loss of deeds, mistakes in receipts and payments, wrong payments, deaths which make it impossible to perform a condition literally, and a multitude of other contingencies": 3 Black. Com. 431; the equitable jurisdiction has never extended to such cases.

[2] See vol. 1, §§ 276–281, where this doctrine is fully considered: People v. Houghtaling, 7 Cal. 348, 351.

and is not exercised are well defined, it is difficult to formulate any general criterion which shall consistently express the extent of the limitation, and account for all these instances. It must be conceded, I think, that the conclusions of the equity courts on this subject are somewhat arbitrary. In the very earliest period of equity jurisprudence, before doctrines had been fully developed and defined, the jurisdiction was undoubtedly understood as embracing every kind of case in which an unexpected result had been produced by accident,— every kind of misfortune; and the rule is even laid down in this manner by Lord Coke.[1] It is now the firmly settled doctrine, with respect to many legal obligations, that there is no equitable jurisdiction to relieve parties from their non-performance caused by accident in its ordinary and popular meaning. The following are the important instances in which the jurisdiction does not exist or will not be exercised.

§ 826. Contracts.— As a general rule, where the obligation arises from an express contract created by the stipulations of the parties, and a non-performance is wholly the result of accident, or a party without fault has been accidentally prevented from completing the execution of the agreement, and deriving full benefits therefrom, in either case equity does not exercise its jurisdiction to give him any relief, whether by way of defense against the enforcement of the obligation, or by way of affirmative remedy. The exception is confined to

1 4 Inst. 84: "Accident, as when a servant of an obligor, mortgagor, etc., is sent to pay the money *on the day*, and he is robbed, remedy is to be had in this court against the forfeiture." This statement by Lord Coke is probably due, in great measure, to his ignorance of equity. A case in the Introduction to the Calendars of Proceedings in Chancery (vol. 1, p. cxlii.) illustrates the early view of the jurisdiction. A B had entered into a bond, with a heavy penalty, to repair certain river banks near the town of Stratford-at-Bow within a specified time. He had been prevented from completing the contract within the required time by sudden and unexpected floods; and the obligee in the bond had sued him at law to recover the penalty. He thereupon filed a bill in chancery to restrain the action at law, and to be relieved from the consequences of the accident.

agreements providing for a penalty or a forfeiture, in which the jurisdiction to relieve is settled within defined and narrow limits.[1]

§ 827. Supplying Lost Records.— It has been held that there is no jurisdiction in equity to supply or establish the records of a court of law which have been lost or accidentally destroyed.[1 a] It seems, however, that a court of equity may, by a suit between the persons interested, confirm the title of a party, vest it in him by decree, and grant

§ 826, [1] This doctrine may be illustrated by a simple supposed case. If A has contracted to build a house by a certain day named, and in the course of completing the agreement has collected a quantity of materials all prepared and necessary for the building, and all these materials are, without A's fault, by a mere accident, — a stroke of lightning and consequent fire, — destroyed, so that it becomes physically impossible to replace them and to finish the house within the specified time, there is no jurisdiction in equity to relieve A in any manner from the liability caused by the non-performance of his contract. Courts of equity, as well as courts of law, say that parties must guard against the possible effect of such misfortunes by express stipulations inserted in their agreements. Among the illustrations of this doctrine, the most frequent are covenants by lessees to pay rent, to keep the buildings in repair, and the like; if the premises are consumed by accidental fire, or destroyed by other inevitable accident, the lessee is not relieved from the obligation of his covenant at law or in equity: Bullock v. Dommitt, 6 Term Rep. 650; Brecknock Can. Co. v. Pritchard, 6 Term Rep. 750; Belfour v. Weston, 1 Term Rep. 310; Pym v. Blackbourn, 3 Ves. 34, 38; Fowler v. Bott, 6 Mass. 63; Hallett v. Wylie, 3 Johns. 44; 3 Am. Dec. 457; Wood v. Hubbell, 10 N. Y. 479; 5 Barb. 601. This does not at all interfere with the jurisdiction which *may* exist to relieve the lessee from a forfeiture of his estate by the non-performance of his covenant. See *ante*, vol. 1, §§ 453, 454. The same doctrine applies to other kinds of contracts, although both parties may be wholly and equally free from blame. Illustrations: Agreements for the sale and purchase of land, where buildings thereon had been accidentally burned: Brewer v. Herbert, 30 Md. 301; 96 Am. Dec. 582; McKecknie v. Sterling, 48 Barb. 330, 335; but see Smith v. McCluskey, 45 Barb. 610, 613; agreements the performance of which is prevented by the death of a person upon whose act the performance depended: Blundell v. Brettargh, 17 Ves. 232, 240; White v. Nutts, 1 P. Wms. 61; Mortimer v. Capper, 1 Brown Ch. 156.

§ 827, [1] Keen v. Jordan, 13 Fla. 327, 333–335; Clingman v. Hopkie, 78 Ill. 152 (records of a justice's court).

(a) This section is cited to this effect in Welch v. Smith, 65 Miss. 394, 4 South. 340. This section is also cited in Bohart v. Chamberlain, 99 Mo. 622, 13 S. W. 85; Sharon v. Tucker, 144 U. S. 542, 12 Sup. Ct. 720.

him all needed relief, when the records of a court ordering a judicial sale upon which that title depends have been lost.[2]

§ 828. **Other Instances in Which the Jurisdiction is not Exercised.**— The jurisdiction will not be exercised on behalf of a party when the accident is the result of his own culpable negligence or fault.[1] Nor will the jurisdiction ever be exercised on behalf of a person who has not a vested right, but whose only claim is a mere expectancy or hope resting upon the volition or discretion of another. As, for example, if a testator was prevented by pure accident from making an intended bequest in favor of A, equity has no jurisdiction to relieve A from the disappointment.[2]

§ 829. **Parties against Whom the Jurisdiction is not Exercised.** — There are also limitations with respect to the situation of the parties against whom the jurisdiction is invoked. It will not be exercised in behalf of any person against a *bona fide* purchaser for a valuable consideration and without notice.[1] And generally, the jurisdiction will not be exercised against a party who has an equal equity, and is equally entitled to protection with the one who seeks to be relieved from the effects of an accident.[2]

§ 827, [2] Garrett v. Lynch, 45 Ala. 204.

§ 828, [1] Ex parte Greenway, 6 Ves. 812; Penny v. Martin, 4 Johns. Ch. 566, 569; Marine Ins. Co. v. Hodgson, 7 Cranch, 336; Barnet v. Turnp. Co., 15 Vt. 757. For cases where the courts refuse to relieve from forfeiture caused by the negligence or fault of the party himself, see vol. 1, § 452. See, however, Chase v. Barrett, 4 Paige, 148, with respect to an agreement the fulfillment of which, according to the intention of the parties, is prevented by the act of God.

§ 828, [2] Whitton v. Russell, 1 Atk. 448. For the same reason a court of equity cannot relieve by supplying the total non-execution of an ordinary power, no matter how accidental:[a] Tollet v. Tollet, 2 P. Wms. 489; Pierson v. Garnet, 2 Brown Ch. 38, 226; Harding v. Glyn, 1 Atk. 469; Brown v. Higgs, 8 Ves. 561. If the power is accompanied with a trust, so that its execution is a matter of obligation, equity may relieve against its non-execution, as in the case of any other obligatory trust.[b]

§ 829, [1] See *ante*, § 776, and cases cited.

§ 829, [2] Weal v. Lower, 1 Eq. Cas. Abr. 266; Powell v. Powell, Prec. Ch. 278; Jenkins v. Kemis, 1 Ch. 103; 1 Fonblanque's Equity, bk. 1, c. 4, sec. 25, and notes.

(a) See, also, § 590. (b) See § 1002.

§ 830. **Particular Instances of the Jurisdiction.**— I pass now to the affirmative side of the subject, and briefly describe those cases in which a jurisdiction occasioned by accident exists and is exercised. It will be found by examining and comparing these instances, that in all of them the party in whose behalf the jurisdiction is exercised has an unmistakable right to relief, an equity intrinsically superior to that of his adversary, and unaffected by his own negligence or other fault, and that the relief to which he was entitled could not be adequately conferred by courts of law, at the time when the equitable jurisdiction was first established. The following are the important examples of this jurisdiction.

§ 831. **1. Suits on Lost Instruments.**— It has long been settled that courts of equity have jurisdiction of suits brought to recover the amount due on lost bonds and other sealed instruments. The original grounds of this jurisdiction were two. In the first place, by the common-law pleading and procedure, *profert* of the sealed instrument was necessary in an action at law thereon; and as no *profert* was possible when the writing was lost, the action could not be maintained. *Profert* was never necessary in a suit in equity. In the second place, the court of equity could require an indemnity from the plaintiff, and could by its decree adjust the rights of the two litigants, by securing and indemnifying the defendant against all further liability and harm,— a power which was not possessed by the courts of law. In order to protect the defendant in this manner, the rule became settled that in all suits praying for relief, and not *merely* for a discovery,— that is, in all suits where a recovery of the amount due was sought,— the plaintiff must make an affidavit of the loss accompanying his bill of complaint, and must offer indemnity. The fact that the common-law requisite of a *profert* has long been abolished, and that actions at law may now be maintained on sealed instru-

ments, has not theoretically affected the equitable jurisdiction.[1] [a]

§ 832. **On Lost Unsealed Instruments.**[a]— Where a negotiable bill, note, or check, whether payable to bearer, indorsed in blank, or not indorsed, is lost before maturity, it is held in England that no action at law can be maintained upon it by the real owner, and that his remedy is in equity.[1] According to these decisions, the only jurisdiction in such case was that in equity prior to the modern legislation which permitted actions in courts of law. Without inquiring whether this view of the jurisdiction at law be correct, the jurisdiction in equity of suits brought by the real owner to recover the amount due on lost negotiable instruments has been long and firmly settled upon the ground of the indemnity which can be given by a court of equity to the defendant, and which is a necessary feature of such suits. An offer of indemnity by the plaintiff is therefore required, as the general rule; but even without it a recovery may be had, since the defendant can always be protected by the provisions of the decree making a recovery conditional upon

§ 831, [1] Walmsley v. Child, 1 Ves. Sr. 341, 344; Kemp v. Pryor, 7 Ves. 237, 249, 250; East India Co. v. Boddam, 9 Ves. 464, 466–469; Ex parte Greenway, 6 Ves. 812, 813; Toulmin v. Price, 5 Ves. 235, 238; Atkinson v. Leonard, 3 Brown Ch. 218, 224; England v. Tredegar, L. R. 1 Eq. 344; Patton v. Campbell, 70 Ill. 72; Howe v. Taylor, 6 Or. 284, 291; Allen v. Smith, 29 Ark. 74; Hickman v. Painter, 11 W. Va. 386; Force v. City of Elizabeth, 27 N. J. Eq. 408; Donaldson v. Williams, 50 Mo. 407; Livingston v. Livingston, 4 Johns. Ch. 294; 8 Am. Dec. 562; Thornton v. Stewart, 7 Leigh, 128; and see Hudspeth v. Thomason, 46 Ala. 470; Lawrence v. Lawrence, 42 N. H. 109.

§ 832, [1] Hansard v. Robinson, 7 Barn. & C. 90; Crowe v. Clay, 9 Ex. 604; Ramuz v. Crowe, 1 Ex. 167.

§ 831, (a) This section is cited in Bohart v. Chamberlain, 99 Mo. 622, 13 S. W. 85; Security Sav. & Loan Ass'n v. Buchanan, 66 Fed. 799, 14 C. C. A. 97, 31 U. S. App. 244. See, also, Griffin v. Fries, 23 Fla. 173, 2 South. 266, 11 Am. St. Rep. 351; Reeves v. Morgan, 48 N. J. Eq. 415, 21 Atl. 1040; Lyttle v. Cozad, 21 W. Va. 183.

§ 832, (a) This section is cited in Security Sav. & Loan Ass'n v. Buchanan, 66 Fed. 799, 14 C. C. A. 97, 31 U. S. App. 244; Moore v. Durnam, 63 N. J. Eq. 96, 51 Atl. 449.

his being fully indemnified.[2 b] Able judges have denied that the equitable jurisdiction extends to suits upon non-negotiable instruments and other unsealed contracts, since an action at law could always be maintained, and no indemnity was necessary.[3] The jurisdiction is sustained, however, by the decided weight of authority in suits upon lost non-negotiable instruments and simple contracts,[c] as well as in suits upon negotiable and sealed instruments. The reason seems to be that the remedy at law is not adequate; a court of equity alone can fully protect the defendant by its decree from all liabilities which *may* arise.[4 d] It has been held that the equitable jurisdiction does not extend to *destroyed* bills, notes, and other contracts, because the remedy at law was always adequate.[5] All these instances of suits upon lost contracts plainly belong to the *concurrent* jurisdiction of equity, because the plaintiff's primary right of contract which is the foundation of his cause of action is purely

2 Walmsley v. Child, 1 Ves. Sr. 341, 344, 345; Glynn v. Bank of England, 2 Ves. Sr. 281; Bromley v. Holland, 7 Ves. 3, 19–21; Mossop v. Eadon, 16 Ves. 430, 433, 434; Savannah Nat. Bank v. Haskins, 101 Mass. 370; 3 Am. Rep. 373.

3 See Mossop v. Eadon, 16 Ves. 430, 433, 434.

4 Macartney v. Graham, 2 Sim. 285; Hardeman v. Battersby, 53 Ga. 36, 38 (suit on a lost warehouseman's receipt); Hickman v. Painter, 11 W. Va. 386; Allen v. Smith, 29 Ark. 74; Force v. City of Elizabeth, 27 N. J. Eq. 408.

5 Wright v. Lord Maidstone, 1 Kay & J. 701, 708, per Page Wood, V. C. It may be doubted whether the American courts have generally followed this distinction: See the American cases cited *ante*, under this paragraph.

(b) City of Bloomington v. Smith, 123 Ind. 41, 23 N. E. 972, 18 Am. St. Rep. 310.

(c) The doctrine cannot be extended to authorize a suit to set up and establish a mere lost piece of written evidence upon which, with other proof, the complainant seeks to charge the defendant with a tort: Security Sav. & Loan Ass'n v. Buchanan, 66 Fed. 799, 14 C. C. A. 97, 31 U. S. App. 244

(d) This section cited to this effect in Moore v. Durnam, 63 N. J. Eq. 96, 51 Atl. 449. See, also, Reeves v. Morgan, 48 N. J. Eq. 415, 21 Atl. 1040. It has been held that equity will compel the issuance of a paid-up life insurance policy, although the original policy has been stolen, and insured is unable to surrender it in accordance with the condition therein contained: Wilcox v. Equitable Life Assur. Soc., 173 N. Y. 50, 65 N. E. 857, 93 Am. St. Rep. 579.

legal, and his remedy is legal, being the ordinary judgment for the recovery of money.[6] Although this particular jurisdiction is theoretically unchanged, yet the cases under it are very few. Actions on lost negotiable instruments and other contracts are ordinarily brought at law, in pursuance of modern permissive statutes. This is especially true in the states which have adopted the reformed procedure; since the action, even if not professing to be based upon the statute, would be subject to the rules which govern all legal actions for the recovery of money; it would not in any way be distinguished from actions confessedly legal.

§ 833. 2. Accidental Forfeitures.— It was shown in a former chapter that the jurisdiction to relieve from pecuniary penalties is well settled and general;[1] and that it also extends to some, though not to all, cases of forfeiture as dis-

[6] Equity does not acquire jurisdiction *merely* because a deed of land has been lost, since in a legal action the deed and its contents could always be proved. To give rise to the equitable jurisdiction on the occasion of a lost deed, it must appear that there is no remedy at all, or else no adequate remedy at law: Whitfield v. Fausset, 1 Ves. Sr. 387, 392. If the owner of land is in possession, and has lost his title deed, there is no remedy at all at law, for ejectment clearly will not lie. Equity, then, has jurisdiction by a suit in the nature of an action to quiet title, and can establish the owner's title and possession:[e] Dalston v. Coatsworth, 1 P. Wms. 731. The same kind of suit seems to be proper, and for the same reasons, when the records of the owner's title are lost: See Garrett v. Lynch, 45 Ala. 204. When the owner is out of possession, the action of ejectment will ordinarily furnish an adequate remedy. There may, however, be special circumstances, and other equities besides that arising from the loss of a title deed, which furnish a sufficient ground for the cognizance of a court of equity in establishing the title and decreeing possession. Something more than a loss of deeds would be necessary: Dormer v. Fortescue, 3 Atk. 124, 132; Whitfield v. Fausset, 1 Ves. Sr. 387, 392.

[1] See vol. 1, §§ 432–460. It has sometimes been said by writers that this entire jurisdiction over penalties and forfeitures is based upon accident. It may be true that, in the earliest period of equity, the chancellors referred cases of relief against penalties to the general head of accident; but to explain the whole jurisdiction as now administered, by treating it as based on accident, is to disregard the plain facts and meaning of words.

(e) Simmons Creek Coal Co. v. Doran, 142 U. S. 417, 12 Sup. Ct. 239; Lancy v. Randlett, 80 Me. 169, 13 Atl. 686, 6 Am. St. Rep. 169 (but the bill must show that the loss was without plaintiff's fault).

tinguished from penalties. It is, however, well settled, as a branch of the jurisdiction occasioned by accident, that, although the agreement is not wholly pecuniary, and is not one measured by pecuniary compensation, still if the party bound by it has been prevented from an exact fulfillment, so that a forfeiture is thereby incurred, by unavoidable accident, without his own negligence or fault, a court of equity will interpose and relieve him from the forfeiture so caused, upon his making compensation, if necessary, or doing everything else within his power to satisfy the equitable rights of the other party.[2] [a] This jurisdiction may be exercised in any manner, by any form of suit, and by granting any kind of relief made necessary by the circumstances of the particular case. Thus the relief may be conferred by a suit to enjoin the prosecution of an action at law brought to enforce the forfeiture, or to enjoin proceedings on the judgment recovered in such an action, or to set aside the forfeiture itself, or to redeem from it, or to obtain several of these remedies

2 See vol. 1, § 451; Hill v. Barclay, 18 Ves. 56, 58, 62, per Lord Eldon; Eaton v. Lyon, 3 Ves. 690, 693, per Lord Alvanley; Hannam v. South London W. Co., 2 Mer. 61; Bamford v. Creasy, 3 Giff. 675; Wing v. Harvey, 5 De Gex, M. & G. 265; Duke of Beaufort v. Neeld, 12 Clarke & F. 248; Bridges v. Longman, 24 Beav. 27; Meek v. Carter, 6 Week. Rep. 852; Wheeler v. Conn. Mutual L. Ins. Co., 82 N. Y. 543, 559; 37 Am. Rep. 594; Giles v. Austin, 62 N. Y. 486; Witbeck v. Van Rensselaer, 64 N. Y. 27; 2 Hun, 55; 4 Thomp. & C. 282; Palmer v. Ford, 70 Ill. 369; Orr v. Zimmerman, 63 Mo. 72; Eveleth v. Little, 16 Me. 374, 377; Atkins v. Rison, 25 Ark. 138; Bostwick v. Stiles, 35 Conn. 195. In Whelan v. Reilly, 61 Mo. 565, a deed of trust, given in place of a mortgage to secure a debt, provided that if the interest was not punctually paid as it became due, the whole principal should be due and payable, and the trustee might sell. The debtor made default in paying a portion of the interest when it fell due, and the trustee thereupon took the proper steps to sell, and did sell in the regular manner. Before the sale, the debtor tendered the amount of interest due and costs, which the trustee refused to accept, but went on with the sale. Held, upon these facts, that the debtor could maintain a suit in equity to be relieved from the forfeiture, and to set aside the sale. This decision should be considered in connection with the discussion in § 439 (vol. 1), and the cases there cited. It seems to be opposed to the general tendency of those cases.

(a) This section is cited in Kopper v. Dyer, 59 Vt. 477, 9 Atl. 4. 59 Am. Rep. 742.

in combination. In all those states which have adopted the reformed procedure, the jurisdiction may be exercised and the relief obtained, as it seems to me upon every sound principle of construction, by means of an equitable defense interposed in a legal action brought to enforce the forfeiture.[3]

§ 834. 3. Defective Execution of Powers.— This subject has already been treated of, and the grounds, extent, and limitations of the peculiar doctrine have been explained.[1] It is unnecessary to repeat the observations there made. It is well settled, as a general rule, that the non-execution — the entire failure to execute — of a mere power not a trust will not be aided in equity.[2] When, however, the party clothed with such a mere power, by a deed, settlement, or will, has attempted and begun to execute it, and the execution is defective through accident or mistake, or where he has made an agreement to execute it which is regarded as a kind of defective execution, equity may interpose its aid by decreeing a complete and perfect execution.[2] As has already been explained, this extraordinary jurisdiction is only exercised on behalf of classes of persons who are considered as possessing a certain meritorious or moral consideration, and against a party who has no equally meritorious equity. Its operation is confined to purchasers,

§ 833, [3] See Giles v. Austin, 62 N. Y. 486; and other American cases cited in the last note; also see Miesell v. Globe Ins. Co., 76 N. Y. 115, 120, and Shaw v. Republic Ins. Co., 69 N. Y. 286, which hold that when a life policy becomes accidentally forfeited, the holder need not at once bring an equity suit for the purpose of re-establishing it; but may tender the premiums as they fall due, and then sue on it at law when the person whose life is assured dies.

§ 834, [1] See *ante*, §§ 589, 590.

§ 834, [2] Tollet v. Tollet, 2 P. Wms. 489; I Lead. Cas. Eq., 4th Am. ed., 365, and notes; Arundell v. Phillpot, 2 Vern. 69; Bull v. Vardy, 1 Ves. 270; Johnson v. Cushing, 15 N. H. 298; 41 Am. Dec. 694; Lippencott v. Stokes, 6 N. J. Eq. 122; Howard v. Carpenter, 11 Md. 259; Lines v. Darden, 5 Fla. 51; Mitchell v. Denson, 29 Ala. 327; 65 Am. Dec. 403; Wilkinson v. Getty, 13 Iowa, 157; 81 Am. Dec. 428.

§ 834, [3] Tollet v. Tollet, 2 P. Wms. 489; 1 Lead. Cas. Eq., 4th Am. ed., 365, and notes; Chapman v. Gibson, 3 Brown Ch. 229; Shannon v. Bradstreet, 1 Schoales & L. 52, 63; Sayer v. Sayer, 7 Hare, 377; and see *ante*, §§ 589, 590.

including mortgagees, lessees, and creditors, wives, legitimate children, and those to whom the party executing stands *in loco parentis,* and charities; it does not include husbands, illegitimate children, distant relatives, nor volunteers.[4][a] As to the defects in the execution of a power which equity will thus aid and complete in proper cases, they must be in matters of form, and not of the very substance and essence of the power,— such as the want of a seal, or of witnesses, or of signatures, or omissions and imperfections in the limitations of the property.[5] The doctrine is confined to powers created by the voluntary act of persons in wills,

[4] See *ante,* § 589; Tollet v. Tollet, 1 Lead. Cas. Eq. 365, and notes; Fothergill v. Fothergill, Freem. Ch. 256; Barker v. Hill, 2 Ch. Rep. 113; Reid v. Shergold, 10 Ves. 370; Pollard v. Greenvil, 1 Cas. Ch. 10; Wilkes v. Holmes, 9 Mod. 485; Clifford v. Burlington, 2 Vern. 379; Sneed v. Sneed, Amb. 64; Bruce v. Bruce, L. R. 11 Eq. 371; Hervey v. Hervey, 1 Atk. 561; Innes v. Sayer, 7 Hare, 377; 3 Macn. & G. 606; Attorney-General v. Sibthorp, 2 Russ. & M. 107; Ellison v. Ellison, 6 Ves. 656; Watt v. Watt, 3 Ves. 244; Tudor v. Anson, 2 Ves. Sr. 582; Watts v. Bullas, 1 P. Wms. 60; Affleck v. Affleck, 3 Smale & G. 394; In re Dyke's Estate, L. R. 7 Eq. 337; Dowell v. Dew, 1 Younge & C. 345; Hughes v. Wells, 9 Hare, 749; Shannon v. Bradstreet, 1 Schoales & L. 52; Taylor v. Wheeler, 2 Vern. 564; Campbell v. Leach, Amb. 740; Bixbey v. Eley, 2 Brown Ch. 325; Medwin v. Sandham, 3 Swanst. 685; Proby v. Landor, 28 Beav. 504; Beatty v. Clark, 20 Cal. 11; Love v. Sierra etc. Co., 32 Cal. 639, 653; Thorp v. McCullum, 1 Gilm. 614; Hout v. Hout, 20 Ohio St. 119; Schenck v. Ellingwood, 3 Edw. Ch. 175; Pepper's Will, 1 Pars. Cas. 436, 446; Porter v. Turner, 3 Serg. & R. 108, 114; Dennison v. Goehring, 7 Pa. St. 175; 47 Am. Dec. 505; Huss v. Morris, 63 Pa. St. 367.

[5] Tollet v. Tollet, 1 Lead. Cas. Eq. 365, and notes. Where a power was required to be executed by means of a deed or other instrument *inter vivos,* an execution of it by a will is a defect which equity will aid: Tollet v. Tollet, 1 Lead. Cas. Eq. 365, and notes; but, conversely, when it was required to be executed only by a will, an execution by an absolute deed will not be aided:[b] Reid v. Shergold, 10 Ves. 370; Adney v. Field Amb. 654. The defects which equity may aid consist either of the use of an inappropriate instrument, although it is duly executed, as in Tollet v. Tollet, 1 Lead. Cas. Eq. 365, and notes; In re Dyke's Estate, L. R. 7 Eq. 337; Garth v. Townsend, L. R. 7 Eq. 220; or in the improper and insufficient mode of executing an appropriate kind of instrument, — as, for example, omitting a seal: Morse v. Martin, 34 Beav. 500. See Piatt v. McCullough, 1 McLean, 69, where relief was refused

(a) This section is cited in American Freehold L. M. Co. v. Walker, 31 Fed. 103; Ellison v. Branstrator, 153 Ind. 146, 54 N. E. 433. See, also, Freeman v. Eacho, 79 Va. 43.

(b) In re Lawley, [1902] 2 Ch. 673. 799.

deeds, and settlements; it does not extend to those created and regulated by statute. The defective execution of statutory powers, in the failure to comply with the prescribed requisites, cannot be aided by equity.[6] [d]

§ 835. **Powers in Trust will be Enforced.**— The general rule that equity refuses to aid the non-execution of powers, and only corrects their defective execution, relates only to bare, naked, or mere powers; it does not apply to powers coupled with a trust. Mere powers create no obligation resting on the donee, nor any right in a person who may be benefited by their execution. Powers in trust, or coupled with a trust, like any other trust, are imperative; they create a duty in the trustee, and a right in the beneficiary. Equity will not suffer this right of the beneficiary to be defeated, either by accident or by designs of the trustee, and will therefore carry into effect the intention of the donor, and give all needed relief to the beneficiary, whenever there has been a total or a partial failure to execute the power according to the terms of the trust.[1] [a]

on the ground that the defect was inherent, and not merely formal. In order to admit the exercise of the jurisdiction and to grant relief, there must be something more than a mere verbal promise to execute the power; there must always be some writing attempting or showing an intention to execute:[c] Carter v. Carter, Mos. 365; Shannon v. Bradstreet, 1 Schoales & L. 52; Innes v. Sayer, 7 Hare, 377; Dowell v. Dew, 1 Younge & C. 345; Vernon v. Vernon, Amb. 3; Campbell v. Leach, Amb. 740; Wilson v. Piggott, 2 Ves. 351; Mitchell v. Denson, 29 Ala. 327; 65 Am. Dec. 403; Barr v. Hatch, 3 Ohio, 527. See also, on the general doctrine, Bradish v. Gibbs, 3 Johns. Ch. 523, 550; Long v. Hewitt, 44 Iowa, 363; Porter v. Turner, 3 Serg. & R. 108, 111, 114; Bakewell v. Ogden, 2 Bush, 265; Stewart v. Stokes, 33 Ala. 494; 73 Am. Dec. 429; Kearney v. Vaughan, 50 Mo. 284.

[6] Smith v. Bowes, 38 Md. 463; Earl of Darlington v. Pulteney, Cowp. 260; and see Stewart v. Stokes, 33 Ala. 494; 73 Am. Dec. 429; Gridley's Heirs v. Phillips, 5 Kan. 349; Kearney v. Vaughan, 50 Mo. 284.

[1] Warneford v. Thompson, 3 Ves. 513; Brown v. Higgs, 8 Ves. 561, 574; Gibbs v. Marsh, 2 Met. 243, 251; Withers v. Yeadon, 1 Rich. Eq. 324, 329; Norcum v. D'Œnch, 17 Mo. 98; Thorp v. McCullum, 1 Gilm. 614, 625, 630.

(c) American Freehold Land Mortgage Co. v. Walker, 31 Fed. 103; Freeman v. Eacho, 79 Va. 43.

(d) The text is quoted in Williams v. Cudd, 26 S. C. 213, 2 S. E. 14, 4 Am. St. Rep. 714.

(a) See also § 1002.

§ 836. 4. Judgments at Law.— Accident is also one of the grounds for the exercise of the most important jurisdiction with respect to actions and judgments at law. Where the defendant in an action at law has a good defense on the merits, which he is prevented by accident from setting up or making available without any negligence or inattention on his part, and a judgment is recovered against him, equity will exercise its jurisdiction on his behalf by enjoining further proceedings to enforce the judgment, or by setting it aside so that a new trial can be had on the merits.[1] [a] In many states, especially in those which have adopted the reformed procedure, this particular relief is usually obtained by means of a motion for a new trial, and the necessary occasions for a resort to equity have been lessened; the equitable jurisdiction, however, has not been abrogated even in those states, and it is constantly invoked in the other commonwealths.

§ 837. 5. Other Special Instances.[a]— There are other specific instances of the jurisdiction which must be referred to accident as their occasion. It will be sufficient to mention them in the briefest manner, and it will be seen that they all fall under the general principle stated in the introductory paragraphs of this section. An executor or administrator will be relieved in equity from many liabilities arising from unforeseen and unexpected circumstances in the nature of accidents, where he has acted in good faith and with reason-

1 Cairo etc. R. R. v. Titus, 27 N. J. Eq. 102; Darling v. Baltimore, 51 Md. 1; Alford v. Moore, 15 W. Va. 597; Barber v. Rukeyser, 39 Wis. 590; Thomason v. Fannin, 54 Ga. 361; Grubb v. Kolb, 55 Ga. 630; Robinson v. Wheeler, 51 N. H. 384; Craft v. Thompson, 51 N. H. 536; Holland v. Trotter, 22 Gratt. 136; N. Y. etc. R. R. v. Haws, 56 N. Y. 175; Richmond Enquirer v. Robinson, 24 Gratt. 548; Shields v. McClung, 6 W. Va. 79. See Earl of Oxford's Case, 1 Ch. Rep. 1; 2 Lead. Cas. Eq., 4th Am. ed., 1291, and notes.

§ 836, (a) This section is cited in Hayes v. U. S. Phonograph Co., (N. J. Eq.) 55 Atl. 84; Lothrop v. Duffield, (Mich.) 96 N. W. 577. See, also, Buchanan v. Griggs, 18 Neb. 121, 24 N. W. 452 (defense abandoned by mistake). See, also, *post*, § 1364.

§ 837, (a) This section is cited in Lothrop v. Duffield, (Mich.) 96 N. W. 577.

able care, although no remedy was given by the common law. Thus where an executor or administrator has paid debts or legacies in full, supposing the assets were sufficient, and it turns out that there is a deficiency of assets, equity will grant the remedies necessary to relieve him from the legal liability.[1] In another class of cases, where the consideration contracted to be rendered in return for the payment of a large sum of money entirely fails from accident, and where the dispositions of the principal or income of public securities directed by will to be made among successive beneficiaries become impossible from accident, equity has interposed for the purpose of working substantial justice.[2] Again, if a party to a suit in equity is obliged to make a tender, and, through accident or mistake, he tenders less

1 Edwards v. Freeman, 2 P. Wms. 435, 447; Hawkins v. Day, Amb. 160. See also, as further illustrations, Jones v. Lewis, 2 Ves. Sr. 240; Clough v. Bond, 3 Mylne & C. 490; Pooley v. Ray, 1 P. Wms. 355. As to the relief given by equity to an unpaid legatee against other legatees who have been paid in full, when there was an original deficiency of assets, see Orr v. Kaines, 2 Ves. Sr. 194; Moore v. Moore, 2 Ves. Sr. 596, 600; Noel v. Robinson, 1 Vern. 90, 94; Edwards v. Freeman, 2 P. Wms. 435, 447; Walcot v. Hall, 2 Brown Ch. 305. The specific instances mentioned in the text and note have certainly become obsolete or been abrogated in very many of the states. The whole subject of administration has, to a great extent, been regulated by statute and committed to the control of probate courts. These statutes differ in their details, but most, if not all, of them define the rights and liabilities of administrators, executors, legatees, and creditors, and prescribe modes of proceeding, under the circumstances above mentioned in the text, viz., where some legatees or creditors have been paid in full, or more than their just proportion, and there turns out to be a deficiency of assets.

2 As an illustration of the first case: If a minor is bound as an apprentice, and pays or agrees to pay a large premium, and the master becomes bankrupt before the apprenticeship has expired, equity will relieve the disappointed apprentice by apportioning the premium: Hale v. Webb, 2 Brown Ch. 78. As illustrations of the second case: If an annuity is directed by a will to be secured by an investment in public stock, and an investment is made sufficient at the time for the income to produce the amount of the annuity, and afterwards the stock is reduced by statute so that its income becomes insufficient, equity will relieve the annuitant by directing the deficiency to be made up by the residuary legatees: Davis v. Wattier, 1 Sim. & St. 463; May v. Bennett, 1 Russ. 370; for another illustration, see Hachett v. Pattle, 6 Madd. 4.

than the required amount, the relief to which he is entitled will still be conferred; the decree will be so shaped as to be conditional upon his paying the proper sum.[3] Other instances which are partly referable to accident are mentioned in the foot-note.[4]

SECTION II.

MISTAKE.

ANALYSIS.

§ 838. Origin and purpose of this jurisdiction.
§ 839. I. Definition.
§§ 840–856. II. Various kinds of mistakes which furnish an occasion for relief.
§§ 841–851. *First.* Mistakes of law.
§ 842. The general rule and its limitations.
§ 843. Mistake as to the legal import or effect of a transaction.
§§ 844–851. Particular instances in which relief will or will not be granted.
§ 845. Reformation of an instrument on account of a mistake of law.
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§ 847. Mistake of law accompanied with inequitable conduct of the other party.
§ 848. Same: between parties in relations of trust.
§ 849. Relief where a party is mistaken as to his own existing legal rights, interests, or relations.
§ 850. Compromises and voluntary settlements made upon a mistake as to legal rights.
§ 851. Payments of money under a mistake of law.

[3] Clark v. Drake, 63 Me. 354.

[4] The well-settled jurisdiction for the adjustment of disputed boundaries between adjoining proprietors rests partly upon the occasion of accident; Wake v. Conyers, 1 Eden, 331; 2 Cox, 360; Miller v. Warmington, 1 Jacob & W. 484; Perry v. Pratt, 31 Conn. 433; De Veney v. Gallagher, 20 N. J. Eq. 33; Norris's Appeal, 64 Pa. St. 275; Tillmes v. Marsh, 67 Pa. St. 507; Wetherbee v. Dunn, 36 Cal. 249. This subject is discussed in a subsequent chapter. Where a note or bill of exchange is transferred and intended to be indorsed, but through accident or mistake the indorsement is omitted, equity will compel the transferrer, or, in case of his death, his executor or administrator, to affix his indorsement, at the suit of the holder. This is in fact a simple case of reformation and re-execution. The holder is an equitable assignee, and is entitled to obtain a full legal right and title: Watkins v. Maule, 2 Jacob & W. 237, 242.

§§ 852–856. *Second.* Mistakes of fact.
§ 853. How mistakes of fact may occur.
§ 854. In what mistakes of fact may consist.
§ 855. Compromises and speculative contracts.
§ 856. Requisites to relief: mistake must be material and free from culpable negligence.
§§ 857–867. III. How mistake may be shown: when by parol evidence.
§ 858. Parol evidence in general in cases of mistake, fraud, or surprise.
§ 859. In suits for a reformation or cancellation: character and effect of the evidence.
§ 860. Parol evidence in defense in suits for a specific performance.
§ 861. Parol evidence of mistake on the plaintiff's part in suits for a specific performance: English rule.
§ 862. Same: American rule: evidence admissible.
§ 863. Evidence of a parol variation which has been part performed.
§§ 864–867. Effect of the statute of frauds upon the use of parol evidence in equitable suits.
§ 865. Two classes of cases in which the use of parol evidence may be affected by the statute.
§ 866. General doctrine: parol evidence of mistake or fraud admissible in both these classes of cases.
§ 867. Glass v. Hulbert: examination of proposed limitations upon this general doctrine.
§§ 868–871. IV. Instances of equitable jurisdiction occasioned by mistake.
§ 868. When exercised by way of defense.
§ 869. By way of affirmative relief: recovery of money paid by mistake.
§ 870. Affirmative relief: reformation and cancellation.
§ 871. Conditions of fact which are occasions for affirmative relief.

§ 838. Origin and Purpose of This Jurisdiction.—From the time when jurisdiction was first formally delegated to the chancellor by the crown, mistake has played a most important part as the occasion of equitable rights and duties, and for the exercise of the jurisdiction in awarding equitable remedies. In the earlier periods, when the domains of the law courts and of the court of chancery were sharply discriminated, when the common-law judges were not influenced by equitable notions, this branch of equitable jurisprudence and jurisdiction consisted entirely in the means by which certain parties were prevented from holding and enjoying legal rights, and certain other parties were relieved from the burden of legal duties and liabilities, which had originated under a mistake, and which were complete

and unassailable at law. In the progress of time, as the common law became more and more conformed to equitable principles, the legal tribunals assumed a partial cognizance and gave a partial relief in cases involving mistake. All the *possible* modes in which the remedial jurisdiction occasioned by mistake can be exercised are the following: 1. Negatively, as a ground of defense either in actions at law or in suits in equity, to defeat an enforcement of and recovery upon either legal or equitable rights of action; 2. Affirmatively, as a ground for rescinding a transaction, and restoring the mistaken party to his original position by means of an appropriate legal action and a recovery therein of money or property; 3. Affirmatively, as a ground for the equitable relief of rescinding a transaction, or canceling an agreement or other written instrument; 4. Affirmatively, as a ground for the equitable relief of reforming or re-executing a written instrument. The final object of the present discussion is to ascertain when these various remedies may be obtained in equity; and incidentally to ascertain when and to what extent some of them may be conferred by courts of law. The discussion itself will be conducted under the following divisions: 1. Definition; 2. A statement of the various kinds of mistakes both of law and of fact which do or do not furnish an occasion for relief, with an examination of the equitable conception and the essential elements of a mistake in order that it may be a ground for the exercise of jurisdiction; 3. The mode of showing a mistake, and especially how far may parol evidence be resorted to for the purpose of showing mistakes in written instruments; 4. An enumeration of the instances and forms of equitable jurisdiction and reliefs occasioned by mistake.

§ 839. I. Definition.— It is very difficult to formulate a definition which shall contain the essential elements of the conception as distinguished from its effects, and which shall accurately discriminate between mistake and accident on the one side, and fraud and negligence on the other. The

definitions given by some American and English text-writers describe the effects of mistake,— the consequences resulting from it,— rather than its essential features.[1] It was shown in the preceding section that accident is an unexpected occurrence *external* to the party affected by it; and its operation is ordinarily to prevent that party from doing some act whereby he becomes subjected to a liability which would not otherwise have arisen. Mistake, on the other hand, is *internal;* it is a mental condition, a conception, a conviction of the understanding,— erroneous, indeed, but none the less a conviction,— which influences the will and leads to some outward physical manifestation. Its operation is ordinarily, though not always, affirmative,— the doing of some act which would not have been done in the absence of the particular conception or conviction which influenced the free action of the will.[2] Its essential prerequisite is *igno-*

[1] Thus Judge Story says: Mistake "is some unintentional *act*, or omission, or error, arising from ignorance, surprise, imposition, or misplaced confidence": Eq. Jur., sec. 110. His language is copied by Snell: Principles of Equity, 370; and by Kerr: Fraud and Mistake, 396. This definition is erroneous, as it seems to me, in two most important particulars: 1. It substitutes the consequences of the thing in place of the thing itself, — the act or omission done through mistake; 2. The language is so broad that it not only embraces in its very terms acts and omissions which are the results of fraud, but it fails to exclude those which are occasioned through negligence. The modern commentators upon the Roman law, who have generally investigated the nature of legal relations much more accurately and profoundly than the common-law writers, do not fall into this error. They correctly describe mistake as essentially a mental or intellectual condition interfering with the free operation of the will, and not as the acts or omissions produced by that condition. Mr. Haynes, in his lectures on equity, gives a definition which much more nearly embodies the true conception. He says (p. 80): "Mistake may be said to exist, in a legal sense, where a person, acting upon some erroneous conviction, either of law or of fact, executes some instrument or does some act which but for that erroneous conviction he would not have executed or done." He here correctly apprehends that the mental condition — the "erroneous conviction"— constitutes the mistake, and not the act done in pursuance of it.

[2] This analysis is not a mere matter of words. Upon the accurate notion of what is essential to the legal conception of mistake depends the answer to the question, When may a person be relieved from the consequences of his mistakes of law?

rance. It is distinguished from fraud, fraudulent representations, or fraudulent concealments by the absence of knowledge and intention, which in legal fraud are actually present, and in constructive fraud are theoretically present, as necessary elements. It is also distinguished from that inattention or absence of thought which are inherent in negligence. The erroneous conception or conviction of the understanding which constitutes the equitable notion of mistake has nothing in common with negligence; equity will not relieve a person from his erroneous acts or omissions resulting from his own negligence.[3] Mistake, therefore, within the meaning of equity, and as the occasion of jurisdiction, is an erroneous mental condition, conception, or conviction, induced by ignorance, misapprehension, or misunderstanding of the truth, but without negligence, and resulting in some act or omission done or suffered erroneously by one or both the parties to a transaction, but without its erroneous character being intended or known at the time. I add the two following definitions, which originally appeared in the proposed Civil Code of New York, and were thence adopted by the existing Civil Code of California, because they embody the essential notions which I have attempted to explain, and are both accurate and comprehensive: "Mistake of fact is a mistake not caused by the neglect of a legal duty on the part of the person making the mistake, and consisting in,— 1. An unconscious ignorance or forgetfulness of a fact, past or

[3] Leuty v. Hillas, 2 De Gex & J. 110, 121; Duke of Beaufort v. Neeld, 12 Clark & F. 248, 286; Wild v. Hillas, 28 L. J. Ch. 170; Gregory v. Wilson, 9 Hare, 683, 689; Drewry v. Barnes, 3 Russ. 94; Bateman v. Willoe, 1 Schoales & L. 201; Ware v. Harwood, 14 Ves. 28, 31; Stevens v. Praed, 2 Ves. 519; Stephenson v. Wilson, 2 Vern. 325; Trigge v. Lavallée, 15 Moore P. C. C. 270; Marquis of Breadalbane v. Marquis of Chandos, 2 Mylne & C. 711, 719; Henderson v. Cook, 4 Drew. 306; Diman v. Providence etc. R. R. Co., 5 R. I. 130; Western R. R. Co. v. Babcock, 6 Met. 346; Wood v. Patterson, 4 Md. Ch. 335; Kite v. Lumpkin, 40 Ga. 506; Lamb v. Harris, 8 Ga. 546; Capehart v. Mhoon, 5 Jones Eq. 178.

present, material to the contract;[a] or 2. Belief in the present existence of a thing material to the contract which does not exist, or in the past existence of such a thing which has not existed."[4] "Mistake of law constitutes a mistake only when it arises from,— 1. A misapprehension of the law by all parties, all supposing that they knew and understood it, and all making substantially the same mistake as to the law; or 2. A misapprehension of the law by one party, of which the others are aware at the time of contracting, but

[4] N. Y. Civil Code (proposed), sec. 762; Cal. Civil Code, sec. 1577. The authors of the New York code cite the following authorities in support of the material items of their definition: Introductory part. *Absence of neglect:* U. S. Bank v. Bank of Georgia, 10 Wheat. 333. Subd. 1. *Unconscious:* Kelly v. Solari, 9 Mees. & W. 54; McDaniels v. Bank of Rutland, 29 Vt. 230, 238; 70 Am. Dec. 406; Elwell v. Chamberlain, 4 Bosw. 320. *Ignorance:* Bell v. Gardiner, 4 Man. & G. 11; 4 Scott N. R. 621; Hore v. Becher, 12 Sim. 465; East India Co. v. Donald, 9 Ves. 275; East India Co. v. Neave, 5 Ves. 173; Cocking v. Pratt, 1 Ves. Sr. 400; Briggs v. Vanderbilt, 19 Barb. 222. *Forgetfulness:* Kelly v. Solari, 9 Mees. & W. 54; Lucas v. Worswick, 1 Moody & R. 293. *Fact past:* McCarthy v. Decaix, 2 Russ. & M. 614; Willan v. Willan, 16 Ves. 72; East I. Co. v. Donald, 9 Ves. 275; East I. Co. v. Neave, 5 Ves. 173; Durkin v. Cranston, 7 Johns. 442. *Fact present:* Broughton v. Hutt, 3 De Gex & J. 501; Colyer v. Clay, 7 Beav. 188; Hore v. Becher, 12 Sim. 465; Cocking v. Pratt, 1 Ves. Sr. 400; Huthmacher v. Harris's Adm'r, 38 Pa. St. 491. Subd. 2. *Thing which does not exist:* Hitchcock v. Giddings, 4 Price, 135; Hastie v. Couturier, 9 Ex. 102; 5 H. L. Cas. 673; Strickland v. Turner, 7 Ex. 208; Cochrane v. Willis, L. R. 1 Ch. 58; Rheel v. Hicks, 25 N. Y. 289; Ketchum v. Bank of Commerce, 19 N. Y. 499, 502; Belknap v. Sealey, 14 N. Y. 143; 67 Am. Dec. 120; Martin v. McCormick, 8 N. Y. 331, 335; Kip v. Monroe, 29 Barb. 579; Briggs v. Vanderbilt, 19 Barb. 222, 239; Gardner v. Mayor etc., 26 Barb. 423; Wheadon v. Olds, 20 Wend. 174; Mowatt v. Wright, 1 Wend. 355, 360; 19 Am. Dec. 508; Allen v. Mayor etc., 4 E. D. Smith, 404. *Thing which has not existed:* Martin v. McCormick, 8 N. Y. 331, 335. The same authors add: "The *dicta* found in some cases to the effect that a mistake in respect of matters as to which the party had 'means of knowledge' does not avoid a contract: See Mut. L. Ins. Co. v. Wager, 27 Barb. 354; Clarke v. Dutcher, 9 Cow. 674; Milnes v. Duncan, 6 Barn. & C. 671; are not sustained by the decisions: See Allen v. Mayor, 4 E. D. Smith, 404; Kelly v. Solari, 9 Mees. & W. 54; and have been finally overruled: Townsend v. Crowdy, 8 Com. B., N. S., 477; Bell v. Gardiner, 4 Man. & G. 11; Dails v. Lloyd, 12 Q. B. 531."

(a) This portion of the text is quoted in Kowalke v. Milwaukee E. R. & L. Co., 103 Wis. 472, 79 N. W. 762, 74 Am. St. Rep. 877.

which they do not rectify."[5] "Mistake of foreign law is a mistake of fact."[6b]

§ 840. II. Various Kinds of Mistakes Which Furnish an Occasion for Relief.— Under this most important head I purpose to examine more in detail the equitable conception of mistake; to ascertain its essential elements, in order that it may be the ground of any equitable interposition; and to describe the various kinds of mistakes, both of law and of fact, which do or do not furnish an occasion for relief. We are met at the outset by a natural line of division. A party may enter into a transaction altering his legal relations for the better or the worse, with full knowledge of all the facts connected therewith, but ignorant or mistaken concerning either the general law of the land governing the case, or concerning his own personal legal rights affected by or resulting from the transaction. On the other hand, he may be cognizant of the general law and of his own legal rights, but be ignorant or mistaken as to some material fact of the transaction which forms an important factor in determining his action. All possible mistakes are therefore sepa-

[5] N. Y. Civ. Code, sec. 763; Cal. Civ. Code, sec. 1588. The authors of the New York code cite, in support of this definition,— Subd. 1: Many v. Beekman Iron Co., 9 Paige, 188; Hall v. Reed, 2 Barb. Ch. 500; Pitcher v. Turin Plank Road Co., 10 Barb. 436; Wake v. Harrop, 6 Hurl. & N. 768. Subd. 2: Cooke v. Nathan, 16 Barb. 342. On the general subject of relief in equity from mistakes in law, they refer, in addition, to Stone v. Godfrey, 5 De Gex, M. & G. 76, 90; Broughton v. Hutt, 3 De Gex & J. 501; Evants v. Strode, 11 Ohio, 480; 38 Am. Dec. 744; Wheeler v. Smith, 9 How. 55; Champlin v. Laytin, 18 Wend. 407, 422; 31 Am. Dec. 382.

[6] N. Y. Civ. Code, sec. 764; Cal. Civ. Code, sec. 1579; citing McCormick v. Garnett, 5 De Gex, M. & G. 278; Leslie v. Baillie, 2 Younge & C. Ch. 91; Patterson v. Bloomer, 35 Conn. 57; 95 Am. Dec. 218; Haven v. Foster, 9 Pick. 112; 19 Am. Dec. 353; Bank of Chillicothe v. Dodge, 8 Barb. 233; Merchants' Bank v. Spalding, 12 Barb. 302. It should be added that the three definitions given in the text occur in the chapter of the codes which treats of the consent necesaary to the completion of a contract, so that they primarily relate to mistakes in contracts; they may be readily applied, however, to mistakes in any other transaction.

(b) Ellison v. Branstator, 153 Ind. 146, 54 N. E. 433.

rated into those of law and those of fact, although it is sometimes very difficult to ascertain in a particular instance whether the mistake is purely one of law, or is of law and of fact in combination. As the cases in which persons are relieved from their mistakes of law are somewhat exceptional, it will be convenient to examine them first in order.

§ 841. First. Mistakes of Law.[a]— It is very important to form an accurate notion of the various conditions included within this general term; much confusion and apparent conflict of opinion have resulted from a failure to recognize these distinctions. Mistake of law may be an ignorance or error with respect to some general rules of the municipal law applicable to all persons, which regulate human conduct, determine rights of property, of contract, and the like; such as the rules making certain acts criminal, and those controlling the devolution, acquisition, and transfer of estates, and those prescribing the modes of entering into agreements. On the other hand, the term may mean the ignorance or error of a particular person with respect to his own legal rights and interests which are affected by or which result from a certain transaction in which he engages.[b] This application of the term may present two entirely different conditions. The person about to enter into the transaction may be ignorant of or mistaken about his own antecedent existing legal rights and interests which are to be affected by what he does, although he correctly apprehends and fully understands the legal import of the transaction itself and its true effects upon his supposed legal rights;[1] or the person may be correctly informed as to his

[1] For example, a person about to give a release might erroneously suppose that he held only a life estate, while in fact he was the owner in fee; and might know that the legal operation of the conveyance was to release all the interest which he had. Compromises are the most common illus-

(a) This section is cited in Crippen v. Chappel, 35 Kan. 495, 11 Pac. 453, 57 Am. Rep. 187.

(b) The text is quoted in Alabama & Vicksburg Ry. Co. v. Jones, 73 Miss. 110, 55 Am. St. Rep. 488, 19 South. 105; cited, in Drake v. Wild, 70 Vt. 52, 39 Atl. 248.

existing legal rights, interests, or relations, and may be ignorant or mistaken with respect to the legal import of the transaction in which he engages, and its legal effect upon those rights, interests, or relations. Finally, in any one of the foregoing instances the ignorance or error may be confined to one party, or it may extend to both parties; all the parties may alike enter into the transaction under a common ignorance or error concerning the general rules of the law, or concerning the individual legal interests affected by or resulting from it. An ancient and familiar maxim of the common law is, *Ignorantia juris non excusat.* This maxim confessedly has its primary application to cases of the first class above described,— ignorance or error concerning the general rules of law controlling human conduct, and especially in criminal prosecutions.[2] The real question for discussion is, How far does it apply to the two species contained in the second class,— mistakes as to individual legal rights? The principle embodied in the maxim was derived from the Roman law; little aid, however, can be derived from the uncertain and conflicting opinions of the Roman law jurists and commentators.[3]

tration of this species, when the parties correctly understand the legal effect of the agreement itself which they make, and of the instruments which they execute, and the mistake consists of their ignorance or error as to the nature of the prior legal rights which they possessed, and which they surrender by means of the compromise. It will be found, I think, that a great majority of the cases in which mistakes of law have been relieved belong to this species.

2 See 1 Plowd. 342, per Manwood, J.: "It is to be presumed that no subject of this realm is miscognizant of the law whereby he is governed. Ignorance of the law excuseth none."

3 In the digest, title *De juris et facti ignorantia*, the general rule is stated: "*Regula est, juris quidem ignorantiam cuique nocere, facti vero ignorantiam non nocere*": Dig., xxii., tit. vi., 1, 9. The following illustration is given: "If a man be ignorant of the death of a kinsman whose estate is to be administered, time shall not run against him and bar his claim to inherit; otherwise if he be aware of the death and of his own relationship, but ignorant of his own right to inherit, time will bar his claim, because the error is one of law." The digest admitted certain classes of persons to whom relief would be allowed from the consequences of ignorance or error

§ 842. **The General Rule, and its Limitations.**[a]— The doctrine is settled that, in general, a mistake of law, pure and simple, is not adequate ground for relief. Where a party with knowledge of all the material facts, and without any other special circumstances giving rise to an equity in his

of law, — *Quibus permissum est jus ignorare,*" — namely, women, soldiers, and persons under the age of twenty-five. It was presumed that they had not had opportunities to become acquainted with the law. This permission was not universal; they were not allowed to allege their ignorance as defense for acts in violation of rules based upon the *jus gentium,* since these rules were founded upon natural reason and equity, and were apprehended *naturali ratione,* and did not require any special knowledge or study: Dig., *ubi supra.* The question how far relief may be given for a mistake of law has given rise to a great conflict of opinion among the modern commentators upon the Roman law. It was a settled doctrine that where one, through error, had paid what was not due, he might recover it back by an action called *conditio indebiti.* The importance of this action is shown by the fact that a whole title is devoted to it in the digest and also in the code. A text of the code seems to deny restitution where the money has been paid under an error of law: "*Quum quis jus ignorans indebitam pecuniam solverit, cessat repetitio. Per ignorantiam enim facti tantum repetitionem indebiti soluti competere tibi notum est*": Code, lib. I., tit. 18, l. 10. Upon this text and some others, certain jurists, including Cujas, Donellus, Voet, and Pothier, maintain that no action ever lies to recover back money paid by mistake of law. Another class of writers, equally eminent among whom are Vinnius, Ulric, Huber, Mühlenbruch, and D'Aguesseau, hold that the action can be maintained in all cases of error, whether of fact or of law. They contend that the action is eminently equitable, and can be defeated only by a defense which is equally equitable; that in the whole title on *condictio indebiti* in the digest, there is no text confining the action to error of fact, but the language everywhere speaks of "error" generally; and that the passages in the code which seem to confine the remedy to errors of fact are not general rules, but are all taken from imperial "rescripts" applicable only to special cases in which a natural, though not a legal, obligation to make the payment existed, so as to afford an equitable ground for retaining the money. This reasoning is certainly very powerful. A similar opinion, based entirely upon a comparison of texts in the digest and code, is maintained by a recent French writer, Professor Demangeat, in his Cours Elémentaire du Droit Romain (vol. 2, pp. 370–372). Savigny, in his great work on the Roman law, reaches the conclusion that money paid by a mistake of law cannot be recovered back, unless it can be proved that the ignorance was excusable under the circumstances, and not the result of gross negligence: 3 Traité de Droit Romain, Append. 8, sec. 35, p. 415. The modern

(a) The text, §§ 842–847, is cited in Benson v. Markoe, 37 Minn. 30, 33 N. W. 38, 5 Am. St. Rep. 816.

behalf, enters into a transaction affecting his interests, rights, and liabilities, under an ignorance or error with respect to the rules of law controlling the case, courts will not, in general, relieve him from the consequences of his mistake.[1] [b] The reasons are obvious. The administration

European codes based upon the Roman law exhibit the same diversity. The French and the Austrian codes permit a recovery of money paid under a mistake either of law or of fact; the Prussian code permits it only when paid through a mistake of fact: See Studies in Roman Law, by Lord Mackenzie, 338–340; 2 Austin's Lectures on Jurisprudence, 168–170. The foregoing *résumé* shows that the question is one of great and inherent difficulty.

[1] The leading case of Bilbie v. Lumley, 2 East, 469, furnishes a good illustration of the general rule and of its reasons. An insurer, with knowledge of all the facts which destroyed his liability on a policy of insurance which he had signed, but in ignorance of the legal rights resulting from those facts, paid the amount he had assured; and afterwards he brought an action to recover back the money as paid under a mistake. The court held that the action could not be maintained. Lord Ellenborough said: "Every man must be taken to be cognizant of the law; otherwise there is no saying to what extent the ignorance might not be carried. It would be urged in almost every case." If a legal question could be settled by numbers of judicial *dicta* expressed in the most general terms, there could be no doubt of the universality of the doctrine stated in the text. The following are some of the cases by which it is sustained: Snell v. Atlantic Ins. Co., 98 U. S. 85; De Give v. Healey, 60 Ga. 391; Ottenheimer v. Cook, 10 Heisk. 309; Jenkins v. German Luth. Cong., 58 Ga. 125; Hardigree v. Mitchum, 51 Ala. 151; Heavenridge v. Mondy, 49 Ind. 434; Gebb v. Rose, 40 Md. 387; Thurmond v. Clark, 47 Ga. 500; Bledsoe v. Nixon, 68 N. C. 521; Smith v. Penn, 22 Gratt. 402; Jacobs v. Morange, 47 N. Y. 57; Zollman v. Moore, 21 Gratt. 313; Goltra v. Sanasack, 53 Ill. 456; Bryant v. Mansfield, 22 Me. 360; Mellish v. Robertson, 25 Vt. 603; Proctor v. Thrall, 22 Vt. 262; Shotwell v. Murray, 1 Johns. Ch. 512; Lyon v. Richmond, 2 Johns. Ch. 51, 60; Storrs v. Barker, 6 Johns. Ch. 166; 10 Am. Dec. 316; Gilbert v. Gilbert, 9 Barb. 532; Garnar v. Bird, 57 Barb. 277; Stoddard v. Hart, 23 N. Y. 556; Hinchman

(b) Quoted in Lockhart v. Leeds, (N. M.) 76 Pac. 312; Dinwiddie v. Self, 145 Ill. 290, 33 N. E. 892; Drake v. Wild, 70 Vt. 52, 39 Atl. 248; Marshall v. Westrope, 98 Iowa 324, 67 N. W. 257. See also, Allen v. Galloway, 30 Fed. 466; Hamblin v. Bishop, 41 Fed. 74; Heath v. Albrook, (Iowa) 98 N. W. 619; Lane v. Holmes, 55 Minn. 379, 57 N. W. 132, 43 Am. St. Rep. 508; Gjerstadengen v. Van Duzen, 7 N. Dak. 612, 76 N. W. 233, 66 Am. St. Rep. 679; Norris v. Crowe, 206 Pa. St. 438, 98 Am. St. Rep. 783, 55 Atl. 1125; Olney v. Weaver, 24 R. I. 408, 53 Atl. 287; Keenan v. Daniels, (S. Dak.) 99 N. W. 853; Deavitt v. Ring, (Vt.) 56 Atl. 978; Kleimann v. Gieselmann, 114 Mo. 437, 35 Am. St. Rep. 761, 21 S. W. 796.

of justice, the law itself as a practical system for the regulation of human conduct, require that some fundamental assumptions should be made as postulates. The most important, perhaps, of all these, is the assumption that all persons of sound and mature mind are presumed to know the law. If ignorance of the law were generally allowed to be pleaded, there could be no security in legal rights, no certainty in judicial investigations, no finality in litigations. While this general doctrine prevails in equity as well as at law, its operation is not there universal; it is subject to modifications and limitations; equity *does* sometimes exercise its jurisdiction on the occasion of mistakes of law. If the mistake of law is not pure and simple, but is induced or accompanied by other special facts giving rise to an independent equity on behalf of the mistaken person, such as inequitable conduct of the other party, there can be no doubt that a court of equity will interpose its aid.[c] Even when the mistake of law is pure and simple, equity *may* interfere. The difficulty is to ascertain any general criterion which shall determine and include all *such* cases. Many judges have attempted to formulate a criterion for all instances of pure mistakes of law which will be relieved in equity, but their conclusions are conflicting, and none is

v. Emans, 1 N. J. Eq. 100; Wintermute v. Snyder, 3 N. J. Eq. 489; Peters v. Florence, 38 Pa. St. 194; Good v. Herr, 7 Watts & S. 253; State v. Reigart, 1 Gill, 1; Davis v. Bagley, 40 Ga. 181; 2 Am. Rep. 570; Dill v. Shahan, 25 Ala. 694; 60 Am. Dec. 540; Gwynn v. Hamilton, 29 Ala. 233; Lyon v. Sanders, 23 Miss. 530; State v. Paup, 13 Ark. 129; 56 Am. Dec. 303; McMurray v. St. Louis etc. Co., 33 Mo. 377; Rochester v. Alfred Bank, 13 Wis. 432; 80 Am. Dec. 746; Smith v. McDougal, 2 Cal. 586; Kenyon v. Welty, 20 Cal. 637; 81 Am. Dec. 137; Bank of United States v. Daniel, 12 Pet. 32; Hunt v. Rousmanier, 8 Wheat. 174; 1 Pet. 1; 2 Mason, 342; Malden v. Menil, 2 Atk. 8; Cann v. Cann, 1 P. Wms. 723, 727; Currie v. Goold, 2 Madd. 163; Smith v. Jackson, 1 Madd. 618; Goodman v. Sayers, 2 Jacob & W. 249, 263; Marshall v. Collett, 1 Younge & C. 232; Denys v. Shuckburgh, 4 Younge & C. 42; Mellers v. Duke of Devonshire, 16 Beav. 252; Midland Gr. W. Co. v. Johnson, 6 H. L. Cas. 798.

(c) Quoted in Spurlock v. Brown, 91 Tenn. 241, 18 S. W. 868.

sustained by the authority of judicial decisions. It has been said by judges of the highest ability that the general doctrine heretofore stated, and embodied in the maxim, *Ignorantia juris non excusat,* is confined to mistakes of the general rules of law,— the first class of mistakes described in the preceding paragraph; that it has no application to the mistakes of persons as to their own private legal rights and interests,[d] — the second class before described; that "*jus,*" in the maxim, denotes the general law, the law of the country, and never means private legal rights.[2]

2 This view is supported by the authority of Lord Westbury, certainly one of the ablest judges that ever sat in the English court of chancery, and distinguished for the remarkable grasp and clear enunciation of *principles* in all his opinions. In Cooper v. Phibbs, L. R. 2 H. L. 149, 170, he said: "In such a state of things there can be no doubt of the rule of a court of equity with regard to the dealing with that agreement. It is said *ignorantia juris haud excusat;* but in that maxim the word '*jus*' is used in the sense of denoting general law, — the ordinary law of the country. But when the word '*jus*' is used in the sense of denoting a private right, that maxim has no application. Private right of ownership is a matter of fact; it may be the result also of matter of law; *but if parties contract under a mutual mistake and misapprehension as to their relative and respective rights,* the result is that that agreement is liable to be set aside as having proceeded upon a common mistake. Now, that was the case with these parties; the respondents believed themselves to be entitled to the property, the petitioner believed that he was a stranger to it, the mistake is discovered, and the agreement cannot stand." It is proper to observe that although Lord Westbury's general language is broad enough to cover both species embraced in my *second* class as described in the preceding paragraph, where the mistake is concerning a private legal right, yet the facts to which he applies his language fall exclusively under the *first* species of that class, namely, where the party is mistaken concerning his antecedent existing legal right which is to be affected by the agreement which he makes, and not concerning the legal import of the agreement itself. The same view will completely explain Lord King's decision in the celebrated case of Lansdowne v. Lansdowne, 2 Jacob & W. 205; Mos. 364, 365; although the grounds were not so accurately stated by him as by Lord Westbury. The facts of this often-quoted case briefly were: The plaintiff was the only son of the *eldest* brother of a deceased intestate. He had a dispute with his uncle, a *younger* brother of the deceased, concerning their respective rights to inherit the land of the deceased. It was agreed by them to consult a schoolmaster, one Hughes.

(d) Quoted in Alabama & Vicksburg Ry. Co. v. Jones, 73 Miss. 110, 55 Am. St. Rep. 488, 19 South. 105; cited in Drake v. Wild, 70 Vt. 52, 39 Atl. 248.

§ 843. **Mistake as to the Legal Import or Effect of a Transaction.**— That this rule, as suggested by Lord Westbury, would furnish a clear, definite, and in some respects a desirable criterion cannot be doubted; but it is not, in its full extent, sustained by authority; indeed, a portion of its conclusions is directly opposed to the overwhelming weight of judicial decisions. The rule is well settled that a simple mistake by a party as to the legal effect of an agreement which he executes, or as to the legal result of an act which he performs, is no ground for either defensive or affirmative relief. If there were no elements of fraud, concealment, misrepresentation, undue influence, violation of confidence reposed, or of other inequitable conduct in the transaction, the party who knew, or had an opportunity to know, the contents of an agreement or other instrument cannot defeat its performance or obtain its cancellation or reformation because he mistook the legal meaning and effect of the whole or of any of its provisions. Where the parties, with knowledge of the facts, and without any inequitable incidents, have made an agreement or other instrument as they intended it should be, and the writing expresses the trans-

Hughes went for instruction to a book called the Clerk's Remembrancer, and there found the law laid down that "land could not ascend, but always descended," and he thereupon informed the parties that the land went to the younger brother, the plaintiff's uncle. Upon this decision, the plaintiff and his uncle agreed to share the land between them, and conveyances were executed carrying out this arrangement. The result was, of course, that the plaintiff, through a mistake of law, conveyed away land which clearly belonged to himself. Discovering his error subsequently, he filed a bill to be relieved. Lord Chancellor King held that the conveyances were made through *a mistake and misrepresentation* of the law, and decreed that they should be surrendered up and canceled. He is reported to have said: "The maxim of law, *Ignorantia juris non excusat*, was, in regard to the public, that ignorance cannot be pleaded in excuse of crimes, but did not hold in civil cases." This *dictum*, when taken literally, is much too broad, and is clearly incorrect; but the real doctrine lying beneath it, and what the chancellor plainly had in his mind, is identical with the view expressed by Lord Westbury. This case, as it seems to me, has created a great deal of unnecessary difficulty and criticism. It falls directly within the first species of my second class of mistakes, and is a striking example of that species. See also Blakeman v. Blakeman, 39 Conn. 320.

action as it was understood and designed to be made, then the above rule uniformly applies; equity will not allow a defense, or grant a reformation or rescission, although one of the parties — and as many cases hold, both of them — may have mistaken or misconceived its legal meaning, scope, and effect.[1] [a] The principle underlying this rule is, that

[1] The circumstances mentioned in the text are the same as the second species of the second class described before in § 841, where a person knowing correctly his existing legal rights and relations is mistaken as to the legal import of the transaction in which he engages, and of its legal effect upon those rights or relations. In Powell v. Smith, L. R. 14 Eq. 85, 90, Lord Romilly accurately states the doctrine of the text, and its reasons. The defendant endeavored to defeat the enforcement of an agreement to give a lease, on the ground that he was mistaken as to the legal meaning and effect of an important provision. The master of rolls, in overruling the defense, said: "All those cases which have been cited on the argument are cases where there was either a dispute or doubt as to the thing sold, or where the words of the agreement expressed certain things in an ambiguous manner, which might be misunderstood by one of the parties. [In such cases a decree for performance might be refused, because it did not appear with sufficient certainty *what* the parties had agreed.] But here the words of the agreement are quite certain, and the only thing that was not understood was the legal effect of certain words which it contained. Now, that is no ground of mistake at all. *It is a question upon the construction* of an agreement agreed to by everybody concerned." Hunt v. Rousmanier, 8 Wheat. 174, 1 Pet. 1, is the leading American case upon this phase of the doctrine, in which the rule and its limitations are most carefully examined; and the decision has been regarded as one of the highest authority. See also Gerald v. Elley, 45 Iowa, 322; Glenn v. Statler, 42 Iowa, 107; Nelson v. Davis, 40 Ind. 366; Fellows v. Heermans, 4 Lans. 230; Moorman v. Collier, 32 Iowa, 138; Hoover v. Reilly, 2 Abb. 471; Norris v. Laberee, 58 Me. 260; Kennard v. George, 44 N. H. 440; Mellish v. Robertson, 25 Vt. 603; Pettes v. Bank of Whitehall, 17 Vt. 435; Goodell v. Field, 15 Vt. 448; Molony v. Rourke, 100 Mass. 190; Haven v. Foster, 9 Pick. 112; 19 Am. Dec. 353; Wheaton v. Wheaton, 9 Conn. 96; Leavitt v. Palmer, 3 N. Y. 19; 51 Am. Dec. 333; Lanning v. Carpenter, 48 N. Y. 408; Pitcher v. Hennessey,

(a) The text is quoted in Eldridge v. Dexter & P. R. R. Co., 88 Me. 191, 33 Atl. 974; Marshall v. Westrope, 98 Iowa, 324, 67 N. W. 257. This section is cited in Wilson v. McLoughlin, 11 Colo. 465, 18 Pac. 739; Ryder v. Ryder, 19 R. I. 188, 32 Atl. 919. §§ 843–847 are cited in Griswold v. Hazard, 141 U. S. 260, 11 Sup. Ct. 972, 999. See, also, Wilding v. Sanderson, [1897] 2 Ch. 534; Kelly v. Turner, 74 Ala. 513; Rector v. Collins, 46 Ark. 167, 55 Am. Rep. 571; Hicks v. Coody, 49 Ark. 429, 5 S. W. 714; Atlanta Trust & Bkg. Co., v. Nelms, 116 Ga. 915, 43 S. E. 380; Fowler v. Black, 136 Ill. 363, 26 N. E. 596; Caldwell v. Depew, 40 Minn. 528, 42 N. W. 479; Corrigan v. Tiernay, 100 Mo. 276, 13 S. W 401.

equity will not interfere for the purpose of carrying out an intention *which the parties did not have when they entered into a transaction,* but which they might or even would have had if they had been more correctly informed as to the law, — if they had not been mistaken as to the legal scope and effect of their transaction.[b] If an agreement or written instrument or other transaction expresses the thought and intention which the parties had at the time and in the act of concluding it, no relief, affirmative or defensive, will be granted with respect to it, upon the assumption that their thought and intention would have been different if they had not been mistaken as to the legal meaning and effect of the terms and provisions by which such intention is embodied or expressed, even though it should be incontestably proved that their intention would have been different if they had been correctly informed as to the law.[c] These rules are

48 N. Y. 415; Story v. Conger, 36 N. Y. 673; 93 Am. Dec. 546; O'Donnell v. Harmon, 3 Daly, 424; Champlin v. Laytin, 18 Wend. 407; 31 Am. Dec. 382; Crosier v. Acer, 7 Paige, 137; Hall v. Reed, 2 Barb. Ch. 500; Dupre v. Thompson, 4 Barb. 279; Bentley v. Whittemore, 18 N. J. Eq. 366; Hawralty v. Warren, 18 N. J. Eq. 124; 90 Am. Dec. 613; Durant v. Bacot, 13 N. J. Eq. 201; Garwood v. Eldridge, 2 N. J. Eq. 145; 34 Am. Dec. 195; Wintermute v. Snyder, 3 N. J. Eq. 489; Light v. Light, 21 Pa. St. 407; Rankin v. Mortimere, 7 Watts, 372; McElderry v. Shipley, 2 Md. 25; 56 Am. Dec. 703; Showman v. Miller, 6 Md. 479; Watkins v. Stockett, 6 Har. & J. 435; Alexander v. Newton, 2 Gratt. 266; Dill v. Shahan, 25 Ala. 694, 702; 60 Am. Dec. 540; Clayton v. Freet, 10 Ohio St. 544; Evants v. Strode, 11 Ohio, 480; 38 Am. Dec. 744; McNaughten v. Partridge, 11 Ohio, 223; 38 Am. Dec. 731; Martin v. Hamlin, 18 Mich. 354; 100 Am. Dec. 181; Barnes v. Bartlett, 47 Ind. 98; Heavenridge v. Mondy, 49 Ind. 434; Wood v. Price, 46 Ill. 439; Adams v. Robertson, 37 Ill. 45; Montgomery v. Shockey, 37 Iowa, 107; Heaton v. Fryberger, 38 Iowa, 185, 190, 201; Hearst v. Pujol, 44 Cal. 230; Great West. R'y v. Cripps, 5 Hare, 91; Croome v. Lediard, 2 Mylne & K. 251; Cockerell v. Cholmeley, 1 Russ. & M. 418; Marshall v. Collett, 1 Younge & C. 232, 238; Pullen v. Ready, 2 Atk. 587, 591; Stockley v. Stockley, 1 Ves. & B. 23, 30; Mildmay v. Hungerford, 2 Vern. 243; Irnham v. Child, 1 Brown Ch. 92; Gibbons v. Caunt, 4 Ves. 840, 849; Marquis of Townshend v. Stangroom, 6 Ves. 328, 332; Price v. Dyer, 17 Ves. 356.

(b) Quoted in Rector v. Collins, 46 Ark. 167, 55 Am. Rep. 571; Corrigan v. Tiernay, 100 Mo. 276, 13 S. W. 401; Marshall v. Westrope, 98 Iowa 324, 67 N. W. 257.

(c) Quoted in Dinwiddie v. Self, 145 Ill. 290, 33 N. E. 892.

settled with perfect unanimity where one party has been mistaken in such a manner; they are also applied by very many cases where the same mistake is common to both the parties.

§ 844. **Particular Instances in Which Relief will or will not be Granted.**— Firmly settled as are the foregoing general rules, it is equally well settled that there are particular instances in which equity will grant defensive or affirmative relief from mistakes of law pure and simple, as well as from those accompanied by other inequitable incidents. The only difficulty consists, as has already been mentioned, in drawing any sharply defined lines by which all these instances may be accurately determined.[1] I shall endeavor to state those conclusions which seem to be based upon principle as well as sustained by authority; although it must be conceded that no results can be reached which shall represent the unanimous concurrence of decisions and *dicta*. It is certain, however, that no mistake of law will be relieved from unless it is material, and the court is certain that the conduct of the parties has been determined by it.[2]

§ 845. **Reformation of an Instrument on Account of a Mistake of Law.**— The first instance which I shall mention is closely connected with the doctrine stated in the last paragraph but one. It was there shown that if an agreement is what it was intended to be, equity would not interfere with it because the parties had mistaken its legal import and effect. If, on the other hand, after making an agreement, in the process of reducing it to a written form the instrument, *by means of a mistake of law*, fails to express the contract which the parties actually entered into, equity will interfere with the appropriate relief, either by way of defense to its enforce-

[1] Rogers v. Ingham, L. R. 3 Ch. Div. 351, 355, 356, per James, L. J.; p. 358, per Mellish, L. J.; Ex parte James, L. R. 9 Ch. 609; Bullock v Downes, 9 H. L. Cas. 1; Stone v. Godfrey, 5 De Gex, M. & G. 76, 90, per Turner, L. J.; Broughton v. Hutt, 3 De Gex & J. 501, 504.

[2] Stone v. Godfrey, 5 De Gex, M. & G. 76, 90, per Turner, L. J.

ment, or by cancellation, or by reformation, to the same extent as if the failure of the writing to express the real contract was caused by a mistake of fact. In this instance there is no mistake as to the legal import of *the contract actually made;* but the mistake of law prevents the real contract from being embodied in the written instrument.[a] In short, if a written instrument fails to express the intention which the parties had in making the contract which it purports to contain, equity will grant its relief, affirmative or defensive, although the failure may have resulted from a mistake as to the legal meaning and operation of the terms or language employed in the writing.[b] Among the ordinary examples of such errors are those as to the legal effect of a description of the subject-matter, and as to the import of technical words and phrases; but the rule is not confined to these instances.[1 c]

[1] Hunt v. Rousmanier, 8 Wheat. 174; 1 Pet. 1; Pitcher v. Hennessey, 48 N. Y. 415; Lanning v. Carpenter, 48 N. Y. 408; O'Donnell v. Harmon, 3 Daly, 424; Gillespie v. Moon, 2 Johns. Ch. 585, 596; 7 Am. Dec. 559; Canedy v. Marcy, 13 Gray, 373–377; Stedwell v. Anderson, 21 Conn. 139; Huss v. Morris, 63 Pa. St. 367; Moser v. Libenguth, 2 Rawle, 428; Cooke v. Husbands, 11 Md. 492; Springs v. Harven, 3 Jones Eq. 96; Larkins v. Biddle, 21 Ala. 252; Stone v. Hale, 17 Ala. 557; 52 Am. Dec. 185; Clopton v. Martin, 11 Ala. 187; Clayton v. Freet, 10 Ohio St. 544; Young v. Miller, 10 Ohio, 85; McNaughten v. Partridge, 11 Ohio, 223; 38 Am. Dec. 731; Worley v. Tuggle, 4 Bush, 168; Smith v. Jordan, 13 Minn. 264; 97 Am. Dec. 232; Sparks v. Pittman, 51 Miss. 511; Stockbridge Iron Co. v. Hudson Iron Co., 107 Mass. 290; Oliver v. Mut. etc. Ins. Co., 2 Curt. 277.

(a) Quoted in Lansing v. Commercial Union Assur. Co., (Nebr.) 93 N. W. 756; Dinwiddie v. Self, 145 Ill. 290, 33 N. E. 892; Lee v. Percival, 85 Iowa 135, 52 N. W. 543; Marshall v. Westrope, 98 Iowa 324, 67 N. W. 257.

(b) Quoted in Corrigan v. Tiernay, 100 Mo. 276, 13 S. W. 401; Minot v. Tilton, 64 N. H. 371, 10 Atl. 682; Wall v. Meilke, 89 Minn. 232, 94 N. W. 688; Richmond v. Ogden St. Ry. Co., (Or.) 74 Pac. 333; Dinwiddie v. Self, 145 Ill. 290, 33 N. E. 892.

(c) Quoted in Dinwiddie v. Self, 145 Ill. 290, 33 N. E. 892, a simple and striking illustration of the principle of the text. This section is cited in Hausbrandt v. Hofler, 117 Iowa, 103, 90 N. W. 494, 94 Am. St. Rep. 289; Ryder v. Ryder, 19 R. I. 188, 32 Atl. 919 (reformation); Kelley v. Ward, 94 Tex. 289, 60 S. W. 311; Citizens' Nat. Bank of Attica v. Judy, 146 Ind. 322, 43 N. E. 259;

§ 846. **Mistakes Common to All the Parties — Mistake of a Plain Rule.**— It has been said that whenever a mistake of law is common to all the parties, where they all act under the same misapprehension of the law, and make substantially the same mistake concerning it, this is a sufficient ground, without any other incidents, for the interposition of equity.[1] No such general rule, in my opinion, can be regarded as established, or even suggested, by the weight of authority; and it is certainly contradicted by well-considered decisions of most able courts.[2] It will be found, I

[1] The authors of the New York Civil Code lay down this rule as the leading element in their definition of "mistake of law," claiming it to be declaratory merely, and not new legislation: See *ante*, § 839. In support of it they cite Many v. Beekman Iron Co., 9 Paige, 188; Hall v. Reed, 2 Barb. Ch. 500. Mr. Kerr also states the same rule in a somewhat more limited form, and cites in its support only Cooper v. Phibbs, L. R. 2 H. L. 149. This case utterly fails to sustain any such conclusion. The decision of the court was based solely upon an assumed *mistake of fact*. The head-note correctly states the rule on which the decision was placed: "Where two parties, *under a mistake of fact*, enter into an agreement," equity may set it aside. See also opinion of Lord Cranworth (p. 164). Lord Westbury's opinion dealt with the mistake as one of law, but he did not even hint at any such rule, and reached a very different conclusion, as already explained: See *ante*, § 842.

[2] In the recent case of Eaglesfield v. Marquis of Londonderry, L. R. 4 Ch. Div. 693, 709, the court of appeal, so far from recognizing any such rule, placed their decision entirely upon the ground that both parties acted under a common misapprehension and mistake of the law, and therefore, without other circumstances, equity could not relieve. Undoubtedly, in many cases where equity has interfered there has been a mutual mistake; but the interference must be referred to some other cause than the mere existence of that fact.

Park Bros. & Co. v. Blodgett & Clapp Co., 64 Conn. 28, 29 Atl. 133. See, also, Griswold v. Hazard, 141 U. S. 260, 11 Sup. Ct. 972, 999, citing §§ 843–847 of the text; Knight v. Glasscock, 51 Ark. 390, 11 S. W. 580; Denver Brick, etc., Mfg. Co. v. McAllister, 6 Colo. 261; Cake v. Peet, 49 Conn. 591; Wyche v. Greene, 16 Ga. 49, 2 Ames Cas. Eq. Jur. 289; Bonbright v. Bonbright, (Iowa) 98 N. W. 784; Stafford v. Fetters, 55 Iowa, 484, 8 N. W. 322; Brown v. Ward, 119 Iowa, 604, 93 N. W. 587; Hopwood v. McCausland, 120 Iowa, 218, 94 N. W. 469; Bottorf v. Lewis, (Iowa) 95 N. W. 262 (cancellation); Nourse v. Weitz, (Iowa) 95 N. W. 251 (reformation of supersedeas bond); Benson v. Markoe, 37 Minn. 30, 33 N. W. 38, 5 Am. St. Rep. 816; Wall v. Meilke, 89 Minn. 232, 94 N. W. 688; Corrigan v. Tierney, 100 Mo. 276, 13 S. W. 401; Lansing v. Commercial Union Assur. Co., (Neb.) 93 N. W. 756; Minot v.

think, that the instances of relief where the mistake of law was mutual fall under the particular rule stated in the last preceding paragraph. It has also been asserted, as a general criterion, that where the mistake is concerning a clear, unquestioned, unequivocal rule of the law, a court of equity will relieve the party from its consequences; but where the mistake is concerning a doubtful, obscure, or unsettled rule, no relief will be granted. In the first place, this proposition, if taken as a general rule, is directly opposed to the fundamental principle upon which the entire doctrine concerning mistakes of law is based. The presumption that every person knows the law must necessarily extend to all rules of the law alike. To permit a distinction between rules said to be clear and those claimed to be doubtful would at once open the door for all the evils in the administration of justice, which the presumption itself is intended to exclude. In the second place, the proposition finds no support, as a general rule, from the decisions of authority. All the cases in which such language was originally used by the judges, either as a *dictum* or as the *ratio decidendi,* were cases arising upon family compromises and settlements, which, as will appear hereafter, are governed by special considerations, whether they involve mistakes of law or of fact. The rule, so far as it may be called a rule, has a very restricted application, and cannot be raised to the position of a general criterion.[3]

[3] Judge Story seems to lay down this rule as one of the most prominent and important means for determining whether equity will or will not grant relief: Story's Eq. Jur., secs. 121–126. He is followed by Mr. Snell: Snell's Equity, 371, 372. Mr. Adams states the proposition in a guarded, and in my opinion accurate, manner, confining it to cases of family compromises: Adams's Equity, 190. The important case of Stone v. Godfrey, 5 De Gex, M. & G. 76, cited in the notes to the American edition of Adams (pp. 386,

Tilton, 64 N. H. 371, 10 Atl. 682; Shaw v. Williams, 100 N. C. 272, 6 S. E. 196; Richmond v. Ogden St. Ry. Co., (Or.) 74 Pac. 333; Lant's Appeal, 95 Pa. St. 279, 40 Am. Rep. 646; Dietrich v. Hutchinson, 73 Vt. 134, 50 Atl. 810, 87 Am. St. Rep. 703 (cancellation); but see Hicks v. Coody, 49 Ark. 425, 5. S. W. 714.

There are undoubtedly cases, not arising out of family compromises, in which parties ignorant or mistaken concerning their *own clear legal rights* have been relieved; but these will all find another explanation more consonant with principle than the foregoing alleged general rule.

§ 847. **Mistake of Law Accompanied with Inequitable Conduct of the Other Party.**—Whatever be the effect of a mistake pure and simple, there is no doubt that equitable relief, affirmative or defensive, will be granted when the ignorance or misapprehension of a party concerning the legal effect of a transaction in which he engages, or concerning his own legal rights which are to be affected, is induced, procured, aided, or accompanied by inequitable conduct of the other parties. It is not necessary that such inequitable conduct should be intentionally misleading, much less that it should be actual fraud; it is enough that the misconception of the law was the result of, or even aided or accompanied by, incorrect or misleading statements, or acts of the

387) in support of this rule, does not even allude to it. It will be found that the cases referred to — at least the original authorities — as sustaining such a general proposition are either cases arising upon family compromises, in which judges have used language applicable only to the particular facts before them, and explaining why the settlement in controversy should or should not be allowed to stand, or else they were cases decided upon entirely different grounds, and not involving the alleged general rule, — cases in which the *ratio decidendi* as stated by the court did not in the least turn upon the question whether the misapprehended rule of law was clear or doubtful. Of the first class, Naylor v. Winch, 1 Sim. & St. 555, 564, is a leading and striking example. It was a suit upon a family compromise which had been entered into in settlement of a family controversy as to the construction and meaning of a will. Sir John Leach, V. C., said: "If a party, acting in ignorance of a plain and settled principle of law, is induced to give up a portion of his indisputable property to another under the name of compromise, a court of equity will relieve him from the effect of his mistake. But where a doubtful question arises, such as this question of construction upon the will of the testator, it is extremely reasonable that parties should terminate their differences by dividing the stake between them, in the proportions which may be agreed upon." The vice-chancellor is clearly referring, in this language, to family compromises, and is not laying down a general rule for all forms of mistakes of law. See also Clifton v. Cockburn, 3 Mylne & K. 76. See also, on the subject of doubtful rules, Freeman v. Curtis, 51

other party.[a] When the mistake of law is pure and simple, the balance held by justice hangs even; but when the error is accompanied by any inequitable conduct of the other party, it inclines in favor of the one who is mistaken. The scope and limitations of this doctrine may be summed up in the proposition that a misapprehension of the law by one party, of which the others are aware at the time of entering into the transaction, but which they do not rectify, is a sufficient ground for equitable relief. A court of equity will not permit one party to take advantage and enjoy the benefit of an ignorance or mistake of law by the other, which he knew of and did not correct.[b] While equity interposes under such circumstances, it follows *a fortiori* that when the mistake of law by one party is induced, aided, or accompanied by conduct of the other more positively inequitable, and containing elements of wrongful intent, such as misrepresentation, imposition, concealment, undue influence, breach of confidence reposed, mental weakness, or surprise, a court of equity will lend its aid and relieve from the consequences of the error. The decisions illustrating this general rule are numerous, and it will be found that many of the cases in which relief has been granted contained, either

Me. 140; 81 Am. Dec. 564; Jordan v. Stevens, 51 Me. 78; 81 Am. Dec. 556; Reservoir Co. v. Chase, 14 Conn. 123; Champlin v. Laytin, 18 Wend. 407; 31 Am. Dec. 382; 6 Paige, 189; 1 Edw. Ch. 467; Cooke v. Nathan, 16 Barb. 342; Green v. Morris etc. R. R., 12 N. J. Eq. 165; Cumberland Coal Co. v. Sherman, 20 Md. 117; Lammott v. Maulsby, 8 Md. 5; Garner v. Garner, 1 Desaus. Eq. 437; Lowndes v. Chisolm, 2 McCord Eq. 455; 16 Am. Dec. 667; Mortimer v. Pritchard, 1 Bail. Eq. 505; Hadon v. Ware, 15 Ala. 149; Moreland v. Atchison, 19 Tex. 303.

(a) Quoted in Merchants' & Farmers' Bank v. Cleland, 25 Ky. Law Rep. 1169, 77 S. W. 176, 719. "A written contract cannot be set aside merely because one of the parties to it put an erroneous construction on the words in which it was expressed; but this principle does not apply to a case where a mistake by one of the parties as to the meaning of the words used has been induced, however innocently, by the other party." Wilding v. Sanderson, [1897] 2 Ch. 534.

(b) Quoted in Merchants' & Farmers' Bank v. Cleland, 25 Ky. Law Rep. 1169, 77 S. W. 176, 719.

openly or implicitly, some elements of such inequitable conduct.[1 c]

§ 848. Same. Between Parties in Relations of Trust.— A particular application of the foregoing rule requires a special mention. Where an ignorance or misapprehension of

[1] Fane v. Fane, L. R. 20 Eq. 698; Gee v. Spencer, 1 Vern. 32; Mildmay v. Hungerford, 2 Vern. 243; Willan v. Willan, 16 Ves. 72, 82; Ramsden v. Hylton, 2 Ves. Sr. 304; Cocking v. Pratt, 1 Ves. Sr. 400; McCarthy v. Decaix, 2 Russ. & M. 614; Scholefield v. Templer, Johns. 155, 166; Coward v. Hughes, 1 Kay & J. 443; Sturge v. Sturge, 12 Beav. 229; Broughton v. Hutt, 3 De Gex & J. 501; In re Saxon etc. Co., 1 De Gex, J. & S. 29; 2 Johns. & H. 408; Jordan v. Stevens, 51 Me. 78; 81 Am. Dec. 556; Freeman v. Curtis, 51 Me. 140; 81 Am. Dec. 564; Spurr v. Benedict, 99 Mass. 463; Chestnut Hill etc. Co. v. Chase, 14 Conn. 123; Woodbury etc. Bank v. Charter Oak Ins. Co., 31 Conn. 517; Champlin v. Laytin, 18 Wend. 407, 422; 31 Am. Dec. 382; Rider v. Powell, 28 N. Y. 310; Green v. Morris etc. R. R. Co., 12 N. J. Eq. 165; Whelen's Appeal, 70 Pa. St. 410, 425; Light v. Light, 21 Pa. St. 407, 412; Snyder v. May, 19 Pa. St. 235; Tyson v. Passmore, 2 Pa. St. 122; 44 Am. Dec. 181; Watts v. Cummins, 59 Pa. St. 84; Phillips v. Hollister, 2 Cold. 269; Bryan v. Masterson, 4 J. J. Marsh. 225; Hardigree v. Mitchum, 51 Ala. 151; Metropolitan Bank v. Godfrey, 23 Ill. 579; Cathcart v. Robinson, 5 Pet. 264, 276; Wheeler v. Smith, 9 How. 55.

Cases of surprise: Evans v. Llewellyn, 2 Brown Ch. 150; 1 Cox, 333; Pusey v. Desbouvrie, 3 P. Wms. 315; Willan v. Willan, 16 Ves. 72, 81; Ormond v. Hutchinson, 13 Ves. 47; Marquis of Townshend v. Stangroom, 6 Ves. 328, 333, 338; Clowes v. Higginson, 1 Ves. & B. 524, 527; Farewell v. Coker, 2 Mer. 353; Cochrane v. Willis, L. R. 1 Ch. 58; Tyson v. Tyson, 31 Md. 134; Jones v. Munroe, 32 Ga. 181; Harney v. Charles, 45 Mo. 157; Carley v. Lewis, 24 Ind. 23. Some of these cases, which are commonly referred to the effect of surprise, are much more naturally and correctly explained, in my opinion, by the doctrine stated in § 849 of the text.

(c) This entire section is quoted in Lawrence Co. Bank v. Arndt, 69 Ark. 406, 65 S. W. 1052. This section is cited in Insurance Companies v. Raden, 87 Ala. 311, 5 South. 876, 13 Am. St. Rep. 36; Keister v. Myers, 115 Ind. 312, 17 N. E. 161; Heath v. Albrook, (Iowa) 98 N. W. 619. §§ 847–849 are cited in Berry v. American Central Ins. Co., 132 N. Y. 49, 28 Am. St. Rep. 548, 30 N. E. 254 (insurance policy surrendered on account of false representations of insurance agent, believed by him to be true, that the policy was void: surrender set aside). See, also, Hartwig v. Clark, 138 Cal. 668, 72 Pac. 149; Sands v. Sands, 112 Ill. 225; Titus v. Rochester G. Ins. Co., 97 Ky. 567, 31 S. W. 127, 53 Am. St. Rep. 427; Ramey v. Allison, 64 Tex. 697; Kyle v. Fehley, 81 Wis. 67, 51 N. W. 257, 29 Am. St. Rep. 866; Williams v. Hamilton, 104 Iowa 423, 65 Am. St. Rep. 475, 73 N. W. 1029; Haviland v. Willetts, 141 N. Y. 35, 35 N. E. 958 (an instructive case). See, also, § 877.

the law, even without any positive, incorrect, or misleading words or incidental acts, occurs in a transaction concerning the trust between two parties holding close relations of trust and confidence, injuriously affecting the one who reposes the confidence, equity will, in general, relieve the one who has thus been injured. The relations of trustee and *cestui que trust,* guardian and ward, and the like, are examples. The relief is here based upon the close confidence reposed, — upon the duty of the trustee to act in the most perfect good faith, to consult the interests of the beneficiary, not to mislead him, and not even to suffer him to be misled, when such a result can be prevented by reasonable diligence and prudence.[1] [a]

§ 849. **Relief where a Party is Mistaken as to his Own Existing Legal Rights, Interests, or Relations.**[a]— Is it possible to formulate any general rule which shall be a criterion for all cases of relief from mistakes of law pure and simple, and without other incidental circumstances, which shall be sustained by judicial authority, and which shall furnish a *principle* as guide for future decisions? In my opinion, it is possible. It has been shown that where the general law of the land — the common *jus* — is involved, a pure and simple mistake in any kind of transaction cannot be relieved. Also, where a person correctly apprehends his own legal rights, interests, and relations, a simple mistake as to the legal

[1] Langstaffe v. Fenwick, 10 Ves. 405; and see Cooke v. Nathan, 16 Barb. 342; Dill v. Shahan, 25 Ala. 694; 60 Am. Dec. 540; Moreland v. Atchison, 19 Tex. 303; Ex parte James, L. R. 9 Ch. 609, 614; Davis v. Morier, 2 Coll. C. C. 303, and cases cited under last paragraph.

§ 848, (a) Quoted in Voltz v. Voltz, 75 Ala. 555; cited in Ludington v. Patton, 111 Wis. 208, 86 N. W. 571 (an instructive and important case). See, also, Tompkins v. Hollister, 60 Mich. 470, 27 N. W. 651; Hall v. Otterson, 52 N. J. Eq. 522, 28 Atl. 907 (an important case); Schneider v. Schneider, (Iowa) 98 N. W. 159.

§ 849, (a) This section is cited in Geib v. Reynolds, 35 Minn. 331, 28 N. W. 923; Gerdine v. Menage, 41 Minn. 417, 43 N. W. 91; Greeley v. De Cottes, 24 Fla. 475, 5 South. 239; Blakemore v. Blakemore, 19 Ky. Law Rep. 1619, 44 S. W. 96; Wooster v. Cavender, 54 Ark. 153, 15 S. W. 192, 26 Am. St. Rep. 31; Renard v. Clark, 91 Mich. 1, 51 N. W. 692, 30 Am. St. Rep. 458; Livingston v. Murray, (Mass.) 72 N. E. 1012.

effect of a transaction into which he enters, in the absence of other determining incidents, is not ground for relief. There is, as shown in a former paragraph (§ 841), a third condition. A person may be ignorant or mistaken as to his own antecedent existing legal rights, interests, duties, liabilities, or other relations, while he accurately understands the legal scope of a transaction into which he enters, and its legal effect upon his rights and liabilities. It will be found that the great majority, if not indeed all, of the well-considered decisions in which relief has been extended to mistakes pure and simple fall within this class; and also, that whenever cases of this kind have arisen, *relief has almost always been granted*, although not always on this ground. Courts have felt the imperative demands of justice, and have aided the mistaken parties, although they have often assigned as the reason for doing so some inequitable conduct of the other party which they have inferred or assumed. The *real reason* for this judicial tendency is obvious, although it has not always been assigned. A private legal right, title, estate, interest, duty, or liability is always *a very complex conception.* It necessarily depends so much upon conditions of fact, that it is difficult, if not impossible, to form a distinct notion of a private legal right, interest, or liability, separated from the facts in which it is involved and upon which it depends. Mistakes, therefore, of a person with respect to his own private legal rights and liabilities may be properly regarded,— as in great measure they really are,— and may be dealt with as mistakes of fact.[b] Courts have constantly felt and acted upon this view, though not always avowedly. Lord Westbury openly declares that such misconceptions are truly mistakes of fact. Some very instructive remarks of Sir George Jessel, which I have placed in the foot-note, will, with a slight modification of

(b) Quoted in Order of United Commercial Travelers v. M'Adam, (C. C. A.) 125 Fed. 358; Alabama & Vicksburg Ry. Co. v. Jones, 73 Miss. 110, 55 Am. St. Rep. 488, 19 South. 105.

his language, apply to all instances involving this kind of error or ignorance.[1] A general rule permitting the jurisdiction of equity to relieve from mistakes of the law pure and simple, in all cases belonging to this species, and confining its operation to them, would at once reduce to clear-

1 Eaglesfield v. Marquis of Londonderry, L. R. 4 Ch. Div. 693, 702, 703. The master of rolls is speaking of a misrepresentation of the law affecting a person's private rights, but his language, with slight change, will apply to all cases of ignorance or error concerning one's own private legal interests. In my opinion, it suggests the true *principle* upon which to rest the action of the courts in all such instances. "It was put to me that this was a misrepresentation of law, and not of fact. . . . . Was it a misrepresentation of law? A misrepresentation of law is this: when you state the facts, and state a conclusion of law, *so as to distinguish between facts and law.* The man who knows the facts is taken to know the law; but when you state that as a fact which no doubt involves, as most facts do, a conclusion of law, that is still a statement of fact, and not a statement of law. Suppose a man is asked by a tradesman whether he can give credit to a lady, and the answer is, 'You may; she is a single woman of large fortune.' It turns out that the man who gave that answer knew that the lady had gone through the ceremony of marriage with a man who was believed to be a married man, and that she had been advised that the marriage ceremony was null and void, though it had not been declared so by any court, and it afterwards turned out they were all mistaken,— that the first marriage of the man was void, so that the lady was married. He does not tell the tradesman all these facts, but states that she is single. That is a statement of fact. If he had told him the whole story, and all the facts, and said, 'Now, you see the lady is single,' that would have been a misrepresentation of law. But the single fact he states — that the lady is unmarried — is a statement of fact, neither more nor less; and it is not the less a statement of fact that in order to arrive at it you must know more or less of the law. There is not a single fact connected with personal *status* that does not, more or less, involve a question of law. If you state that a man is the eldest son of a marriage, you state a question of law, because you must know that there has been a valid marriage, and that that man was the first-born son after the marriage, or, in some countries, before. Therefore, to say it is not a representation of fact seems to arise from a confusion of ideas. It is not the less a fact because that fact involves some knowledge or relation of law. There is hardly any fact which does not involve it. If you say that a man is in possession of an estate of ten thousand pounds a year, the notion of possession is a legal notion, and involves knowledge of law; nor can any other fact in connection with property be stated which does not involve such knowledge of law. To state that a man is entitled to ten thousand pounds consols involves all sorts of law." The *decision* of the master of rolls in this case was reversed by the court of appeal, but only upon a different view of the evidence from that which he took, and without in the least affecting the correctness of the observations which I have quoted.

ness, order, and certainty a subject which has hitherto been confessedly uncertain and confused. It would work justice, for these kinds of errors stand upon a different footing from all others, and justice and good conscience demand their relief; it would conform to sound principle, for these mistakes are in part essentially errors of fact; and finally, it would explain and harmonize many decisions of the ablest courts which have hitherto seemed almost inexplicable except by violent and unnatural assumptions. I therefore venture to formulate the following general rule as being eminently just and based on principle, and furnishing a simple criterion defining the extent of the jurisdiction. The number of decisions which support it, and which it explains, is very great. Wherever a person is ignorant or mistaken with respect to his own antecedent and existing private legal rights, interests, estates, duties, liabilities, or other relation, either of property or contract or personal *status,* and enters into some transaction the legal scope and operation of which he correctly apprehends and understands, for the purpose of affecting such assumed rights, interests, or relations, or of carrying out such assumed duties or liabilities, equity will grant its relief, defensive or affirmative, treating the mistake as analogous to, if not identical with, a mistake of fact.[2] [c] It should be carefully observed that this rule has no application to cases of compromise, where doubts have arisen as to the rights of parties, and they have intentionally entered into an arrangement for the purpose of

[2] It is not claimed that all these cases were avowedly decided upon the above rule, although many of them seem to distinctly recognize it. In all of them the error was of the kind described in the text, and the rule will furnish a simple reason why relief was granted, which the judges sometimes failed to do: Cooper v. Phibbs, L. R. 2 H. L. 149 (A, being ignorant that certain property belonged to himself, and supposing that it belonged to B, agreed to take a lease of it from B at a certain rent. There was no fraud, no unfair conduct, all the parties equally knew the facts. The house of lords set aside the agreement on account of the mistake. A majority of the judges called it a mistake of fact. Lord Westbury boldly acknowledged

(c) Quoted in Baldock v. Johnson, 14 Or. 542, 13 Pac. 434; Order of United Commercial Travelers v. M'Adam, (C. C. A.) 125 Fed. 358;

compromising and settling those doubts. Such compromises, whether involving mistakes of law or of fact, are governed by special considerations.

it to be what is ordinarily called a mistake of law, but held that it was really a mistake of fact, and to be dealt with as such. The mistake was clearly one to which the term "mistake of law" has ordinarily been applied; but it as clearly possessed the elements of a mistake of fact. The decision is a direct authority in support of the text); Bingham v. Bingham, 1 Ves. Sr. 126; Landsdowne v. Landsdowne, 2 Jacob & W. 205; Mos. 364; Cocking v. Pratt, 1 Ves. Sr. 400; Pusey v. Desbouvrie, 3 P. Wms. 315, 320; Cann v. Cann, 1 P. Wms. 723, 727; Marquis of Townshend v. Stangroom, 6 Ves. 328, 332; Broughton v. Hutt, 3 De Gex & J. 501, 504 (the heir of a stockholder in a company, the shares in which were personal estate, supposing himself liable in respect of his ancestor's shares, gave a deed of indemnity to the company. This deed was ordered to be canceled on the ground of the mistake, which was treated as one of fact as well as law); In re Saxon L. Ins. Co., 1 De Gex, J. & S. 29; 2 Johns. & H. 408; McCarthy v. Decaix, 2 Russ. & M. 614; Clifton v. Cockburn, 3 Mylne & K. 76, 99; Coward v. Hughes, 1 Kay & J. 443; Sturge v. Sturge, 12 Beav. 229; Davis v. Morier, 2 Coll. C. C. 303; Denys v. Shuckburgh, 4 Younge & C. 42; Reynell v. Sprye, 8 Hare, 222, 255; Ramsden v. Hylton, 2 Ves. Sr. 304; Gee v. Spencer, 1 Vern. 32; Mildmay v. Hungerford, 2 Vern. 243; Naylor v. Winch, 1 Sim. & St. 555; Farewell v. Coker, cited 2 Mer. 353. In Reynell v. Sprye, 8 Hare, 222, Wigram, V. C., laid down the rule in complete harmony with the positions maintained in the text: "I will not attempt to define the cases in which relief is given on the ground of ignorance or mistake. They may, however, safely be distinguished from cases in which, doubts having arisen as to the rights of parties, an arrangement is made for compromising those doubts. But if parties are ignorant of facts on which their rights depend, *or erroneously assume that they know those rights*, and deal with their property accordingly, not upon the principle of compromising doubts, this court will relieve against such transactions"; citing Stockley v. Stockley, 1 Ves. & B. 23; Harvey v. Cooke, 4 Russ. 34. Blakeman v. Blakeman, 39 Conn. 320, is directly in

Drake v. Wild, 70 Vt. 52, 39 Atl. 248 (opinion apparently limits the principle to cases where the mistaken party was led into error by the action of the other party to a transaction, as in contracts or releases): Jeakins v. Frazier, 64 Kan. 267, 67 Pac. 864. See, also, Standard Oil Co. v. Hawkins, 74 Fed. 395, 20 C. C. A. 468, 46 U. S. App. 115, 33 L. R. A. 739; Renard v. Clink, 91 Mich. 1, 30 Am. St. Rep. 458, 51 N. W. 692; Swedesboro L. & B. Ass'n v. Gaus, (N. J. Eq.) 55 Atl. 82; Hutchinson v. Fuller, (S. C.) 45 S. E. 164; Benson v. Bunting, 127 Cal. 532, 59 Pac. 991, 78 Am. St. Rep. 81; Livingstone v. Murphy, (Mass.) 72 N. E. 1012 (citing this section of the text, and quoting from Cooper v. Phibbs: mistake as to ownership is mistake of fact, although it arises from an erroneous view of the legal effect of a deed in the claim of title); Goff v. Gott, 5 Sneed (Tenn.) 562, 2 Ames Cas. Eq. Jur. 281.

§ 850. **Compromises and Voluntary Settlements Made upon a Mistake as to Legal Rights.**[a]—Compromises, where doubts with respect to individual rights, especially among members of the same family, have arisen, and where all the parties, instead of ascertaining and enforcing their mutual rights and obligations which are yet undetermined and uncertain, intentionally put an end to all controversy by a voluntary transaction in the way of a compromise, are highly favored by courts of equity. They will not be disturbed for any ordinary mistake, either of law or of fact, in the absence of conduct otherwise inequitable, since their very object is to settle all such possible errors without a judicial controversy.[b] There are, indeed, *dicta* to the effect

point, and is a striking illustration. A right of way had become extinguished by the purchase of the servient estate by A, the owner of the dominant estate. A afterwards conveyed the dominant estate to B by a deed which granted the land "with its privileges and appurtenances," but did not in express terms mention the right of way. A and B were both ignorant of the legal rule under which the right of way had become extinguished, and supposed it still existed; and the price paid by B was sufficient to cover the right of way. Held, that a court of equity would relieve B by correcting the mistake. The court expressly held that there was no mistake as to the legal scope and effect of the deed, since its terms were sufficient to have conveyed the way if it had existed. It will be noticed that there was no ignorance nor error as to the external facts. The mistake was solely as to the legal interest, the right of property held by A, and to be affected by the conveyance. This mistake was clearly one to which the term "mistake of law" is ordinarily applied, and yet the court correctly held it to be essentially a mistake of fact, and dealt with it as such. There could be no more admirable an illustration of the remarks of Sir G. Jessel, quoted in a preceding note. See also Whelen's Appeal, 70 Pa. St. 410; Hearst v. Pujol, 44 Cal. 230; Morgan v. Dod, 3 Col. 551.[d] Zollman v. Moore, 21 Gratt. 313, is directly conflicting. If the position of the text is correct, it cannot be sustained; and on any view it seems opposed to the weight of authority, English and American.

(d) Daniell v. Sinclair, 6 App. Cas. (Priv. Coun.) 181; Blakemore v. Blakemore, 19 Ky. Law Rep. 1619, 44 S. W. 96; Geib v. Reynolds, 35 Minn. 331, 28 N. W. 923; Gerdine v. Menage, 41 Minn. 417, 43 N. W. 91; Blair v. Chicago, etc., R. R. Co., 89 Mo. 383, 1 S. W. 350; Baldock v. Johnson, 14 Or. 542, 13 Pac. 434.

(a) This section is cited in Appeal of Ward, (Conn.) 54 Atl. 731.

(b) The text is quoted in Burnes v. Burnes, 132 Fed. 485, 494.

that a party will be relieved from a compromise in which he has surrendered property or other rights unquestionably his own, through a misconception of a clear legal rule, or an erroneous supposition that a legal duty rested upon him, whereas plainly no such duty existed; but the decisions show that these *dicta* must be confined to circumstances which render the compromise itself a virtual surprise, or to cases in which it was induced by positive inequitable conduct of the other parties.[1] [c] Voluntary settlements are so favored that if a doubt or dispute exists between parties with respect to their rights, and all have the same knowledge, or means of obtaining knowledge, concerning the circumstances involving these rights, and there is no fraud, misrepresentation, concealment, or other misleading incident, a compromise into which they thus voluntarily enter must stand and be enforced, although the final issue may be different from that which was anticipated, and although the disposition made by the parties in their agreement may not be that which the court would have decreed had the controversy been brought before it for decision.[2] [d] Of course, there must not only be

[1] Naylor v. Winch, 1 Sim. & St. 555, 564; Bingham v. Bingham, 1 Ves. Sr. 126; and see Willan v. Willan, 16 Ves. 72; Gross v. Leber, 47 Pa. St. 520; Light v. Light, 21 Pa. St. 407, 412; Cabot v. Haskins, 3 Pick. 83; Larkins v. Biddle, 21 Ala. 252, 256.

[2] Stapilton v. Stapilton, 1 Atk. 2; 2 Lead. Cas. Eq., and notes, 1675, 4th Am. ed.; Naylor v. Winch, 1 Sim. & St. 555; Ex parte Lucy, 4 De Gex, M. & G. 356; Brooke v. Lord Mostyn, 2 De Gex, J. & S. 373; Bullock v. Downes, 9 H. L. Cas. 1; Stewart v. Stewart, 6 Clark & F. 911, 969; Trigge v. Lavallée, 15 Moore P. C. C. 270; Parker v. Palmer, 1 Cas. Ch. 42; Baxendale v. Seale, 19 Beav. 601; Pickering v. Pickering, 2 Beav. 31, 56; Lawton v. Campion, 18 Beav. 87; Heap v. Tonge, 9 Hare, 90; Reynell v. Sprye, 8 Hare, 222, 254; Gordon v. Gordon, 3 Swanst. 400, 463; Westby v. Westby, 2 Dru. & War. 502; Leonard v. Leonard, 2 Ball & B. 176, 179; Neale v. Neale, 1

(c) See, also, Hinckman v. Berens, [1895] 2 Ch. 638 (compromise of counsel set aside where counsel consented under a misapprehension, such as where, intending to concede one thing he inadvertently concedes another, or where the counsel on both sides are not *ad idem*).

(d) This portion of the text is quoted in Gilliam v. Alford, 69 Tex. 267, 6 S. W. 757. See, also, Hall v. Wheeler, 37 Minn. 522, 35 N. W.

no representation, imposition, or concealment; there must also be a full disclosure of all material facts within the knowledge of the parties, whether demanded or not by the others. In the words of a distinguished judge: "There must not only be good faith and honest intention, but full disclosure; and without full disclosure, honest intention is not sufficient." If these requisites of good faith exist, it is not necessary that the dispute should be concerning a question really doubtful, if the parties *bona fide* consider it so; it is enough that there is a question between them to be settled by their compromise.[3] The foregoing rules apply to all cases of compromise, whether the doubtful questions to be settled relate to matters of law or of fact.[4]

§ 851. Payments of Money under a Mistake of Law.[a]— The general rule stated in the paragraph before the last, concerning mistakes as to one's own private legal rights and duties, is also subject to another important limitation. It is settled at law, and the rule has been followed in equity, that money paid under a mistake of law with respect to the liability to make payment, but with full knowledge, or with

Keen, 672; Greenwood v. Greenwood, 2 De Gex, J. & S. 28, 42, per Turner, L. J.; Harvey v. Cooke, 4 Russ. 34; Attwood v. ——, 5 Russ. 149; Clifton v. Cockburn, 3 Mylne & K. 76; Good v. Herr, 7 Watts & S. 253; Stub v. Leis, 7 Watts, 43; Shartel's Appeal, 64 Pa. St. 25; Wistar's Appeal, 80 Pa. St. 484; Brandon v. Medley, 1 Jones Eq. 313; Bell v. Lawrence, 51 Ala. 160. The requirement of complete frankness and full disclosure applies with especial force when the parties stand toward each other in any prior existing relation of trust and confidence: See Pusey v. Desbouvrie, 3 P. Wms. 315; Sturge v. Sturge, 12 Beav. 229.

[3] Ex parte Lucy, 4 De Gex, M. & G. 356; Neale v. Neale, 1 Keen, 672.

[4] Neale v. Neale, 1 Keen, 672; Westby v. Westby, 2 Dru. & War. 502; and see *post*, § 855, and cases there cited.

377; Wells v. Neff, 14 Or. 66, 12 Pac. 84, 88; Gormly v. Gormly, 130 Pa. St. 467, 18 Atl. 727; Smith v. Tanner, 32 S. C. 259, 10 S. E. 1008; Gilliam v. Alford, 69 Tex. 267, 6 S. W. 757.

(a) This section is cited in Smith v. Tanner, 32 S. C. 259, 10 S. E. 1008; Gilliam v. Alford, 69 Tex. 267, 6 S. W. 757; Crippen v. Chappel, 35 Kan. 495, 11 Pac. 453, 57 Am. Rep. 187; Scott v. Slaughter, (Tex. Civ. App.) 80 S. W. 643.

means of obtaining knowledge, of all the circumstances, cannot be recovered back.[1 b] There is an exception, as in the case of compromises, when the erroneous payment is induced or accompanied by a violation of confidence reposed, lack of full disclosure, misrepresentation as to liability, or other similar inequitable conduct.[2 c]

1 Bilbie v. Lumley, 2 East, 469; Rogers v. Ingham, L. R. 3 Ch. Div. 351, 356, 357; Bate v. Hooper, 5 De Gex, M. & G. 338; Stafford v. Stafford, 1 De Gex & J. 193, 197; Great Western R'y v. Cripps, 5 Hare, 91; Drewry v. Barnes, 3 Russ. 94; Goodman v. Sayers, 2 Jacob & W. 249, 263; Currie v. Goold, 2 Madd. 163; Railroad Co. v. Soutter, 13 Wall. 517, 524; Bank of United States v. Daniel, 12 Pet. 32; Elliott v. Swartout, 10 Pet. 137; Haven v. Foster, 9 Pick. 112; 19 Am. Dec. 353; Clarke v. Dutcher, 9 Cow. 674; Ege v. Koontz, 3 Pa. St. 109; Shotwell v. Murray, 1 Johns. Ch. 512, 516; Storrs v. Barker, 6 Johns. Ch. 166; 10 Am. Dec. 316; Livermore v. Peru, 55 Me. 469. If the doctrine formulated in § 849 be correct, then it seems that this particular rule forbidding the recovery back of money paid under a mistake of law is based upon an erroneous conception of the principle which should govern such cases, and the opinions of those jurists which uphold the right of recovery, quoted *ante*, in the note under § 841, appear to be correct in principle. This rule itself is an illustration of the disinclination of equity courts to depart from a doctrine, settled at law, when the rights and the remedies are the same in both jurisdictions.

2 Bingham v. Bingham, 1 Ves. Sr. 126; Davis v. Morier, 2 Coll. C. C. 303; Ex parte James, L. R. 9 Ch. 609; Rogers v. Ingham, L. R. 3 Ch. Div. 351, 356; Pusey v. Desbouvrie, 3 P. Wms. 315.

(b) Painter v. Polk County, 81 Iowa, 242, 47 N. W. 65, 25 Am. St. Rep. 489; Alton v. First Nat. Bank, 157 Mass. 341, 32 N. E. 228, 34 Am. St. Rep. 285, 18 L. R. A. 144; Erkens v. Nicolin, 39 Minn. 461, 40 N. W. 567; Gilliam v. Alford, 69 Tex. 267, 6 S. W. 757; Beard v. Beard, 25 W. Va. 486, 52 Am. Rep. 219; Shriver v. Garrison, 30 W. Va. 456, 4 S. E. 660; Scott v. Slaughter, (Tex. Civ. App.) 80 S. W. 643. In Connecticut the rule seems to be otherwise, both at law and in equity; the doctrine stated in § 849 applies: Mansfield v. Lynch, 59 Conn. 320, 22 Atl. 313, 12 L. R. A. 285, citing Northrop v. Graves, 19 Conn. 548, 50 Am. Dec. 264.

In Daniell v. Sinclair, 6 App. Cas. (Priv. Coun.) 181, it was held that giving credit in an account under a mistake of law does not prevent the reopening of the account in equity, though under some circumstances giving such credit may at law be treated as equivalent to payment.

(c) Also, the rule applicable to private litigants does not apply to a case where money is by mistake of law paid to an officer of the court; the court will not allow him to take advantage of the mistake, but will order the money to be refunded: Ex parte Simmonds, L. R. 16 Q. B. D. 308; In re Opera, Limited, [1891] 2 Ch. 154; Gillig v. Grant, 49 N. Y. Suppl. 78, 23 App. Div. 596.

§ 852. Second. Mistakes of Facts.[a]— The general doctrine is firmly settled as one of the elementary principles of the equitable jurisdiction, that a court of equity will grant its affirmative or defensive relief, as may be required by the circumstances, from the consequences of any mistake of fact which is a material element of the transaction, and which is not the result of the mistaken party's own violation of some legal duty, provided that no adequate remedy can be had at law.[b] It has been said, "No person can be presumed to be acquainted with all matters of fact connected with a transaction in which he engages." This general doctrine is applied in a great variety of forms and under a great variety of circumstances. It presents but few *theoretical* difficulties; its practical difficulties arise from its application to particular instances of relief, and this application must be largely controlled by the circumstances of each case.

§ 853. How Mistakes of Fact may Occur.— All mistakes of fact in agreements executed or executory, express or implied, must be concerning either the subject-matter or the terms. In the first case, the terms are stated according to the intent of both the parties, but there is an error of one or both in respect of the thing to which these terms apply,— its identity, situation, boundaries, title, amount, value, and the like. Such a mistake may relate to any kind of subject-matter, and may occur in a verbal as well as in a written agreement. In the second case, the mistake may arise *after* the parties have verbally concluded their agreement, and may occur in reducing that agreement to writing, by erroneously adding, omitting, or altering some term;[a] or it may arise in the very process of making the agreement, during the negotiation itself, one or both the parties misconceiving,

§ 852, (a) Sections 852–854 are cited in Earl v. Van Natta, 29 Ind. App. 532, 64 N. E. 901. Sections 852–870 are cited in Miles v. Miles, (Miss.) 37 South. 112.

§ 852, (b) Quoted in Farrell v. Bouck, 60 Neb. 771, 84 N. W. 260. This section is cited in Silbar v. Ryder, 63 Wis. 106, 23 N. W. 106; Barker v. Fitzgerald, (Ill.) 68 N. E. 430.

§ 853, (a) See Citizens' Nat. Bank of Attica v. Judy, 146 Ind. 322, 43 N.

misunderstanding, or even being entirely ignorant of some term or provision; so that, although they *appear* to have made an agreement, yet in fact their minds never met upon the same matters.[b] While this latter species of error is not infrequent, it generally consists in a mistake or ignorance as to the *legal effect* of the provision, rather than as to the language in which the provision is expressed. The same description will plainly apply to all forms of mistakes of fact in transactions which are not agreements.

§ 854. **In What Mistakes of Fact may Consist.**[a]—It would be impossible, within any reasonable limits, to enumerate the various forms in which mistakes of fact may appear; and such an enumeration is not at all necessary; some important illustrations will be given in subsequent chapters which treat of reformation and cancellation. A general description of all the possible phases will be sufficient. It will be remembered that the essential element of mistake was defined to be a *mental* condition or conception or conviction of the understanding. This mental condition may be either a *passive* state or an *active* conviction. When merely passive, it may consist of an unconsciousness, an ignorance, or a forgetfulness; when active, it must be a belief. In the first of these two conditions, the unconsciousness, ignorance, or forgetfulness may be either of a fact which is present and now existing, or of a fact which is past and has existed; they must always concern a *fact* material to the transaction. In the second condition, the belief may be either that a certain matter or thing exists at the present time, which really does not exist; or that a certain matter or thing ex-

E. 259, citing this paragraph of the text.

(b) See Crookston Imp. Co. v. Marshall, 57 Minn. 333, 47 Am. St. Rep. 612, 59 N. W. 294, citing this paragraph of the text.

(a) This section is cited in Stacey v. Walter, 125 Ala. 291, 28 South. 89, 82 Am. St. Rep. 235; Barker v. Fitzgerald, (Ill.) 68 N. E. 430; Hall v. First Nat. Bank, 173 Mass. 16, 53 N. E. 154, 73 Am. St. Rep. 255, 44 L. R. A. 319.

isted at some past time, which did not really exist. All possible forms of mistakes of fact are embraced within this description; and all particular errors which fall under any of these conditions are mistakes of fact which furnish an occasion for equitable relief.[1] The law of a foreign country or of another state is always regarded as a "fact," within the meaning of the term as used in the foregoing description; an error or ignorance concerning such law is therefore a mistake of fact.[2] [b] It necessarily follows from this description that where an act is done intentionally and with knowledge, the doing the act cannot be treated as a mistake. Thus if parties knowingly and intentionally add to or omit from their written agreement a certain provision, such adding to or omission cannot constitute a mistake, so as to be a ground for relief.[3] [c]

[1] See *ante*, cases under § 839.

[2] McCormick v. Garnett, 5 De Gex, M. & G. 278; Leslie v. Baillie, 2 Younge & C. 91; Haven v. Foster, 9 Pick. 111, 112; 19 Am. Dec. 353; Bank of Chillicothe v. Dodge, 8 Barb. 233; Merchants' Bank v. Spalding, 12 Barb. 302; Patterson v. Bloomer. 35 Conn. 57; 95 Am. Dec. 218.

[3] The exact import of this rule should not be misapprehended. The parties may be in error as to the *legal effect* of the addition or omission; this would be a mistake of law which, as has been shown, would not be relieved. They *might* also be mistaken as to the subject-matter of the provision added or omitted, or *possibly* as to its language, and such an error might be a mistake of fact. The rule of the text simply declares that when an act is done intentionally and knowingly, the *very doing itself* cannot be treated as a mistake entitled to relief; the elements of knowledge and intention contradict the essential conception of mistake; See Marquis of Townshend v. Stangroom, 6 Ves. 328, 332; Lord Irnham v. Child, 1 Brown Ch. 92; Lord Portmore v. Morris, 2 Brown Ch. 219; Hare v. Shearwood, 3 Brown Ch. 168; Cripps v. Jee, 4 Brown Ch. 472; Pitcairn v. Ogbourne, 2 Ves. Sr. 375; Betts v. Gunn, 31 Ala. 219.

Where a verbal stipulation is made at the same time as the written contract, and is omitted intentionally on the faith of an assurance that it shall be as binding as though incorporated into the writing, the rule as generally settled does not permit such provision to be proved and enforced. It is said that, there being no fraud or mistake, to allow the verbal term to be proved by parol evidence, and the written agreement to be thereby varied, would be a

(b) Ellison v. Branstator, 153 Ind. 146, 54 N. E. 433.

(c) Hall v. First Nat. Bank, 173 Mass. 16, 53 N. E. 154, 73 Am. St. Rep. 255, 44 L. R. A. 319.

§ 855. Compromises and Speculative Contracts.— When parties have entered into a contract or arrangement based upon uncertain or contingent events, purposely as a compromise of doubtful claims arising from them, and where parties have knowingly entered into a speculative contract or transaction,— one in which they intentionally speculated as to the result,— and there is in either case an absence of bad faith, violation of confidence, misrepresentation, concealment, and other inequitable conduct mentioned in a former paragraph, if the facts upon which such agreement or transaction was founded, or the event of the agreement itself, turn out very different from what was expected or anticipated, this error, miscalculation, or disappointment, although relating to matters of fact, and not of law, is not such a mistake, within the meaning of the equitable doctrine, as entitles the disappointed party to any relief either by way of canceling the contract and rescinding the trans-

violation of the statute of frauds, and would introduce all the evils which the statute was designed to prevent. The relief given in cases of fraud and mistake stands upon different grounds; although *appearing* to conflict with the statute, it is really carrying out the ultimate purposes of the legislature by preventing injustice. No such grounds, it is said, exist where parties have intentionally omitted provisions from their written agreements: See cases cited above; also Stevens v. Cooper, 1 Johns. Ch. 425; 7 Am. Dec. 499; Dwight v. Pomeroy, 17 Mass. 303; 9 Am. Dec. 148; Towner v. Lucas, 13 Gratt. 705; Broughton v. Coffer, 18 Gratt. 184; Knight v. Bunn, 7 Ired. Eq. 77; Westbrook v. Harbeson, 2 McCord Eq. 112; Ware v. Cowles, 24 Ala. 446; 60 Am. Dec. 482. There are cases, however, which seem to reject this conclusion, and allow the verbal stipulation to be proved and enforced, and the written agreement to be reformed, on the ground that the refusal to abide by the whole agreement, and the attempt to enforce that portion only which is written, constitute a fraud which equity ought to prohibit: See Murray v. Dake, 46 Cal. 644; Taylor v. Gilman, 25 Vt. 411; Coger's Ex'rs v. McGee, 2 Bibb, 321; 5 Am. Dec. 610; Rearich v. Swinehart, 11 Pa. St. 233; 51 Am. Dec. 540; Renshaw v. Gans, 7 Pa. St. 119; Clark v. Partridge, 2 Pa. St. 13; 4 Pa. St. 166; Oliver v. Oliver, 4 Rawle, 141; 26 Am. Dec. 123; Miller v. Henderson, 10 Serg. & R. 290; Campbell v. McClenachan, 6 Serg. & R. 171. Whether affirmative relief be permitted or not, the omitted verbal portion of the entire agreement may be set up by way of *defense* in equity, when an attempt is made to enforce the written part alone: Jervis v. Berridge, L. R. 8 Ch. 351 (a very important case); and see Quinn v. Roath, 37 Conn. 16; Murray v. Dake, 46 Cal. 644.

action, or of defense to a suit brought for its enforcement. In such classes of agreements and transactions, the parties are supposed to calculate the chances, and they certainly assume the risks, where there is no element of bad faith, breach of confidence, misrepresentation, culpable concealment, or other like conduct amounting to actual or constructive fraud.[1a]

§ 856. Requisites to Relief — Mistake must be Material and Free from Culpable Negligence.— There are two requisites essential to the exercise of the equitable jurisdiction in giving any relief defensive or affirmative. The fact concerning which the mistake is made must be material to the

[1] Stapilton v. Stapilton, 1 Atk. 2; 2 Lead. Cas. Eq., 4th Am. ed., 1676, and notes; Jefferys v. Fairs, L. R. 4 Ch. D. 448; Pickering v. Pickering, 2 Beav. 31, 56; Lawton v. Champion, 18 Beav. 87; Baxendale v. Seale, 19 Beav. 601; Haywood v. Cope, 25 Beav. 140; Colby v. Gadsden, 34 Beav. 416; Jennings v. Broughton, 17 Beav. 234; Mellers v. Duke of Devonshire, 16 Beav. 252; Stanton v. Tattersall, 1 Smale & G. 529; Ridgway v. Sneyd, Kay, 627; Parker v. Palmer, 1 Cas. Ch. 42; Anonymous, cited in Cooth v. Jackson, 6 Ves. 24; Ex parte Peake, 1 Madd. 346, 355; Cann v. Cann, 1 P. Wms. 722, 727; Stockley v. Stockley, 1 Ves. & B. 23, 29, 31; Naylor v. Winch, 1 Sim. & St. 555; Goodman v. Sayers, 2 Jacob & W. 249, 263; Dunnage v. White, 1 Swanst. 137, 151, 152; Gordon v. Gordon, 3 Swanst. 400, 470; Harvey v. Cooke, 4 Russ. 34; Leonard v. Leonard, 2 Ball & B. 171, 179, 180; Stewart v. Stewart, 6 Clark & F. 911, 969; Shotwell v. Murray, 1 Johns. Ch. 512, 516; Good v. Herr, 7 Watts & S. 253; Brandon v. Medley, 1 Jones Eq. 313; Durham v. Wadlington, 2 Strob. Eq. 258; Williams v. Sneed, 3 Coldw. 533; Stover v. Mitchell, 45 Ill. 213; Bell v. Lawrence, 51 Ala. 160; and see *ante*, § 850, and cases cited. It is to this kind of agreements and transactions that the rules properly apply which have sometimes been incorrectly laid down as requisite to relief in all species of mistakes (see 1 Story Eq. Jur., secs. 146–149; Snell's Equity, p. 376), viz., that if the party could by reasonable diligence have obtained knowledge of the facts, equity will not relieve; also when means of information are equally open to both parties, and no confidence is reposed, and there is no violation of a duty to disclose, equity will not relieve: See Pickering v. Pickering, 2 Beav. 31, 56, per Lord Langdale; and Clapham v. Shillito, 7 Beav. 146, 149, 150.

(a) This entire section is quoted in Colton v. Stanford, 82 Cal. 389, 23 Pac. 16, 16 Am. St. Rep. 137. This section is cited in Chicago & N. W. R. Co. v. Wilcox, (C. C. A.) 116 Fed. 913; Kowalke v. Milwaukee E. R. & L. Co., 103 Wis. 472, 79 N W. 762, 74 Am. St. Rep. 877. See, also, Cooper v. Austin, 58 Tex. 494. As to the requisite of good faith, see Anthony v. Boyd, 15 R. I. 495, 8 Atl. 701, 10 Atl. 657; McHarry v. Irvin, 85 Ky. 322, 3 S. W. 374, 4 S. W. 800.

transaction, affecting its substance, and not merely its incidents; and the mistake itself must be so important that it determines the conduct of the mistaken party or parties.[a] If a mistake is made by one or both parties in reference to some fact which, though connected with the transaction, is merely incidental, and not a part of the very subject-matter, or essential to any of its terms, or if the complaining party fails to show that his conduct was in reality determined by it, in either case the mistake will not be ground for any relief affirmative or defensive.[1 b] As a second requisite, it has sometimes been said in very general terms that a mistake resulting from the complaining party's own negligence will never be relieved. This proposition is not sustained by the authorities. It would be more accurate to say that where the mistake is wholly caused by the want of that care and diligence in the transaction which should be used by every person of reasonable prudence, and the absence of which would be a violation of legal duty, a court of equity will not interpose its relief; but even with this more guarded mode of statement, each instance of negligence must depend to a great extent upon its own circumstances.[2 c] It is not every negli-

1 Stone v. Godfrey, 5 De Gex, M. & G. 76, 90, per Turner, L. J.; Okill v. Whittaker, 1 De Gex & S. 83; 2 Phill. Ch. 338; Trigge v. Lavallée, 15 Moore P. C. C. 270, 276; Carpmael v. Powis, 10 Beav. 36, 39; Penny v. Martin, 4 Johns. Ch. 566; Segur v. Tingley, 11 Conn. 134; Weaver v. Carter, 10 Leigh, 37; Trigg v. Read, 5 Humph. 529; 42 Am. Dec. 447; McFerran v. Taylor, 3 Cranch, 270; Henderson v. Dickey, 35 Mo. 120; Paulison v. Van Iderstine, 28 N. J. Eq. 306; Dambmann v. Schulting, 75 N. Y. 55, 63; Stettheimer v. Killip, 75 N. Y. 282.

2 Duke of Beaufort v. Neeld, 12 Clark & F. 248, 286; Leuty v. Hillas, 2 De Gex & J. 110; Wild v. Hillas, 28 L. J. Ch. 170; Besley v. Besley, L. R. 9

(a) Quoted in Pearce v. Suggs, 85 Tenn. 724, 4 S. W. 526. This section is cited in Buckley v. Patterson, 39 Minn. 250, 39 N. W. 490; Barker v. Fitzgerald, (Ill.) 68 N. E. 430.

(b) Quoted in Kowalke v. Milwaukee E. R. & L. Co., 103 Wis. 472, 79 N. W. 762, 74 Am. St. Rep. 877; Simmons v. Palmer, 93 Va. 389, 25 S. E. 6. See, also, Daggett v. Ayer, 65 N. H. 82, 18 Atl. 169.

(c) Quoted in Kinney v. Ensmenger, 87 Ala. 340, 6 South. 72; San Antonio Nat. Bank v. McLane, (Tex.)

gence that will stay the hand of the court. The conclusion from the best authorities seems to be, that the neglect must amount to the violation of a positive legal duty. The highest possible care is not demanded. Even a clearly established negligence may not of itself be a sufficient ground for refusing relief, if it appears that the other

Ch. Div. 103; West. R. R. v. Babcock, 6 Met. 346; Diman v. Providence R. R., 5 R. I. 130; Voorhis v. Murphy, 26 N. J. Eq. 434; Dillett v. Kemble, 25 N. J. Eq. 66; Haggerty v. McCanna, 25 N. J. Eq. 48; Wood v. Patterson, 4 Md. Ch. 335; Capehart v. Mhoon, 5 Jones Eq. 178; Lewis v. Lewis, 5 Or. 169; Ferson v. Sanger, 1 Wood. & M. 138; and see cases *ante*, under § 839. As examples: Under the original form of the two jurisdictions, a party who had a good defense or cause of action at law, and through negligence failed to set it up or enforce it, could not obtain relief in equity:[d] Stephenson v. Wilson, 2 Vern. 325; Ware v. Horwood, 14 Ves. 29, 31; Drewry v. Barnes, 3 Russ. 94; Bateman v. Willoe, 1 Schoales & L. 201. The purchaser of an estate, who had been compelled to give it up from a defect in the title which his attorney had carelessly overlooked, could not recover back the purchase price which he had paid: Urmston v. Pate, 3 Ves. 235, note; and see Cator v. Lord Pembroke, 1 Brown Ch. 301; 2 Brown Ch. 282; Thomas v. Powell, 2 Cox, 394. When a person neglects to perform some legal obligation, and thereby incurs a forfeiture, equity will not relieve therefrom: Gregory v. Wilson, 9 Hare, 683, 689; and see *ante*, § 452. And if a person executes an instrument carelessly, without even reading it, equity may refuse to relieve him from the consequences of errors in its contents:[e] Glenn v. Statler, 42 Iowa, 107, 110; and see Butman v. Hussey, 30 Me. 263; Juzan v. Toulmin, 9 Ala. 662; 44 Am. Dec. 448; Hill v. Bush, 19 Ark. 522.

70 S. W. 201. See, also, Champion v. Woods, 79 Cal. 17, 21 Pac. 534, 12 Am. St. Rep. 126; Boulden v. Wood, 96 Md. 332, 53 Atl. 911; Powell v. Heisler, 16 Or. 412, 19 Pac. 109; Seeley v. Bacon, (N. J. Eq.) 34 Atl. 139; Southern F. & W. Co. v. Ozment, 132 N. C. 839, 44 S. E. 681; Pearce v. Suggs, 85 Tenn. 724, 4 S. W. 526; Durkee v. Durkee, 59 Vt. 70, 8 Atl. 490.

(d) See § 1361, note.

(e) Metropolitan Loan Ass'n v. Esche, 75 Cal. 513, 17 Pac. 675; Roundy v. Kent, 75 Iowa, 662, 37 N. W. 146; Thompson v. Ela, 58 N. H. 490; Kennerty v. Phosphate Co., 21 S. C. 226, 53 Am. Rep. 669; Cape Fear Lumber Co. v. Matheson, (S. C.) 48 S. E. 111; Ferrell v. Ferrell, 53 W. Va. 515, 44 S. E. 187. But failure to read an instrument before executing it is not always such negligence as will bar relief: Albany City Savings Inst. v. Burdick, 87 N. Y. 39; Andrews v. Gillespie, 47 N. Y. 487; San Antonio Nat. Bank v. McLane, (Tex.) 70 S. W. 201; Story v. Gammell, (Iowa) 94 N. W. 982; Taylor v. Glens Falls Ins. Co., (Fla.) 32 South. 887; Smelser v. Pugh, (Ind.) 64 N. E. 943; Loyd v. Phillips, (Wis.) 101 N. W. 1092. Thus in Palmer v. Hartford Ins. Co., 54 Conn. 488, 9 Atl. 248, an insurance policy was reformed at the suit of the insured, al-

party has not been prejudiced thereby.[3] [f] In addition to the two foregoing requisites, it has been said that equity would never give any relief from a mistake, if the party could by reasonable diligence have ascertained the real facts; nor where the means of information are open to both parties and no confidence is reposed; nor unless the other party was under some obligation to disclose the facts known to himself, and concealed them.[4] A moment's reflection will clearly show that these rules cannot possibly apply to all instances of mistake, and furnish the prerequisites for all species of relief.[5] Their operation is, in-

3 U. S. Bank v. Bank of Georgia, 10 Wheat. 333, 343; Mayer v. Mayor etc., 63 N. Y. 455; Snyder v. Ives, 42 Iowa, 157, 162; and see cases at the commencement of last note. In this connection, there are *dicta*, followed by some of the text-writers, that a mistake concerning matters as to which the party had "means of knowledge," or "might have ascertained the truth," etc., will not be relieved from: See Mutual Life Ins. Co. v. Wager, 27 Barb. 354; Clarke v. Dutcher, 9 Cow. 674. These *dicta* cannot be accepted as correct. They are inconsistent with decisions, and have been expressly overruled: See Kelly v. Solari, 9 Mees. & W. 54; Townsend v. Crowdy, 8 Com. B., N. S., 477; Bell v. Gardiner, 4 Man. & G. 11; Dails v. Lloyd, 12 Q. B. 531; Allen v. Mayor etc., 4 E. D. Smith, 404. These are decisions at law, but the same would *a fortiori* be true in equity.

4 In Story's Equity Jurisprudence these rules are laid down in most general terms, without limitation, as though they belonged to every kind of mistake and form of relief: Secs. 146–148. Mr. Snell adopts them in the same unreserved manner: P. 376. The utter impossibility of applying such requisites in all instances of a common mistake by both the parties, and in granting the most important remedy of reformation, is evident; there is a contradiction in terms between these requirements and the very conception of a common mistake. Even where only one party is mistaken, and alleges the error as ground of defense or of rescission, to make these requisites ordinarily applicable would contradict the decisions concerning negligence cited in the last note, and would curtail the relief far within the well-established limits.

though he had not read the stipulations of the policy, in order to ascertain whether they corresponded with the terms of the agreement which he had already made. Illiteracy may excuse carelessness in executing an instrument: Kinney v. Ensmenger, 87 Ala. 340, 6 South. 72; Williams v. Hamilton, 104 Iowa 423, 65 Am. St. Rep. 475, 73 N. W. 1029.

(f) Quoted in Kinney v. Ensmenger, 87 Ala. 340, 6 South. 72. Cited to this effect in Bush v. Bush, 33 Kan. 556, 6 Pac. 794; Collignon v. Collignon, 52 N. J. Eq. 516, 28 Atl. 794.

(g) Quoted in Powell v. Heisler, 16 Or. 412, 19 Pac. 109; Pearce v. Suggs, 85 Tenn. 724, 4 S. W. 526.

deed, quite narrow; it is confined to the single relief of cancellation, and even then it is restricted to certain special kinds of agreements.[5]

§ 857. III. How Mistake may be Shown — When by Parol Evidence. — The next important matter to be considered is the mode of showing any mistake which may furnish an occasion for the exercise of equitable jurisdiction and the granting of equitable relief; and practically this is reduced to the question, When is extrinsic parol evidence admissible to establish a mistake in written instruments, and obtain the appropriate remedy? Whenever any suit or defense arises from a mistake in some transaction, not in the body of a written instrument, and not controlled by the statute of frauds nor by the settled rules concerning written evidence,— as, for example, a suit to recover back money paid through mistake,— since the entire transaction may be parol, there can be no doubt that the mistake may be proved by parol evidence. The whole right of action or of defense in such case may depend upon verbal proofs. It is only in cases of mistakes in writings that any difficulty is possible. The following comprise all the modes in which the question can be presented, and furnish a natural order of discussion: 1. In suits expressly brought to reform or to cancel written instruments on account of mistake; 2. Where the mistake is set up as a defense in suits brought to specifically enforce written instruments; 3. When the plaintiff alleges mistake in a written instrument, and seeks to have it enforced as corrected. There will be added,— 4. An examination of the question, how far the admission of parol evidence is limited in general by the statute of frauds.

§ 858. Parol Evidence in Cases of Mistake, Fraud, or Surprise.[a] — It is an elementary doctrine that parol evidence is not,

[5] See note under the preceding paragraph (§ 855), and cases at the end of the last note but one.

(a) This section is cited in Harding v. Long, 103 N. C. 1, 9 S. E. 445, 14 Am. St. Rep. 775; Smith v. Butler, 11 Or. 46, 4 Pac. 517.

in general, admissible between the parties to vary a written instrument, whether the same has been voluntarily adopted, or made in pursuance of a legal necessity.[1] It is equally well settled that mistake, fraud, surprise, and accident furnish exceptions to this otherwise universal doctrine. Parol evidence may, in proper modes and within proper limits, be admitted to vary written instruments, upon the ground of mistake, fraud, surprise, and accident. This exception rests upon the highest motives of policy and expediency; for otherwise an injured party would generally be without remedy. Even the statute of frauds cannot, by shutting out parol evidence, be converted into an instrument of fraud or wrong.[2]

1 Croome v. Lediard, 2 Mylne & K. 251.

2 See, per Lord Westbury, in McCormick v. Grogan, L. R. 4 H. L. 82, 97, quoted *ante*, in § 431; Clarke v. Grant, 14 Ves. 519; Marquis of Townshend v. Stangroom, 6 Ves. 328, 333, per Lord Eldon; Clinan v. Cooke, 1 Schoales & L. 22, 39, per Lord Redesdale; Murray v. Parker, 19 Beav. 305, 308. As to the effect of surprise, see Willan v. Willan, 16 Ves. 72; 19 Ves. 590; 2 Dow. 274; Twining v. Morrice, 2 Brown Ch. 326; Mason v. Armitage, 13 Ves. 25. The following American cases illustrate the exception by which parol evidence may be admitted to vary written instruments on the ground of mistake, in different forms and modes of proceeding:[b] Peterson v. Grover, 20 Me. 363; Bradbury v. White, 4 Greenl. 391; Rogers v. Saunders, 16 Me. 92; 33 Am. Dec. 635; Goodell v. Field, 15 Vt. 448; Lawrence v. Staigg, 8 R. I. 256; Quinn v. Roath, 37 Conn. 16; Canterbury Aq. Co. v. Ensworth, 22 Conn. 608; Patterson v. Bloomer, 35 Conn. 57; 95 Am. Dec. 218; Margraff v. Muir, 57 N. Y. 155; Best v. Stow, 2 Sand. Ch. 298; White v. Williams, 48 Barb. 222; Morganthau v. White, 1 Sweeny, 395; Ryno v. Darby, 20 N. J. Eq. 231; Conover v. Wardell, 20 N. J. Eq. 266; Chamness v. Crutchfield, 2 Ired. Eq. 148; Harrison v. Howard, 1 Ired. Eq. 407; Perry v. Pearson, 1 Humph. 431; Blanchard v. Moore, 4 J. J. Marsh. 471; Chambers v. Livermore, 15 Mich. 381; Van Ness v. City of Washington, 4 Pet. 232.

In the California Code of Civil Procedure the general doctrine and the exceptions are formulated as follows: "Sec. 1856. When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be between the parties and their representatives, or successors in interest, no evidence of the terms of the agreement, other than the contents of the writing, except in the following cases: 1. Where a mistake or imperfection of the writing is put in issue by

(b) Walden v. Skinner, 101 U. S. 577; Harding v. Long, 103 N. C. 1, 9 S. E. 445, 14 Am. St. Rep. 775; Smith v. Butler, 11 Or. 46, 4 Pac. 517.

§ 859. Parol Evidence in Suits for a Reformation or Cancellation.[a]— The foregoing exception embraces all suits brought expressly upon the mistake for the purpose of obtaining affirmative relief from its consequences. It is therefore settled that in the suits, whenever permitted, to reform a written instrument on the ground of a mutual mistake, parol evidence is always admissible to establish the fact of the mistake, and in what it consisted; and to show how the writing should be corrected in order to conform to the agreement which the parties actually made. Although in such cases there is often some ancillary writing to aid the court, such as a rough draught of the agreement, written instructions, and the like, yet, in the absence of these helps, the court *may* grant relief upon the strength of the verbal evidence alone. The same is true in suits brought to rescind and cancel a written agreement on the ground of a mistake by one of the parties, whereby their minds were prevented from meeting upon the same matter, and no agreement was really made; and *a fortiori* when the ground of the relief is fraud. Parol evidence must be admitted in these classes of cases, in order to a due administration of justice. If the general doctrine of the law or the statute of frauds was regarded as closing the door against such evidence, the injured party would be without any certain remedy, and fraud and injustice

the pleadings; 2. Where the validity of the agreement is the fact in dispute. But this section does not exclude other evidence of the circumstances under which the agreement was made, or to . . . . explain an extrinsic ambiguity, or to establish illegality or fraud. The term 'agreement' includes deeds and wills, as well as contracts between parties."

(a) This section is cited in Harding v. Long, 103 N. C. 1, 9 S. E. 445, 14 Am. St. Rep. 775; Koontz v. Owens, (Mo.) 18 S. W. 928; Bergeron v. Pamlico Ins. & B. Co., 111 N. C. 45, 15 S. E. 883; Wieneke v. Deputy, (Ind. App.) 68 N. E. 921; McGuigan v. Gaines, (Ark.) 77 S. W. 52; Treat v. Russell, (C. C. A.) 128 Fed. 847; Citizens' Nat. Bank of Attica v. Judy, 146 Ind. 322, 43 N. E. 259.

would be successful.[1] [b] The authorities all require that the parol evidence of the mistake and of the alleged modification must be most clear and convincing,— in the language of some judges, "the strongest possible,"— or else the mistake must be admitted by the opposite party; the resulting proof must be established beyond a reasonable doubt. Courts of equity do not grant the high remedy of reformation upon a probability, nor even upon a *mere* preponderance of evidence, but only upon a certainty of the error.[2] [c]

1 Lady Shelburne v. Lord Inchiquin, 1 Brown Ch. 338, per Lord Thurlow; Calverly v. Williams, 1 Ves. 210; Willan v. Willan, 16 Ves. 72; Davis v. Symonds, 1 Cox, 402; Druiff v. Parker, L. R. 5 Eq. 131, 137; Fowler v. Fowler, 4 De Gex & J. 250, 273; Garrard v. Frankel, 30 Beav. 445, 451; Barrow v. Barrow, 18 Beav. 529; Malmesbury v. Malmesbury, 31 Beav. 407; Murray v. Parker, 19 Beav. 305, 308; Scholefield v. Lockwood, 32 Beav. 436; Ashurst v. Mill, 7 Hare, 502; Bentley v. Mackay, 31 L. J. Ch. 697; Lackersteen v. Lackersteen, 6 Jur., N. S., 1111; Tomlison v. Leigh, 11 Jur., N. S., 962; Beaumont v. Bramley, Turn. & R. 41; Mortimer v. Shortall, 2 Dru. & War. 363; Alexander v. Crosbie, Lloyd & G. 145; Peterson v. Grover, 20 Me. 363; Bellows v. Stone, 14 N. H. 175; Langdon v. Keith, 9 Vt. 299; Chamberlain v. Thompson, 10 Conn. 243; 26 Am. Dec. 390; Wooden v. Haviland, 18 Conn. 101; Many v. Beekman Iron Co., 9 Paige, 188; Firmstone v. De Camp, 17 N. J. Eq. 317; Waldron v. Letson, 15 N. J. Eq. 123; Blair v. McDonnell, 5 N. J. Eq. 327; Gump's Appeal, 65 Pa. St. 476; Chew v. Gillespie, 56 Pa. St. 308; Lauchner v. Rex, 20 Pa. St. 464; Gower v. Sterner, 2 Whart. 75; Baynard v. Norris, 5 Gill, 468; 46 Am. Dec. 647; Newcomer v. Kline, 11 Gill & J. 457; 37 Am. Dec. 74; Irick v. Fulton, 3 Gratt. 193; Keyton v. Brawford, 5 Gratt. 39; Larkins v. Biddle, 21 Ala. 252; Hale v. Stone, 14 Ala. 803; Lauderdale v. Hallock, 7 Smedes & M. 622; Wurzburger v. Meric, 20 La. Ann. 415; Mattingly v. Speak, 4 Bush, 316; Graves v. Mattingly, 6 Bush, 361; McCann v. Letcher, 8 B. Mon. 320; McCloskey v. McCormick, 44 Ill. 336; Mills v. Lockwood, 42 Ill. 111; Cleary v. Babcock, 41 Ill. 271; Shively v. Welsh, 2 Or. 288; Bradford v. Union Bank, 13 How. 57, 66; and see cases in next note.

2 Henkle v. Royal Exch. Co., 1 Ves. Sr. 317; Pitcairn v. Ogbourne, 2 Ves. Sr. 375, 379; Willan v. Willan, 16 Ves. 72; Marquis of Townshend v. Stangroom, 6 Ves. 328, 333; Fowler v. Fowler, 4 De Gex & J. 250, 265; Walker v. Arm-

(b) Parol evidence is admissible to rectify a mistake in a marriage settlement, notwithstanding the statute of frauds, an action of that kind not being one seeking "to charge any person upon any agreement made upon consideration of marriage," within the meaning of the statute: Johnson v. Bragge, [1901] 1 Ch. 28.

(c) This portion of the text is quoted in Hupsch v. Resch, 45 N. J. Eq. 657, 18 Atl. 372; Harding v.

§ 860. Parol Evidence in Defense in Suits for a Specific Performance.[a]— The second class of cases embraces those in which parol evidence of mistake is offered defensively. The equitable remedy of the specific enforcement of contracts, even when they are valid and binding at law, is not a matter of course; it is so completely governed by equitable considerations that it is sometimes, though improp-

strong, 8 De Gex, M. & G. 531; Bold v. Hutchinson, 5 De Gex, M. & G. 558; Bentley v. Mackay, 4 De Gex, F. & J. 279; 31 L. J. Ch. 709; Harris v. Pepperell, L. R. 5 Eq. 1; Earl of Bradford v. Earl of Romney, 30 Beav. 431; Garrard v. Frankel, 30 Beav. 445; Eaton v. Bennett, 34 Beav. 196; Lloyd v. Cocker, 19 Beav. 140; Rooke v. Lord Kensington, 2 Kay & J. 753; Sells v. Sells, 1 Dru. & Sm. 42; Mortimer v. Shortall, 2 Dru. & War. 363, 372, 374; Beaumont v. Bramley, Turn. & R. 41, 50; Marquis of Breadalbane v. Marquis of Chandos, 2 Mylne & C. 711, 740; United States v. Munroe, 5 Mason, 572; Andrews v. Essex Ins. Co., 3 Mason, 6; Tucker v. Madden, 44 Me. 206; Farley v. Bryant, 32 Me. 474; Brown v. Lamphear, 35 Vt. 252; Lyman v. Little, 15 Vt. 576; Preston v. Whitcomb, 17 Vt. 183; Stockbridge Iron Co. v. Hudson R. Iron Co., 102 Mass. 45; Sawyer v. Hovey, 3 Allen, 331; 81 Am. Dec. 659; Andrew v. Spurr, 8 Allen, 412; Canedy v. Marcy, 13 Gray, 373; Nevins v. Dunlap, 33 N. Y. 676; Mead v. Westchester Ins. Co., 64 N. Y. 453; White v. Williams, 48 Barb. 222; Smith v. Mackin, 4 Lans. 41; Lyman v. U. S. Ins. Co., 2 Johns. Ch. 630; 17 Johns. 373; Conover v. Wardell, 22 N. J. Eq. 492; Burgin v. Giberson, 26 N. J. Eq. 72; Green v. Morris, 12 N. J. Eq. 165, 170;

Long, 103 N. C. 1, 9 S. E. 445, 14 Am. St. Rep. 775; Anderson v. Anderson Food Co., (N. J. Eq.) 57 Atl. 489; Southard v. Curley, 134 N. Y. 148, 31 N. E. 330, 30 Am. St. Rep. 642, 16 L. R. A. 561; Marsh v. Marsh, 74 Ala. 418. See, also, Maxwell Land Grant Case, 121 U. S. 325, 122 U. S. 365, 7 Sup. Ct. 1015, 1271; Chicago & N. W. R. Co. v. Wilcox, (C. C. A.) 116 Fed. 913; Griswold v. Hazard, 26 Fed. 135; McGuigan v. Gaines, (Ark.) 77 S. W. 52; Hutchinson v. Ainsworth, 73 Cal. 458, 15 Pac. 82, 2 Am. St. Rep. 823; Stanley v. Marshall, 206 Ill. 20, 69 N. E. 58; Jackson v. Magbee, 21 Fla. 622; Wieneke v. Deputy, (Ind. App.) 68 N. E. 921; First Presbyterian Church v. Logan, 77 Iowa, 328, 42 N. W. 310; Sauer v. Nehls, (Iowa) 96 N. W. 759; Bowman v. Besley, (Iowa) 97 N. W. 60; Bodwell v. Heaton, 40 Kan. 36, 18 Pac. 901; Schaefer v. Mills, (Kan.) 76 Pac. 436; Andrews v. Andrews, 81 Me. 337, 17 Atl. 166; Mikiska v. Mikiska, (Minn.) 95 N. W. 910; Meredith v. Holmes, (Mo. App.) 80 S. W. 61; Koontz v. Owens, (Mo.) 18 S. W. 928; Allen v. Crouter, (N. J. Eq.) 54 Atl. 426; Green v. Stone, 54 N. J. Eq. 387, 55 Am. St. Rep. 577, 34 Atl. 1099; Harding v. Long, 103 N. C. 1, 9 S. E. 445, 14 Am. St. Rep. 775; Forester v. Van Auken, (N. D.) 96 N. W. 301; Boyertown Nat. Bank v. Hartman, 147 Pa. St. 558, 23 Atl. 842, 30 Am. St. Rep. 759; Moore v. Giesecke, 76 Tex. 543, 13 S. W. 290; Jarrell v. Jarrell, 27 W. Va. 743.

(a) This section is cited in Reynolds v. Hooker, (Vt.) 56 Atl. 988.

erly, called discretionary; it is never granted unless it is entirely in accordance with equity and good conscience. It is therefore a well-settled rule, that in suits for the specific enforcement of agreements, even when written, the defendant may by means of parol evidence show that, through the mistake of both or either of the parties, the writing does not express the real agreement, or that the agreement itself was entered into through a mistake as to its subject-matter or as to its terms. In short, a court of equity will not grant its affirmative remedy to compel the defendant to perform a contract which he did not intend to make, or which he would not have entered into had its true effect been understood. What is thus true of mistake is equally true of a defense based upon fraud or surprise.[1] [b]

Durant v. Bacot, 13 N. J. Eq. 201; 15 N. J. Eq. 411; Hall v. Clagett, 2 Md. Ch. 151; Philpott v. Elliott, 4 Md. Ch. 273; Showman v. Miller, 6 Md. 479; Brantley v. West, 27 Ala. 542; Mosby v. Wall, 23 Miss. 81; 55 Am. Dec. 71; Tesson v. Atlantic Ins. Co., 40 Mo. 33, 36; 93 Am. Dec. 293; Beebe v. Young, 14 Mich. 136; Shay v. Pettes, 35 Ill. 360; Edmonds's Appeal, 59 Pa. St. 220; Potter v. Potter, 27 Ohio St. 84; Heavenridge v. Mondy, 49 Ind. 434; Miner v. Hess, 47 Ill. 170; Newton v. Holley, 6 Wis. 564; State v. Frank, 51 Mo. 98; Lestrade v. Barth, 19 Cal. 660, 675; Hathaway v. Brady, 23 Cal. 122; Shively v. Welch, 2 Or. 288. In Stockbridge etc. Co. v. Hudson R. Iron Co., 102 Mass. 45, Chapman, J., said: "The ordinary rule of evidence in civil actions, that the fact must be proved by a preponderance of evidence, does not apply to such a case as this. The proof that both parties intended to have the precise agreement set forth inserted in the deed, and omitted to do so by mistake, must be made beyond a reasonable doubt."

[1] Joynes v. Statham, 3 Atk. 388; Garrard v. Grinling, 2 Swanst. 244; Lord Gordon v. Marquis of Hertford, 2 Madd. 106; Clarke v. Grant, 14 Ves. 519; Winch v. Winchester, 1 Ves. & B. 375; Manser v. Back, 6 Hare, 443; Wood v. Scarth, 2 Kay & J. 33; Alvanley v. Kinnaird, 2 Macn. & G. 1; Watson v. Marston, 4 De Gex, M. & G. 230; Falcke v. Gray, 4 Drew. 651; Barnard v. Cave, 26 Beav. 253; Webster v. Cecil, 30 Beav. 62; Bradbury v. White, 4 Greenl. 391; Quinn v. Roath, 37 Conn. 16; Best v. Stow, 2 Sand. Ch. 298; Coles v. Bowne, 10 Paige, 526; Ely v. Perrine, 2 N. J. Eq. 396; Ryno v. Darby, 20 N. J. Eq. 231; Towner v. Lucas, 13 Gratt. 705, 714; Chambers v. Livermore, 15 Mich. 381; Cathcart v. Robinson, 5 Pet. 263.

(b) Fort Smith v. Brogan, 49 Ark. 306, 5 S. W. 337; Wilken v. Voss, 120 Iowa, 500, 94 N. W. 1123; Mansfield v. Sherman, 81 Me. 365, 17 Atl. 300; Hatch v. Kizer, 140 Ill. 583, 33 Am. St. Rep. 258, 30 N. E. 605. See, also, § 868.

Wherever the defendant's mistake was, either intentionally or not, induced, or made probable or even possible, by the acts or omissions of the plaintiff, then, on the plainest principles of justice, such error prevents a specific enforcement of the agreement.[2 c] Such co-operation by the plaintiff, however, is not at all essential. A mistake which is entirely the defendant's own, or that of his agent, and for which the plaintiff is not directly or indirectly responsible, may be proved in defense, and may defeat a specific performance. This is indeed the very essence of the equitable theory concerning the nature and effect of mistake.[3 d] A

2 Denny v. Hancock, L. R. 6 Ch. 1; Bascomb v. Beckwith, L. R. 8 Eq. 100; Swaisland v. Dearsley, 29 Beav. 430; Webster v. Cecil, 30 Beav. 62; Mason v. Armitage, 13 Ves. 25; Clowes v. Higginson, 1 Ves. & B. 524; 15 Ves. 516; Pym v. Blackburn, 3 Ves. 34; and see Doggett v. Emerson, 3 Story, 700; Rider v. Powell, 28 N. Y. 310; Matthews v. Terwilliger, 3 Barb. 50.

3 Ball v. Storie, 1 Sim. & St. 210; Malins v. Freeman, 2 Keen, 25; Manser v. Back, 6 Hare, 443; Leslie v. Tompson, 9 Hare, 268; Alvanley v. Kinnaird, 2 Macn. & G. 1, 7; Helsham v. Langley, 1 Younge & C. 175; Neap v. Abbott, Coop. C. P. 333; Howell v. George, 1 Madd. 1; Wood v. Scarth, 2 Kay & J. 33; Baxendale v. Seale, 19 Beav 601; Webster v. Cecil, 30 Beav. 62; Western R. R. Co. v. Babcock, 6 Met. 346; Park v. Johnson, 4 Allen, 259; Post v. Leet, 8 Paige, 337. See, however, Mortimer v. Pritchard, 1 Bail. Eq. 505.

In applying these rules of the text, it may be laid down as a general proposition that wherever, in the description of the subject-matter or in the terms and stipulations, a written agreement is ambiguous, so that the defendant may reasonably have been mistaken as to the subject-matter or terms, or is susceptible of different constructions, so that upon one construction it would have an effect which the defendant may be reasonably supposed not to have contemplated or intended, or so that the defendant may have reasonably put a different construction upon it from that which was understood by the plaintiff, in either of these cases a specific performance will be denied at the instance of the defendant, on the ground that it is inequitable to enforce the apparent agreement, when he has shown that there was no real meeting of minds, no common assent upon the same matters: Calverly v. Williams, 1 Ves. 210; Jenkinson v. Pepys, cited 15 Ves. 521; 1 Ves. & B. 528; Clowes v. Higginson, 1 Ves. & B. 524; Harnett v. Yielding, 2 Schoales & L. 549; Watson v. Marston, 4 De Gex, M. & G. 230; Parker v. Taswell, 2 De Gex & J. 559; Callaghan v. Callaghan, 8 Clark & F. 374; Wycombe R'y v. Donnington Hospital, L. R. 1 Ch. 268; Neap v. Abbott,

(c) Campbell v. Durham, 86 Ala. 299, 5 South. 507.

(d) Buckley v. Patterson, 39 Minn. 250, 39 N. W. 490.

mistake thus set up by the defendant is not merely a ground of defense, of dismissing the suit. If the plaintiff alleges a written agreement, and demands its specific performance, and the defendant sets up in his answer a verbal provision or stipulation, or variation omitted by mistake, surprise, or fraud, and submits to an enforcement of the contract *as thus* varied, and clearly proves by his parol evidence that the written contract modified or varied in the manner alleged by him constitutes the original and true agreement made by the parties, the court may not only reject the plaintiff's version, but may adopt that of the defendant, and may decree a specific performance of the agreement with the parol variation upon the mere allegations of his answer, without requiring a cross-bill.[e] The court will either decree a specific execution of the contract thus varied by the defendant, or else, if the plaintiff refuses to accept such relief, will dismiss the suit.[4][f] Under the old chancery prac-

Coop. C. P. 333; Wood v. Scarth, 2 Kay & J. 33; Baxendale v. Seale, 19 Beav. 601; Swaisland v. Dearsley, 29 Beav. 430; Webster v. Cecil, 30 Beav. 62; Hood v. Oglander, 34 Beav. 513; Manser v. Back, 6 Hare, 443. An attempt has been made in a few cases to limit the operation of this doctrine. Thus in Clowes v. Higginson, 1 Ves. & B. 524, Sir Thomas Plumer was of opinion that the admission of defendant's parol evidence of mistake, surprise, or fraud should be restricted to matters collateral to and independent of the written contract itself. He disputed the doctrine which permits the defendant to contradict the terms themselves of a written contract for the purpose of defeating a specific performance, but conceded that parol evidence was admissible to show mistake, fraud, or surprise, in something collateral to the contract. See also Price v. Ley, 4 Giff. 235; 32 L. J. Ch., N. S., 530. Notwithstanding this attempt to limit the doctrine, it is very clear that parol evidence of mistake, surprise, or fraud is admissible *in defense* as well where it contradicts the very terms themselves of the written agreement, as where it contradicts or modifies something collateral to the contract: Ramsbottom v. Gosdon, 1 Ves. & B. 165; Winch v. Winchester, 1 Ves. & B. 375; Marquis of Townshend v. Stangroom, 6 Ves. 328; and see cases cited in former part of this note.

[4] Ramsbottom v. Gosdon, 1 Ves. & B. 165; Winch v. Winchester, 1 Ves. & B. 375; Joynes v. Statham, 3 Atk. 388; Fife v. Clayton, 13 Ves. 546; Clarke v. Grant, 14 Ves. 519; Gwynn v. Lethbridge, 14 Ves. 585; Martin v.

(e) Quoted in Redfield v. Gleason, 61 Vt. 220, 17 Atl. 1075, 15 Am. St. Rep. 889.

(f) Redfield v. Gleason, 61 Vt. 220, 17 Atl. 1075, 15 Am. St. Rep. 889.

tice, the action of the court in such cases seemed to have been discretionary. Under the reformed procedure, which permits affirmative relief, either legal or equitable, to be obtained by defendants through a counterclaim, such a decree, under proper pleadings, is doubtless a matter of course and of right. Even where there has been *no* mistake, surprise, or fraud, if in such a suit the defendant alleges and proves an *additional* parol provision or stipulation agreed upon by the parties, the court will decree a specific performance of the written contract with this verbal provision incorporated into it, or else will dismiss the suit entirely.[5] It is not every mistake which will defeat the enforcement of an agreement. The error must be material, and must possess all of the elements heretofore described as requisite to the existence of the equitable jurisdiction.[6]

§ 861. Parol Evidence of Mistake on the Plaintiff's Part in Suits for a Specific Performance — English Rule.— We come, in the third place, to the question as to parol evidence of mistake on the part of the plaintiff in suits brought upon written agreements seeking to obtain their specific enforce-

Pycroft, 2 De Gex, M. & G. 785; London etc. R'y v. Winter, Craig & P. 57; Price v. Ley, 4 Giff. 235; Manser v. Back, 6 Hare, 443; Wood v. Scarth, 2 Kay & J. 33; Barnard v. Cave, 26 Beav. 253; Webster v. Cecil, 30 Beav. 62; Vouillon v. States, 2 Jur., N. S., 845; Bradford v. Union Bank, 13 How. 57; Quinn v. Roath, 37 Conn. 16; Patterson v. Bloomer, 35 Conn. 57; 95 Am. Dec. 218; Wells v. Cruger, 5 Paige, 164; Best v. Stow, 2 Sand. Ch. 298; Ferussac v. Thorn, 1 Barb. 42; Bradbury v. White, 4 Greenl. 391; Ryno v. Darby, 20 N. J. Eq. 231; McComas v. Easley, 21 Gratt. 23; Arnold v. Arnold, 2 Dev. Eq. 467; Huntington v. Rogers, 9 Ohio St. 511, 516; Chambers v. Livermore, 15 Mich. 381; Murphy v. Rooney, 45 Cal. 78.

[5] Martin v. Pycroft, 2 De Gex, M. & G. 785 (a very instructive case); Leslie v. Tompson, 9 Hare, 268; Barnard v. Cave, 26 Beav. 253; and see Croome v. Lediard, 2 Mylne & K. 251, in which the subject of parol variation is fully discussed. The rule of the text will not be applied where the contract has been to a great extent performed, and the parties cannot be restored to their original position: Vouillon v. States, 2 Jur., N. S., 845.

[6] Thus an inadvertent omission to propose an intended provision or stipulation as a part of the agreement is not: Parker v. Taswell, 2 De Gex & J. 559. But see Broughton v. Hutt, 3 De Gex & J. 501. Nor is a mistake as to the purpose for which the property referred to in the contract is to be used: Mildmay v. Hungerford, 2 Vern. 243.

ment. It has been shown that parol evidence of the mistake may be used by the plaintiff in suits brought directly upon it and seeking the remedy of a reformation or a cancellation, in order to be relieved from its consequences; and also that in suits on a written contract the defendant may resort to parol evidence of a mistake by way of defense, and even that the court may decree a performance of the contract *as thus varied by means of his evidence.* The question now presented is, whether, in suits of the same nature for the enforcement of a written agreement, the plaintiff, in addition to his averment of the written contract, may allege a mistake, surprise, or fraud, and may by means of parol evidence establish the verbal modification in the terms of the contract which would result from such error or fraud, and may obtain in the same suit a specific performance of the agreement so modified or varied. The rule is well established in England that this cannot be done, unless there has been a part performance of the parol variation.[1] [a] The reason originally assigned for this rule was, that the admission of parol evidence

[1] The leading case is Woollam v. Hearn, 7 Ves. 211; 2 Lead. Cas. Eq., 4th Am. ed., 920, and notes; Earl Darnley v. London etc. R'y, L. R. 2 H. L. 43; Wilson v. Wilson, 5 H. L. Cas. 40, 65, per Lord St. Leonards; Rich v. Jackson, 4 Brown Ch. 514; 6 Ves. 334, note; Higginson v. Clowes, 15 Ves. 516, 523; Winch v. Winchester, 1 Ves. & B. 375, 378; Manser v. Back, 6 Hare, 443, 447; Squire v. Campbell, 1 Mylne & C. 459, 480; London etc. R'y v. Winter, Craig & P. 57, 61; Emmet v. Dewhurst, 3 Macn. & G. 587; Attorney-General v. Sitwell, 1 Younge & C. 559; Clinan v. Cooke, 1 Schoales & L. 22, 38, 39; Davies v. Fitton, 2 Dru. & War. 225, 233. There are *dicta* suggesting a contrary view by Lord Hardwicke, in Walker v. Walker, 2 Atk. 98, 100; 6 Ves. 335, note; and in Joynes v. Statham, 3 Atk. 388; by Lord Thurlow, in Pember v. Mathers, 1 Brown Ch. 52; and by Lord Eldon, in Marquis of Townshend v. Stangroom, 6 Ves. 328, 339; and see also Harrison v. Gardner, 2 Madd. 198; Clarke v. Grant, 14 Ves. 519, 524, per Sir William Grant; Clifford v. Turrell, 1 Younge & C. Ch. 138, per Knight Bruce, V. C. As to enforcing the performance of a written contract with a parol modification at the instance of and proved by the defendant, see Martin v. Pycroft, 2 De Gex, M. & G. 785; Robinson v. Page, 3 Russ. 114, and cases in note under the last paragraph. This English doctrine, although established by such an array of authority, is open to the fol-

(a) May v. Platt, [1900] 1 Ch. 616.

as the foundation for final relief in such suits would be a violation of the statute of frauds. If this reasoning has any force, it is difficult to see why it does not equally forbid the enforcement of written contracts as modified by parol evidence at the instance of defendants, or why it does not in fact strike at the very foundation of the doctrine of reforming written agreements by means of parol evidence.

§ 862. Same. American Rule — Evidence Admissible.— The American courts have pursued a more simple and enlightened course of adjudication. The doctrine is well settled in the United States that where the mistake or fraud in a written contract is such as admits the equitable remedy of reformation, parol evidence may be resorted to by the plaintiff in suits brought for a specific performance. The plaintiff in such a suit may allege, and by parol evidence prove, the mistake or fraud, and the modification in the written agreement made necessary thereby, and may obtain a decree for the specific enforcement of the agreement thus varied and corrected.[1 a] As in suits for a refor-

lowing observations: 1. When the alleged mistake, and *a fortiori* the fraud, is committed by the plaintiff himself, it would be manifestly unjust that he should be allowed to correct his own error, or obviate the effects of his own deceit, and obtain the affirmative remedy of a specific execution of the contract as thus amended. In its application to such a case, the doctrine rests upon the sure foundations of equity, and prevails in the United States as well as in England. 2. But when the mistake is common, or the fraud is committed by the other party, so that the contract is one which may be reformed, there is certainly no greater injustice in permitting such correction, as a preliminary to an enforcement, to be made on the demand of the plaintiff, and as the result of parol evidence introduced by him, than in allowing it to be made on the allegations, parol proofs, and contention of the defendant. And when we consider that the plaintiff is able, by means of parol evidence, to obtain a reformation of the written contract, and that he can in a second suit compel the specific performance of the agreement as thus corrected, the doctrine of the text seems to rest upon no more solid foundation than mere verbal logic.

1 The leading case is Keisselbrack v. Livingston, 4 Johns. Ch. 144, 148. Chancellor Kent placed the decision broadly and squarely upon this doc-

(a) This section is cited in Davis v. Ely, 104 N. C. 16, 10 S. E. 138, 17 Am. St. Rep. 667, 5 L. R. A. 810; Forester v. Van Auken, (N. D.) 96 N. W. 301. See, also, Popplein v. Foley, 61 Md. 381; Nutall v. Nutall, (Ky.) 82 S. W. 377.

mation alone, the evidence must be of the clearest and most convincing nature; the burden of proof is on the plaintiff, and he must prove his case beyond a reasonable doubt.[2] It is not sufficient merely to prove a mistake which might be ground for a rescission. The plaintiff must establish a mistake of such a character as entitles him to a reformation, and such circumstances as render a reformation possible.[3] In those states which have adopted the reformed

trine, and said, concerning it, as follows: "Why should not the party aggrieved by a mistake have relief as well where he is plaintiff as where he is defendant? It cannot make any difference in the reasonableness and justice of the remedy, whether the mistake were to the prejudice of the one party or the other. If the court be a competent jurisdiction to correct such mistakes,— and that is a point understood and settled,— the agreement, when corrected and made to speak the real sense of the parties, ought to be enforced, as well as any other agreement perfect in the first instance. It ought to have the same efficacy and be entitled to the same protection, when made accurate under a decree of the court, as when made accurate by the act of the parties." The doctrine is either directly decided or recognized by the following cases: Bellows v. Stone, 14 N. H. 175; Smith v. Greeley, 14 N. H. 378; Tilton v. Tilton, 9 N. H. 385; Craig v. Kittredge, 23 N. H. 231; Beardsley v. Knight, 10 Vt. 185; 33 Am. Dec. 193; Glass v. Hulbert, 102 Mass. 24, 41; 3 Am. Rep. 418; Metcalf v. Putnam, 9 Allen, 97; Quinn v. Roath, 37 Conn. 16; Wooden v. Haviland, 18 Conn. 101; Chamberlain v. Thompson, 10 Conn. 243; 26 Am. Dec. 390; Gillespie v. Moon, 2 Johns. Ch. 585; 7 Am. Dec. 559; Lyman v. Un. Ins. Co., 17 Johns. 373; Rosevelt v. Fulton, 2 Cow. 129; Coles v. Bowne, 10 Paige, 526, 535; Gouverneur v. Titus, 1 Edw. Ch. 477; 6 Paige, 347; Hyde v. Tanner, 1 Barb. 75; Gooding v. McAlister, 9 How. Pr. 123; Smith v. Allen, 1 N. J. Eq. 43; 21 Am. Dec. 33; Hendrickson v. Ivins, 1 N. J. Eq. 562; Christ v. Diffenbach, 1 Serg. & R. 464; 7 Am. Dec. 624; Susquehanna Ins. Co. v. Perrine, 7 Watts & S. 348; Gower v. Sterner, 2 Whart. 75; Bowman v. Bittenbender, 4 Watts, 290; Clark v. Partridge, 2 Pa. St. 13; 4 Pa St. 166; Wesley v. Thomas, 6 Har. & J. 24; Moale v. Buchanan, 11 Gill & J. 314, 325; Coutt v. Craig, 2 Hen. & M. 618; Newsom v. Bufferlow, 1 Dev. Eq. 383; Brady v. Parker, 4 Ired. Eq. 430; Clopton v. Martin, 11 Ala. 187; Harris v. Columbiana Ins. Co., 18 Ohio, 116; 51 Am. Dec. 448; Webster v. Harris, 16 Ohio, 490; Worley v. Tuggle, 4 Bush, 168, 173; Shelby v. Smith, 2 A. K. Marsh. 504; Bailey v. Bailey, 8 Humph. 230; Leitensdorfer v. Delphy, 15 Mo. 160; 55 Am. Dec. 137; Murphy v. Rooney, 45 Cal. 78; Murray v. Dake, 46 Cal. 644.

[2] Nevins v. Dunlap, 33 N. Y. 676; Lyman v. U. Ins. Co., 2 Johns. Ch. 630; 17 Johns. 373; Harris v. Reece, 5 Gilm. 212; Beard v. Linthicum, 1 Md. Ch. 345; Brady v. Parker, 4 Ired. Eq. 430; Harrison v. Howard, 1 Ired. Eq. 407; Hunter v. Bilyeu, 30 Ill. 228, 246; Selby v. Geines, 12 Ill. 69; Bailey v. Bailey, 8 Humph. 230; and see *ante*, § 859, and cases in note.

[3] Lyman v. U. Ins. Co., 2 Johns. Ch. 630; Keisselbrack v. Livingston, 4 Johns. Ch. 144; Rider v. Powell, 28 N. Y. 310; Mathews v. Terwilliger, 3

procedure this doctrine is clearly established and its operation enlarged. In one civil action the plaintiff may not only unite and obtain both the remedy of reformation and the equitable remedy of specific performance, but also the remedy of reformation and the legal remedy of a pecuniary judgment for debt or damages for the breach of the contract as corrected, or the legal remedy of a recovery of specific property.[4] Also, the defendant, by means of a counterclaim, may obtain against the plaintiff the same union of affirmative equitable or equitable and legal reliefs.[5]

§ 863. Evidence of a Parol Variation Which has been Part Performed.— There is one particular case with respect to which the English and American courts are agreed,— the part performance by the plaintiff of the parol provision which he alleges in variation of the written agreement. It is the settled rule, both in England and in this country, that, in suits for a specific performance, the plaintiff may allege and prove a verbal addition or variation of the written contract, and that this additional verbal stipulation has been part performed by him, and may then ob-

Barb. 50; Hall v. Clagett, 2 Md. Ch. 151, 153; Philpott v. Elliott, 4 Md. Ch. 273; Durant v. Bacot 15 N. J. Eq. 411; Beebe v. Young, 14 Mich. 136; Tesson v. Atlantic M. Ins. Co., 40 Mo. 33, 36; 93 Am. Dec. 293; Fowler v. Fowler, 4 De Gex & J. 250, 265.

[4] Pomeroy on Remedies, secs. 78–85. Reforming and a pecuniary judgment on the instrument as reformed: Bidwell v. Astor Ins. Co., 16 N. Y. 263; Cone v. Niagara Ins. Co., 60 N. Y. 619; 3 Thomp. & C. 33; N. Y. Ice Co. v. N. W. Ins. Co., 23 N. Y. 357, 359; Welles v. Yates, 44 N. Y. 525; Caswell v. West, 3 Thomp. & C. 383. Reformation and other specific relief, such as recovery of land: Lattin v. McCarty, 41 N. Y. 107; Phillips v. Gorham, 17 N. Y. 270; Laub v. Buckmiller, 17 N. Y. 620; Henderson v. Dickey, 50 Mo. 161, 165; and see, on this subject generally, Gray v. Dougherty, 25 Cal. 266; Walker v. Sedgwick, 8 Cal. 398; Guernsey v. Am. Ins. Co., 17 Minn. 104, 108; Montgomery v. McEwen, 7 Minn. 351.

[5] Pomeroy on Remedies, secs. 91–97; Murphy v. Rooney, 45 Cal. 78; Guedici v. Boots, 42 Cal. 452, 456; Talbert v. Singleton, 42 Cal. 390; Hoppough v. Struble, 60 N. Y. 430; Haire v. Baker, 5 N. Y. 357; Crary v. Goodman, 12 N. Y. 266, 268; 64 Am. Dec. 506; Bartlett v. Judd, 21 N. Y. 200, 203; 78 Am. Dec. 131; Cavalli v. Allen, 57 N. Y. 508; Petty v. Malier, 15 B. Mon. 591, 604; Ingles v. Patterson, 36 Wis. 373; Onson v. Cown, 22 Wis. 329.

tain a decree for the specific enforcement of the entire agreement as thus modified.[1] There are two conditions of fact to which this rule applies: 1. The verbal modification may be contemporaneous with and a part of the original agreement;[2] 2. It may be a subsequent alteration of or addition to the original written agreement.[3] The rule applies alike to each of these two cases; but in both the part performance must be of the verbal stipulation, and must conform to all requisites as settled with respect to the part performance of any verbal agreement.[4]

§ 864. **Effect of the Statute of Frauds upon the Use of Parol Evidence.**—I shall conclude this branch of the subject with an examination, in more general terms, of the doctrine concerning the admission of parol evidence to vary the terms of written instruments which are embraced within the statute of frauds, the theory upon which the doctrine rests, the extent to which such evidence is admissible, and the limits upon the doctrine which have been asserted by some decisions. The discussion embraces both the use of parol evidence in suits brought merely for the reformation of such written instruments, and also its use where the plaintiff seeks, in one suit, to correct a written instrument by means of a verbal variation, and to specifically enforce it as corrected; the same fundamental principle underlies both of these classes. A distinct conflict of opinion exists

[1] Anonymous, 5 Vin. Abr. 522, pl. 38; Legal v. Miller, 2 Ves. Sr. 299; Pitcairn v. Ogbourne, 2 Ves. Sr. 375; Price v. Dyer, 17 Ves. 356; Gilroy v. Alis, 22 Iowa, 174; and cases in the two following notes.

[2] As an illustration: The real agreement was for the sale of two lots; the writing only set forth a contract for the sale of one; the plaintiff proves by parol evidence the true contract, and also a sufficient part performance with respect to the second lot; a specific performance of the whole is granted: Moale v. Buchanan, 11 Gill & J. 314; Parkhurst v. Cortlandt, 1 Johns. Ch. 273; 14 Johns. 15; and see Tilton v. Tilton, 9 N. H. 385; Glass v. Hulbert, 102 Mass. 24, 43; 3 Am. Rep. 418.

[3] O'Connor v. Spaight, 1 Schoales & L. 305; Devling v. Little, 26 Pa. St. 502.

[4] Cases in the two preceding notes; Glass v. Hulbert, 102 Mass. 24, 28; 3 Am. Rep. 418, per Wells, J.; Allen's Estate, 1 Watts & S. 383; Broughton v. Coffer, 18 Gratt. 184.

among the American decisions with respect to the extent of the general doctrine and the limitations upon its operation; and the question is one of so much practical importance that it demands a careful examination. I shall state the two opposing positions, and the grounds on which they are maintained, as clearly and accurately as may be possible, and shall endeavor to show which of the two accords with principle and is sustained by authority. It is, of course, assumed that the variation in the writing, which is to be established by parol evidence, arose from mistake, surprise, or fraud.

§ 865. **Two Classes of Cases in Which the Use of Parol Evidence may be Affected by the Statute.**— In contracts required by the statute of frauds to be in writing, all possible errors requiring a verbal variation, whether arising from mistake, surprise, or fraud, may be reduced to two general classes: 1. By means of the error the contract may include within its terms certain subject-matters — as, for example, lands — which were not intended by the parties to come within its operation, in which case the parol evidence will show that such subject-matters should be omitted, and the relief demanded will be a correction which shall exclude them, and confine the operation of the agreement to the remaining subject-matters mentioned in it, and to which alone it was intended by the parties to apply; 2. By means of the error the contract may omit certain subject-matters — as lands — which were intended by the parties to come within its operation; and in this case the parol evidence will show that such subject-matter should be included, and the relief demanded will be a modification of the writing, so that it shall embrace them, and shall thus extend its operation to particular subject-matters not mentioned in it, but to which it was originally intended to apply. So far as the statute of frauds can affect the parol variation of written instruments, it is obvious that these two classes describe all possible cases which can arise.

Now, it has been asserted — and I merely *state* the position at present without inquiring into its correctness — that a reformation and enforcement based upon parol evidence in the first of these classes does not conflict with the statute of frauds, since the relief does not *make* a parol contract, but simply narrows a written one already made. On the other hand, as it is asserted, the same relief in the second class does directly conflict with the statute, since it is a virtual making of a parol contract in relation to land or other subject-matter specified in the statute. In short, it is argued, the remedy in the latter instance is a parol extension of a written contract, so that it shall embrace a subject-matter not otherwise within its scope; in the former instance it is the withdrawal, by parol evidence, of a portion of the subject-matter from the scope of a written contract which is left in full force as to the remaining portion which had been embraced within it from the beginning; one is an affirmative process of making a contract; the other is merely a negative process of limiting a contract already made. The conflict of decision before mentioned turns upon these two classes. According to the interpretation of the general doctrine maintained by one group of decisions, the admission of parol evidence is confined to cases falling within the first class; according to the other view, the evidence is admissible alike in cases belonging to both classes.

§ 866. **General Doctrine that Parol Evidence of Mistake or of Fraud is Admissible in Both Classes of Cases.**[a]— The doctrine in all its breadth and force is maintained by courts and jurists of the highest ability and authority, which hold that, whether the contract is executory or executed, the plaintiff may introduce parol evidence to show mistake or fraud whereby the written contract fails to express the actual agreement, and to prove the modifications necessary to be made, whether such variation consists in limit-

(a) This section is cited in Reynolds v. Hooker, (Vt.) 56 Atl. 988.

ing the scope of the contract, or in enlarging and extending it so as to embrace land or other subject-matter which had been omitted through the fraud or mistake, and that he may then obtain a specific performance of the contract thus varied, and such relief may be granted although the agreement is one which by the statute of frauds is required to be in writing.[1] This view, in my opinion, is not only supported by the overwhelming preponderance of judicial authority, but is in complete accordance with the fundamental principles of equity jurisprudence.[b] Indeed, the other theory, as will more fully appear in the sequel, has no *necessary* connection with specific performance; if adopted and consistently carried out, it would necessarily restrict within narrow bounds the most salutary equitable remedy of reformation. The same broad view of the doctrine is clearly illustrated in the treatment of executed contracts or conveyances of land. It is settled by the great preponderance of authority that a deed of land may be thus corrected by enlarging its scope, extending its operation to other subject-matter, supplying portions of land which had been omitted, making the estates conveyed more comprehensive, as changing a life estate into a fee, and the like, and by enforcing the instrument thus varied against the grantor. If the doctrine can be thus applied to deeds which have actually conveyed the title, then *a fortiori* may it be applied to mere executory contracts which do not

[1] Keisselbrack v. Livingston, 4 Johns. Ch. 144; Gillespie v. Moon, 2 Johns. Ch. 585; 8 Am. Dec. 559; Phyfe v. Wardell, 2 Edw. Ch. 47; Coles v. Bown, 10 Paige, 526, 535; Hendrickson v. Ivins, 1 N. J. Eq. 562; Workman v. Guthrie, 29 Pa. St. 495; 72 Am. Dec. 654; Raffensberger v. Callison, 28 Pa. St. 246; Tyson v. Passmore, 2 Pa. St. 122; 44 Am. Dec. 181; Gower v. Sterner, 2 Whart. 75; Philpott v. Elliott, 4 Md. Ch. 273; Tilton v. Tilton, 9 N. H. 385; Murphy v. Rooney, 45 Cal. 78; Quinn v. Roath, 37 Conn. 16; Monro v. Taylor, 3 Macn. & G. 713, 718; Leuty v. Hillas, 2 De Gex & J. 110, 120; Beardsley v. Duntley, 69 N. Y. 577.

(b) The text is quoted in Neininger v. State, 50 Ohio St. 394, 34 N. E. 633 (reforming instrument executed by a surety).

disturb the legal title.[2][c] No such relief, however, can be granted, either when the contract is executory or executed, and no parol evidence can be used to modify the terms of a written instrument, and most emphatically when that instrument is required by the statute of frauds to be in writing, except upon the occasion of mistake, surprise, or fraud; one or the other of these incidents must be alleged and proved before a resort can be had to parol evidence in such cases. This is certainly the general rule, and the exceptions to it are more apparent than real.[3]

§ 867. Glass v. Hulbert — Examination of Proposed Limitations on This General Doctrine.— The courts of some states have confined the operation of the general doctrine to the first of the two classes described in a preceding paragraph. They have refused to apply the doctrine of a parol variation on behalf of the plaintiff to written instruments within the statute of frauds, when the modification would enlarge the scope of the instrument so that it should include subject-matter not embraced within it as it stands, or would increase the estate, or would otherwise cause it to operate

2 Monro v. Taylor, 3 Macn. & G. 718; Leuty v. Hillas, 2 De Gex & J. 110, 120; Craig v. Kittredge, 23 N. H. 231; Smith v. Greeley, 14 N. H. 378; Tilton v. Tilton, 9 N. H. 385; Blodgett v. Hobart, 18 Vt. 414; Chamberlain v. Thompson, 10 Conn. 243; 26 Am. Dec. 390; Gouverneur v. Titus, 1 Edw. Ch. 477; 6 Paige, 347; Wiswall v. Hall, 3 Paige, 313; De Peyster v. Hasbrouck, 11 N. Y. 582; Hendrickson v. Ivins, 1 N. J. Eq. 562; Tyson v. Passmore, 2 Pa. St. 122; 44 Am. Dec. 181; Flagler v. Pleiss, 3 Rawle, 345; Moale v. Buchanan, 11 Gill & J. 314; Worley v. Tuggle, 4 Bush, 168, 182; Provost v. Rebman, 21 Iowa, 419; Wright v. McCormick, 22 Iowa, 545; Hunter v. Bilyeu, 30 Ill. 228; Murray v. Dake, 46 Cal. 644.

3 Lee v. Kirby, 104 Mass. 420; Blakeslee v. Blakeslee, 22 Pa. St. 237. The rule prevailing in several states, which allows parol evidence to show that a deed absolute on its face is really a mortgage even when there was no mistake or fraud in its execution, might be regarded as an exception, but is not so treated by the courts which have adopted it; it is rested by them upon entirely different principles.

(c) McDonald v. Yungbluth, 46 Fed. 836; Taylor v. Deverell, 43 Kan. 469, 23 Pac. 628; Goodbar v. Dunn, 61 Miss. 618; Hitchins v. Pettingill, 58 N. H. 386; Crescent Mining Co. v. Wasatch Mining Co., 5 Utah, 624, 19 Pac. 198; Nutall v. Nutall, (Ky.) 82 S. W. 377.

upon interests which were not originally contained within its terms.[1] The grounds upon which this conclusion is based are briefly as follows: The statute of frauds peremptorily requires that every contract creating or transferring or otherwise dealing with an interest in land must

[1] The case in which this restrictive view is set forth in the most elaborate and distinct manner, and is maintained with the greatest display of reasoning, is Glass v. Hulbert, 102 Mass. 24; 3 Am. Rep. 418. The practical importance of the question justifies a careful examination of this noted decision. One of two adjoining lots belonging to the same person was bought in reliance upon the vendor's false and fraudulent representations that it included a certain sixteen acres, whereas these acres formed a part of the other lot. On discovering the fraud, the purchaser brought the suit, praying that the vendor might be compelled to convey the lot really intended. This remedy the court refused, holding that the vendee must be confined to a rescission and a legal action for damages. The following extracts from the opinion, by Wells, J., will show the theory maintained by the Massachusetts court. Mr. Justice Wells, after criticising the opinion of Chancellor Kent in the leading case of Gillespie v. Moon, 2 Johns. Ch. 585, 8 Am. Dec. 559, and claiming that much of what the chancellor there said concerning the extent and operation of the general doctrine was a mere *dictum*, not warranted by the facts nor necessary to the decision, proceeds: "The *principle* which was maintained by Chancellor Kent in Gillespie v. Moon, 2 Johns. Ch. 585, 8 Am. Dec. 559, was, that relief in equity against the operation of a written instrument, on the ground that by fraud or mistake it did not express the true contract of the parties, might be afforded to a plaintiff seeking a modification of the contract, as well as to a defendant resisting its enforcement. That proposition must be considered as fully established. It is quite another proposition to enlarge the subject-matter of the contract, or to add a new term to the writing, by parol evidence, and enforce it. No such proposition was presented by the case of Gillespie v. Moon, and it does not sustain the right to such relief against the statute of frauds. . . . . When the proposed reformation of an instrument involves the specific enforcement of an oral agreement within the statute of frauds, or when the term sought to be added would so modify the instrument as to make it operate to convey an interest or secure a right which can only be conveyed or secured through an instrument in writing, and for which no writing has ever existed, the statute of frauds is a sufficient answer to such a proceeding, unless the plea of the statute can be met by some ground of estoppel to deprive the party of the right to set up that defense: Jordan v. Sawkins, 1 Ves. Jr. 402; Osborn v. Phelps, 19 Conn. 63; 48 Am. Dec. 133; Clinan v. Cooke, 1 Schoales & L. 22. The fact that the omission or defect in the writing, by reason of which it failed to convey the land, or express the obligation which it is sought to make it convey or express, was occasioned by mistake or by deceit and fraud, will not alone constitute such an estoppel. There must concur, also, some change in the condition or position of the party seeking relief, by reason of being induced to enter upon the execution of the agreement, or to do acts upon the faith of it as if it were executed, with the knowledge and acquiescence of the

be in writing, and that while the limitation or restriction of a written agreement, so that it shall not include all the subject-matter originally within its scope, does not conflict with the statute, a reformation or enforcement based upon parol evidence, by which the contract is made to operate

other party either express or implied, for which he would be left without redress if the agreement were to be defeated. . . . . The principle on which courts of equity rectify an instrument so as to enlarge its operation, or to convey or enforce rights not found in the writing itself, and make it conform to the agreement as proved by parol evidence, on the ground of an omission by mutual mistake in the reduction of the agreement to writing, is, as we understand it, that in equity the previous oral agreement is held to subsist as a binding contract, notwithstanding the attempt to put it in writing; and upon clear proof of its terms the court compel the incorporation of the omitted clause, or the modification of that which is inserted, so that the whole agreement as actually intended to be made shall be truly expressed and executed: Hunt v. Rousmaniere, 1 Pet. 1; Oliver v. Mut. etc. Ins. Co., 2 Curt. 277. But when the omitted term or obligation is within the statute of frauds, *there is no valid agreement which the court is authorized to enforce outside of the writing.* In such case relief may be had *against* the enforcement of the contract as written or the assertion of rights acquired under it contrary to the terms and intent of the real agreement of the parties. Such relief may be given as well upon the suit of a plaintiff seeking to have a written contract or some of its terms set aside, annulled, or restricted, as to a defendant resisting its specific performance: Gillespie v. Moon, 2 Johns. Ch. 585; 8 Am. Dec. 559; Keisselbrack v. Livingston, 4 Johns. Ch. 148. Relief in this form, although procured by parol evidence of an agreement differing from the written contract, with proof that the difference was the result of accident or mistake, does not conflict with the provisions of the statute of frauds. That statute forbids the enforcement of certain kinds of agreement without writing, but it does not forbid the defeat or restriction of written contracts, nor the use of parol evidence for the purpose of establishing the equitable grounds therefor. The parol evidence is introduced, not to *establish* an oral agreement independently of the writing, but to show that the written instrument contains something contrary to or in excess of the real agreement of the parties, or does not properly express that agreement: Higginson v. Clowes, 15 Ves. 516; 1 Ves. & B. 524; Squier v. Campbell, 1 Mylne & C. 459, 480. But rectification by making the contract include obligations or subject-matter to which its written terms will not apply is a direct enforcement of the oral agreement, as much in conflict with the statute of frauds as if there were no writing at all. Such rectification, when the enlarged operation includes that which is within the statute of frauds, must be accomplished, if at all, under the other head of equity jurisdiction, namely, fraud." I remark, in this connection, that it is difficult to understand what the learned judge means by this last statement. The ground on which the plaintiff in the suit sought relief *was* fraud,— direct fraudulent misrepresentations by the defendant, and not mere mistake,— and the relief was denied because, as the court said, the granting it would violate

upon new and distinct subject-matter, estates, or interests, is a direct violation of the legislative mandate, and a gross usurpation of power by the courts, and cannot therefore be permitted. With regard to the character of these decisions as correct representations of the equitable doctrine, and to their effect as binding authority, it would perhaps be enough to say that, at the time when they were made, the courts of Massachusetts and of Maine, able and learned as they were, possessed only a very narrow and partial equitable jurisdiction, conferred entirely by statutes, and it was the very central position of their local system, repeatedly affirmed in the most positive manner, that they would not and could not enlarge their statutory jurisdiction by implication. This fact has exerted a most marked influence upon these courts in their manner of dealing with general topics which were partly embraced within the terms of the local statutes.[2] Passing by this fact, however, the decisions themselves are, in my opinion, based upon a misconception and misinterpretation of the true province and methods of equity in dealing with mandatory statutes of form,— such as the statute of frauds or of wills,— in cases of fraud, mistake, accident, and surprise, so as to prevent the enactments themselves from being

the statute of frauds. How, then, could the relief be sought, consistently with this view, under the jurisdiction over fraud? It is possible that he refers to the remedy of *rescission* based upon fraud; but the use of the word "rectification" seems to be opposed to this explanation. The same view of the doctrine was maintained in Elder v. Elder, 10 Me. 80, 25 Am. Dec. 205, per Weston, J., although it does not appear that any fraud was alleged as in the Massachusetts case. See also, as supporting the same theory with more or less directness,[a] Osborn v. Phelps, 19 Conn. 63; 48 Am. Dec. 133; Miller v. Chetwood, 2 N. J. Eq. 99; Dennis v. Dennis, 4 Rich. Eq. 307; Westbrook v. Harbeson, 2 McCord Eq. 112; Climer v. Hovey, 15 Mich. 18; Whitteaker v. Vanschoiack, 5 Or. 113; Best v. Stow, 2 Sand. Ch. 298. The American editor of the Leading Cases in Equity seems to favor the same view in his notes to Woollam v. Hearn, vol. 2, pp. 920, 944–1040, 4th Am. ed.

[2] See vol. 1, §§ 311–321, 322–337.

(a) Davis v. Ely, 104 N. C. 16, 10 S. E. 138, 17 Am. St. Rep. 667, 5 L. R. A. 810.

made the instruments of injustice.[3] The principles which underlie the theory advocated by the Massachusetts court, if carried out to their legitimate results, would work a virtual revolution in equity jurisprudence, would confine its most salutary remedial functions within very narrow limits, and would overturn doctrines which have been regarded as settled since the earliest periods of the jurisdiction.[4] They would greatly abridge the remedy of refor-

[3] See the language of Lord Westbury in McCormick v. Grogan, L. R. 4 H. L. 82, 97, quoted *ante*, vol. 1, § 431.

[4] In the first place the authorities are overwhelmingly opposed to the fundamental positions maintained by the Massachusetts and Maine courts, and the *ratio decidendi* in these numerous cases is conclusive. The statement necessarily implied by Mr. Justice Wells, that the relief of reformation is confined to agreements *not within* the statute of frauds, is without any foundation of fact. The cases are many, decided by the ablest courts, where a reformation and enforcement have been granted of written agreements within the statute of frauds, the effect of which was to enlarge the scope of the writing and make it include and operate upon lands not embraced within its original form,— cases belonging to the second class described in a foregoing paragraph. I will refer to a few such instances by way of illustration. In Moale v. Buchanan, 11 Gill & J. 314, a vendor had agreed to sell certain lots; he gave a deed, in pursuance of his contract, in which part of the lots were omitted by mistake. The court granted a rectification and compelled the vendor to convey the other lots. In De Peyster v. Hasbrouck, 11 N. Y. 582, defendant gave a mortgage on a piece of land which he fraudulently induced the plaintiff to believe was a lot containing a tannery and mill, while in fact these structures stood on another lot. The court granted relief by extending the lien of the mortgage so that it should include the land on which the buildings stood. In Wiswall v. Hall, 3 Paige, 313, a grantee intended to purchase and supposed he was obtaining certain land containing a wharf and other structures, and the grantor fraudulently suffered him to take a deed which only conveyed an adjacent and worthless lot. The court granted a reformation, and compelled the grantor to convey the true land. In Gouverneur v. Titus, 6 Paige, 347, 1 Edw. Ch. 477, a deed was corrected which by mistake conveyed an entirely different piece of land from the one intended to be purchased. In Flagler v. Pleiss, 3 Rawle, 345, a deed was reformed and made to convey land which had been left out by mistake. In Hendrickson v. Ivins, 1 N. J. Eq. 562, a bond was corrected and enforced against a surety, although the surety's contract was, of course, required to be in writing by the statute. In Tyson v. Passmore, 2 Pa. St. 122, 44 Am. Dec. 181, under the peculiar procedure then prevailing in Pennsylvania, an agreement, which was fraudulently represented as containing an entire tract of 260 acres, but which only covered a third of that amount, was virtually reformed, and the defendant compelled to convey the entire tract. The case, though in form an action of ejectment, was de-

mation; they would prevent the court from establishing and enforcing parol contracts which the defendant's actual fraud had prevented from being put into writing; and in fact, these principles cannot be reconciled with the doctrines upon which the jurisdiction of equity to enforce parol

cided entirely upon equitable principles.[b] See also Tilton v. Tilton, 9 N. H. 385; Smith v. Greeley, 14 N. H. 378; Blodgett v. Hobart, 18 Vt. 414; Beardsley v. Duntley, 69 N. Y. 577. Mr. Justice Wells would escape from the force of these and other cases of the same class, by claiming that they were decided upon the principle of equitable estoppel. He asserts that relief of the kind under consideration can only be given when the defendant has by his conduct estopped himself from setting up and relying upon the mandates of the statute. It is a complete answer to this ingenious position, that these cases were not in fact decided upon the ground of equitable estoppel. In all the cases of this class, the *ratio decidendi* was in no instance an equitable estoppel. In ascertaining what doctrines and rules have been established by adjudicated cases, we must always inquire what was the *actual* ground of the decision, what was the actual *ratio decidendi* adopted by the courts; it is useless to speculate as to other and *possible* grounds upon which the decisions might have been rested. But, as I shall show in the sequel, even if this class of decisions could be referred to the principle of equitable estoppel, their direct antagonism to the positions of the Massachusetts court would not thereby be lessened.

I will now examine these positions upon principle. The sole ground of opposition to the equitable jurisdiction is the statute of frauds. If there is any force in the objection, it applies as well to fraud as to mistake. Indeed the Massachusetts decision expressly takes this view, and denies the power of granting such relief in cases of fraud as well as in those of mistake. The Maine court does not avowedly push its reasoning to this extreme. In the first place, I shall suggest some considerations *negatively*. A fatal objection to the whole theory is, that it proves too much; if accepted as a true *principle* of equity, it necessarily destroys *uno flatu* several branches of the jurisdiction which are among its most familiar and salutary instances of relief. This theory is not in its essence directed against the remedy of specific performance, but against that of reformation; the act which these courts find to be so impossible is the *construction* of a contract by parol evidence, not the enforcement of a contract after it is constructed. The theory, therefore, militates against the remedy of reformation, as such, in all its phases, and as distinct from the subsequent remedy of enforcement. It also seems, notwithstanding the ingenious and very refined distinctions drawn by the Massachusetts court, to militate no less against the remedy of rescission. In short, if this theory be accepted, it must nullify the well-settled doctrines which permit a plaintiff to reform a written contract which, through fraud or mistake, does not express

(b) In McDonald v. Yungbluth, 46 Fed. 836, and Hitchins v. Pettingill, 58 N. H. 386, the doctrine of Glass v. Hulbert is expressly disapproved; see, also, Noel's Ex'r v. Gill, 84 Ky. 241, citing the text.

contracts in cases of part performance is vested. The statute of frauds is no real obstacle in the way of administering equitable remedies so as to promote justice and prevent wrong. Equity does not deny nor overrule the statute; but it declares that fraud or mistake creates obligations,

the real intent of the parties as shown by their prior parol agreement, and which permit a defendant to vary an agreement and enforce it as varied. It is well settled that both of these proceedings may be had; and neither the English nor the American courts have suggested the limitation that they can only be resorted to where the written instrument includes too much and the relief consists in narrowing its operation. But each of these proceedings is in appearance a violation of the statute of frauds, and is certainly prohibited by the principles of the theory which I am examining. Each of them is, in fact, the establishing by parol a contract which the statute says can only be established by writing. Nor can I see any *essential* distinction between the remedy of reformation in these instances and that of *rescission*, when the party, in order to lay the foundation for the rescission, is obliged to show by parol evidence a departure in the written instrument from the intent as verbally agreed. The party proves by parol evidence that there was a verbal contract broader than the written one, and because the written one thus varies from this agreement, it is set aside. The gist of the proceeding lies, not in the nature of the remedy, whether it be rescission or reformation, but in the establishment by means of parol evidence of a contract which embraces more than the written instrument does, and in thus doing what it is said the statute forbids. Again, this theory is in direct conflict with the well-settled doctrine that if one of the parties to a contract which is required by the statute of frauds to be in writing, by his own fraudulent practices prevents it from being reduced to writing in compliance with the statute, equity will interfere at the suit of the other party, and will enforce the agreement, although verbal: See Mestaer v. Gillespie, 11 Ves. 627, 628, per Lord Eldon; Montacute v. Maxwell, 1 P. Wms. 618; Haigh v. Kaye, L. R. 7 Ch. 469; Whitridge v. Parkhurst, 20 Md. 62; Jenkins v. Eldredge, 3 Story, 181; Fed. Cas. No. 7,266; Taylor v. Luther, 2 Sum. 228; Fed. Cas. No. 13,796; Barnard v. Flinn, 8 Ind. 204.

Finally, this theory, if correct, would at once overturn the whole jurisdiction of establishing and enforcing a parol contract which has been partly performed. The Massachusetts court accounts for the numerous cases in which written instruments within the statute of frauds have been reformed and enforced by enlarging their operation and making them include new subject-matter, by referring them all to the doctrine of equitable estoppel. This explanation, while conceding that such cases were correctly decided, is insufficient, and fails to remove the inconsistency and antagonism between those decisions and the theory maintained by the court. If the statute of frauds is so peremptory in its mandates that it forbids the proof of a contract by parol when it ought to be in writing, upon the occasion of fraud or mistake, it is equally peremptory in forbidding such proof upon the occasion of an equitable estoppel. It is just as much a violation of the statute to permit a contract

and confers remedial rights which are not within the statutory prohibition; in respect of them, the statute is uplifted. A more detailed examination of the theory advocated by these decisions, which its importance seemed to require, I have placed in the foot-note.

to be established by parol evidence on the plea of an estoppel from mere conduct, as on the plea of fraud or mistake. If the statute may be avoided on the one ground, it may be on the other; and it should be borne in mind that the sole foundation for the theory is the inviolability of the statute. There is nothing in an equitable estoppel which gives it any more power to dispense with the statute than may be given to fraud or mistake. In fact, the very foundation of the doctrine of equitable estoppel is the notion that it would be a virtual fraud upon one party if the other was not estopped; and some American courts have gone so far in this direction as to hold that *actual* fraud is an indispensable element of every equitable estoppel. It thus appears that the principles involved in this theory, if adopted, would undermine all these various instances of equitable jurisdiction, and the objections urged by the courts in support of the theory prove too much.

To the foregoing negative observations I shall now add an affirmative criticism of theory. Notwithstanding the great learning and eminent ability of the courts which have announced it, the theory involves, as it seems to me, a misconception of the fundamental principles of equity jurisprudence,—a failure to grasp those essential principles in their true nature, operation, and effects. As occasions for the exercise of equitable jurisdiction and for the granting of equitable relief, fraud and mistake stand upon exactly the same footing; their effects upon the rights of the injured party are the same; the necessity which they create for relief is the same. It is true that there is an element of moral wrong in fraud, which is not present in mistake where it at first occurs, and a judge feels inclined to punish the wrong-doer. But it is a principle which is fundamental and should never be forgotten, that equity relieves against fraud on account of its effects upon the rights of the injured party, and not on account of the moral delinquency of the wrong-doer. Now, the effects of a pure mistake upon the rights of the suffering party are the same as injuries, and calling as loudly for relief as those of fraud. Furthermore, although in the original mistake there is no element of immorality, yet afterwards, when the mistake is discovered, and the party benefited insists upon retaining its advantages, and refuses to voluntarily correct the error, but plants himself upon the strict *legal* rights which the erroneous writing gives him, there is but a very shadowy distinction between the immoral character of his conduct and that of the person who intentionally, by misrepresentations and concealments, induces another to enter into an agreement. And for this reason we find judges constantly describing the conduct of persons in such a situation, who insist upon holding the advantages accidentally obtained by mistake, as fraudulent, and the persons themselves as guilty, from a moral point of view, of virtual, if not actual, fraud. Whatever power, therefore, courts of equity possess to prevent and remove the consequences of fraud, they also possess in dealing with the effects of

§ 868. IV. Instances of Equitable Jurisdiction Occasioned by Mistake — By Way of Defense.— I shall, in concluding this section, enumerate the various modes in which the equitable jurisdiction may be exercised, and the various forms of remedy which may be granted, on the occasion of mis-

mistake. What, then, is the true principle upon which equity grants its reliefs on the occasion of fraud or mistake in written instruments, especially when these remedies seem to militate against the provisions of the statute of frauds? There are many settled doctrines of equity which maintain, protect, and enforce rights both of property and of remedy in seeming antagonism to the statutes of frauds, of wills, of recording, and the like. It has been shown in the first volume that in all such instances equity does not overrule the statute, nor deny nor disturb the *legal* title protected by the statute; it fastens a personal obligation upon the conscience of the party, and compels him to hold and use his legal title for the benefit of the other person who is recognized by the court as possessing the beneficial right: See vol. 1, §§ 430, 431, and the language of Lord Westbury there quoted.

The principle is unalterably fixed in the foundations of the jurisprudence that equity will not suffer a statute passed for the purpose of preventing fraud to be used as an instrument for accomplishing fraud; the statute will be uplifted, when necessary to prevent such a result. One or two examples will serve to illustrate this grand principle. In the case of enforcing a verbal contract on the ground of part performance, the relief is wholly based upon the notion that for the defendant — the vendor — to insist upon the statute and to set it up as a bar would be a fraud upon the plaintiff. Although the fraud is merely constructive, yet, because the mere act of setting up the statute as a peremptory defense would be a virtual fraud, a court of equity treats the statute as uplifted; it fastens a personal obligation upon the conscience of the defendant, and compels him to hold his legal title in trust for the plaintiff, and to perform the obligation by a conveyance. It is the same when parties have entered into a verbal agreement which the statute of frauds requires to be in writing in order to be binding, and one of them by his fraudulent conduct prevents it from being executed in a written form. Here, according to the terms of the statute, there is *no* contract; and, according to the theory under review, there being no contract, it should be impossible for a court of equity to construct one by parol proof of what the parties had agreed upon, and to enforce it when established. But a court of equity is not in the least hindered by these considerations, nor prevented from granting its relief. The fraud being shown and the contract proved by parol evidence, the court is not embarrassed by the statute. It fastens upon the wrong-doer a personal obligation to do exactly what he had verbally agreed to do, and if necessary, treats him as holding the legal title to the subject-matter in trust for the plaintiff, and compels him to consummate his own duty and the other's right by a conveyance, and thus the statute is uplifted. The same principle applies to facts and circumstances like those involved in the case of Glass v. Hulbert. When A and B have made a verbal agreement by which A is to convey certain lots of land,

take. These modes and forms will be *enumerated;* the full discussion of the doctrines and rules which govern the remedies themselves, and regulate the exercise of the jurisdiction in awarding them, will be given in the subsequent chapters which treat of remedies. The jurisdiction may be exercised either *defensively* or *affirmatively.* In equitable suits to compel the specific performance of contracts, or to enforce the obligation arising out of contract, or to enforce an obligation arising out of any other transaction, the defense of mistake is available to defeat or modify the relief. Of course, the mistake alleged and proved by the defendant must in all respects conform to the rules heretofore stated concerning the requisites of mistake in equity; it must be material, and must have determined the

and in putting this agreement into a written form, through mistake or the fraud of A, the writing includes only a portion of the lots, or different land from that intended by the parties, a court of equity is not any more obstructed by the statute in granting relief than in the instances before mentioned. The real agreement and intention being shown by parol evidence, the court fastens a personal obligation upon A; it treats him as holding the legal title of the lots really intended in trust for the vendee; and it works out and executes this trust by compelling a conveyance. It follows from the foregoing analysis of the principle, as well as from the general current of authorities, that, in granting the equitable relief of reformation and enforcement in such cases of mistake or fraud, it makes no possible difference whether the failure of the written instrument to express the real agreement and intent of the parties consists in its including too much or too little; it is immaterial whether the verbal contract to be proved by parol is broader than the written instrument, covering more or different subject-matter, or is narrower, embracing only a part of the subject-matter or terms which are found in the writing; whether the reformation shall enlarge the scope of the written contract by adding other terms or subject-matter, or shall restrict it by subtracting from its terms or subject-matter. In either of these instances the statute of frauds opposes no obstacle to relief, since in pursuance of the very principle upon which equity intervenes and grants *any* relief, the statute is regarded as uplifted, so that it may not become the instrument of perpetuating the very fraud which it was designed by the legislature to prevent. That this principle has been established on the grounds and to the extent which I have described, no one acquainted with the course of decision in the English and American courts can deny; and in my opinion, notwithstanding occasional doubts and even protests from individual judges, they have not thereby exceeded their proper powers and functions.

action of the party in entering into the contract or transaction. It may be common to both parties; it may be induced or procured by the conduct of the plaintiff; or it may be an error of the defendant alone, wholly due to himself. In either case it will be a defense.[a] The effect of mistake as a defense in equitable actions has already been considered in the former paragraphs which treat of the admission of parol evidence, and the decisions there cited will furnish examples and illustrations.[1] In states which have adopted the reformed procedure, the equitable jurisdiction may also be invoked, if necessary, by defendants in legal actions. This may be done by means of equitable defenses which simply defeat the plaintiff's legal cause of action, or by means of equitable counterclaims or cross-complaints, which demand for the defendant some affirmative relief, as reformation or cancellation.[2]

§ 869. By Way of Affirmative Relief — Recovery of Money Paid by Mistake.— The jurisdiction to confer affirmative relief will only be exercised in cases where an adequate remedy cannot be obtained at law. Whenever money has been paid, or chattels have been delivered, through mistake, the legal remedy by action will ordinarily be adequate and certain; in fact, the action to recover back money paid by mistake is a very familiar one at law. Whenever land has

1 See *ante*, § 860; see also Allen v. Richardson, L. R. 13 Ch. Div. 524; Jones v. Clifford, L. R. 3 Ch. Div. 779; McKenzie v. Hesketh, L. R. 7 Ch. Div. 675; Denny v. Hancock, L. R. 6 Ch. 1; Davis v. Shepherd, L. R. 1 Ch. 410; Wycombe R'y v. Donnington Hospital, L. R. 1 Ch. 268; Hooper v. Smart, L. R. 18 Eq. 683; Baskcomb v. Beckwith, L. R. 8 Eq. 100; Whittemore v. Whittemore, L. R. 8 Eq. 603; Moxey v. Bigwood, 4 De Gex, F. & J. 351; Parker v. Taswell, 2 De Gex & J. 559; Webb v. Kirby, 7 De Gex, M. & G. 376; Price v. Macaulay, 2 De Gex, M. & G. 339; Swaisland v. Dearsley, 29 Beav. 430; Alvanley v. Kinnaird, 2 Macn. & G. 1, 7; Helsham v. Langley, 1 Younge & C. 175; Howell v. George, 1 Madd. 1; Mason v. Armitage, 13 Ves. 25; Doggett v. Emerson, 3 Story, 700; West. R. R. v. Babcock, 6 Met. 346; Post v. Leet, 8 Paige, 337; Mortimer v. Pritchard, 1 Bail. Eq. 505.

2 See *ante*, § 862; see Arthur v. Homestead F. Ins. Co., 78 N. Y. 462; 34 Am. Rep. 550.

(a) Quoted in Dennis v. Northern Pac. Ry. Co., (Wash.) 55 Pac. 210.

been conveyed, or contracted to be conveyed, through mistake, the adequate remedy of the grantor or vendor would generally require the equitable relief of a cancellation. Although an action at law will ordinarily lie to recover back money paid through mistake, still, if the circumstances are special, and such that an action at law will either not lie at all, or will furnish an inadequate relief, a court of equity has undoubted jurisdiction, and will entertain a suit for the recovery of the money, if in good conscience it ought to be repaid.[1] [a]

§ 870. Affirmative Relief — Reformation and Cancellation.[a]— The most important affirmative remedies conferred by an exercise of the equitable jurisdiction on the occasion of mistake are cancellation and reformation. Cancellation is appropriate when there is an apparently valid written agreement or transaction embodied in writing, while in fact, by reason of a mistake of both or one of the parties, either no agreement at all has really been made, since the minds of both parties have failed to meet upon the same matters, or else the agreement or transaction is different, with respect to its subject-matter or terms, from that which was intended.[1] [b] Reformation is appropriate, when an agree-

§ 869, [1] Davis v. Morier, 2 Coll. C. C. 303; Ex parte James, L. R. 9 Ch. 609; Rogers v. Ingham, L. R. 3 Ch. Div. 351, 356; Bingham v. Bingham, 1 Ves. Sr. 126. As to mistake in settling accounts and relief from, see Gething v. Keighley, L. R. 9 Ch. Div. 547.

§ 870, [1] Illustrations: Childers v. Childers, 1 De Gex & J. 482; Cooper v. Joel, 1 De Gex, F. & J. 240; Bentley v. Mackay, 4 De Gex, F. & J. 279; Henkle v. Royal Ex. Ins. Co., 1 Ves. Sr. 317; Marquis of Townshend v. Stangroom, 6 Ves. 328; Holmes v. Clark, 10 Iowa, 423; Jackson v. Andrews, 59 N. Y.

§ 869, (a) Crocker-Woolworth Nat. Bank v. Nevada Bank, 139 Cal. 564, 73 Pac. 456, 96 Am. St. Rep. 169; Gould v. Emerson, 160 Mass. 438, 35 N. E. 1065, 39 Am. St. Rep. 501.

§ 870, (a) This section is cited in Kinney v. Ensmenger, 87 Ala. 340, 6 South. 72; Crescent Min. Co. v. Wasatch Min. Co., 5 Utah, 624, 19 Pac. 198; Page v. Higgins, 150 Mass. 27, 22 N. E. 63, 5 L. R. A. 152; Ordway v. Chace, 57 N. J. Eq. 478, 42 Atl. 149; Green v. Stone, 54 N. J. Eq. 387, 34 Atl. 1099, 55 Am. St. Rep. 577.

§ 870, (b) See Page v. Higgins, 150 Mass. 27, 22 N. E. 63; Barker v. Fitzgerald, (Ill.) 68 N. E. 430; Farmers' Loan & Tr. Co. v. Suydam, (Neb.)

ment has been made, or a transaction has been entered into or determined upon, as intended by all the parties interested, but in reducing such agreement or transaction to writing, either through the mistake common to both parties, or through the mistake of the plaintiff accompanied by the fraudulent knowledge and procurement of the defendant, the written instrument fails to express the real agreement or transaction.[c] In such a case the instrument may be corrected so that it shall truly represent the agreement or transaction actually made or determined upon according to the real purpose and intention of the parties.[2 d] The

244; Nevins v. Dunlap, 33 N. Y. 676; Story v. Conger, 36 N. Y. 673; 93 Am. Dec. 546; Welles v. Yates, 44 N. Y. 525; Diman v. Providence R. R., 5 R. I. 130, 135; Sawyer v. Hovey, 3 Allen, 331; 81 Am. Dec. 659; Woodbury etc. Bank v. Ins. Co., 31 Conn. 517; Tesson v. Atlantic Ins. Co., 40 Mo. 33; 93 Am. Dec. 293.

2 Illustrations: Baker v. Paine, 1 Ves. Sr. 456; White v. White, L. R. 15 Eq. 247; Bloomer v. Spittle, L. R. 13 Eq. 427; Mackenzie v. Coulson, L. R. 8 Eq. 368; Fowler v. Fowler, 4 De Gex & J. 250; Rider v. Powell, 28 N. Y. 310; De Peyster v. Hasbrouck, 11 N. Y. 582; Ford v. Joyce, 78 N. Y. 618; Moran v. McLarty, 75 N. Y. 25; Cone v. Niagara Ins. Co., 60 N. Y. 619; Comer v. Himes, 49 Ind. 482, 489; Heavenridge v. Mondy, 49 Ind. 434; Winnipiseogee etc. Co. v. Perley, 46 N. H. 83; Wooden v. Haviland, 18 Conn. 101; Langdon v. Keith, 9 Vt. 299; Firmstone v. De Camp, 17 N. J. Eq. 317; Weston v. Wilson, 31 N. J. Eq. 51; Sanders v. Wagner, 32 N. J. Eq. 506; Gump's Appeal, 65 Pa. St. 476; Chew v. Gillespie, 56 Pa. St. 308; Dulany v. Rogers, 50 Md. 524; Bradford v. Union Bank, 13 How. 55, 57, 66.

95 N. W. 867; Green v. Stone, 54 N. J. Eq. 387, 55 Am. St. Rep. 577, 34 Atl. 1099; Wirsching v. Grand Lodge, (N. J. Eq.) 56 Atl. 713; De Voin v. De Voin, 76 Wis. 66, 44 N. W. 839; Lord v. Horr, 30 Wash. 477, 71 Pac. 23. See, also, § 1377, and Pom. Equit. Rem.

(c) Quoted in De Voin v. De Voin, 76 Wis. 66, 44 N. W. 839.

(d) Cowen v. Truefitt, Limited, [1898] 2 Ch. 551, [1899] 2 Ch. 309; Western Assur. Co. v. Ward, 75 Fed. 338, (C. C. A.) 41 U. S. A. 443; Jones v. McNealy, (Ala.) 35 South. 1022; Kinney v. Ensmenger, 87 Ala. 340, 6 South. 72; Allis v. Hall, (Conn.) 56 Atl. 637; Taylor v. Glens Falls Ins. Co., (Fla.) 32 South. 887; Christensen v. Hollingsworth, 6 Idaho, 87, 53 Pac. 211, 96 Am. St. Rep. 256; Stanley v. Marshall, 206 Ill. 20, 69 N. E. 58; Webb v. Hammond, 31 Ind. App. 613, 68 N. E. 916; Earl v. Van Natta, 29 Ind. App. 532, 64 N. E. 901; Smelser v. Pugh, (Ind.) 64 N. E. 943; Adams v. Wheeler, 122 Ind. 251, 23 N. E. 760; Palmer Steel & Iron Co. v. Heat, Light & Power Co., 160 Ind. 232, 66 N. E. 690; St. Clair v. Marquell, (Ind.) 67 N. E. 693; Fritzler v. Robinson, 70 Iowa, 500, 31 N. W.

rules which govern these remedies and determine when they may be conferred, together with the various kinds and classes of instances in which they have been granted, will be found in subsequent chapters.

§ 871. Conditions of Fact Which are Occasions for Affirmative Relief.[a]— The conditions of fact which furnish occasions for the exercise of the jurisdiction to grant affirmative relief, either of reformation, of cancellation, or of pecuniary recovery, are many and various. The following are some of the most important. The relief which equity gives in aid of a defective execution of powers may be occasioned by mistake as well as by accident.[1] Judgments at law recovered through mistake may be a ground for the interposition of equity in enjoining or setting aside the judgment, to the same extent and under the same limits as those

[1] See *ante*, §§ 589, 590, 834, 835, where this particular instance of the jurisdiction is explained.

61; Williams v. Hamilton, 104 Iowa, 423, 65 Am. St. Rep. 475, and note, 73 N. W. 1029; Barry v. Rownd, 119 Iowa, 105, 93 N. W. 67; Story v. Gammell, (Iowa) 94 N. W. 982; Western Wheeled Scraper Co. v. Stickleman, (Iowa) 98 N. W. 139; Fierce v. Houghton, (Iowa) 98 N. W. 306; Schaeffer v. Mills, (Kan.) 76 Pac. 436; Phœnix Ins. Co. v. Ryland, 69 Md. 437, 16 Atl. 109, 1 L. R. A. 548; Boulden v. Wood, 96 Md. 332, 53 Atl. 911; White v. Shaffer, 97 Md. 359, 54 Atl. 974; Page v. Higgins, 150 Mass. 27, 22 N. E. 63, 5 L. R. A. 152; Newland v. First Baptist Church, (Mich.) 100 N. W. 612; Mikiska v. Mikiska, (Minn.) 95 N. W. 910; Hawkins v. Blair, (Miss.) 36 South. 246; Moore v. Crump, (Miss.) 37 South. 109; Wirsching v. Grand Lodge, (N. J. Eq.) 56 Atl. 713; Trusdell v. Lehman, 47 N. J. Eq. 218, 20 Atl. 391; Green v. Stone, 54 N. J. Eq. 387, 55 Am. St. Rep. 577, 34 Atl. 1099; Southern F. & W. Co. v. Ozment, 132 N. C. 839, 44 S. E. 681; Jones v. Warren, (N. C.) 46 S. E. 740; Forester v. Van Auken, (N. Dak.) 96 N. W. 301; Marshall v. Homier, 13 Okl. 264, 74 Pac. 368; North, etc. R'y Co. v. Swank, 105 Pa. St. 555; Baab v. Houser, (Pa. St.) 53 Atl. 344; Silliman v. Taylor, (Tex. Civ. App.) 80 S. W. 651; San Antonio Nat. Bank v. McLane, (Tex.) 70 S. W. 201; Kelley v. Ward, 94 Tex. 289, 60 S. W. 311; Dennis v. Northern Pac. Ry. Co., 20 Wash. 320, 55 Pac. 210; Lord v. Horr, 30 Wash. 477, 71 Pac. 23; Nutter v. Brown, 51 W. Va. 598, 42 S. E. 661; Silbar v. Ryder, 63 Wis. 106, 23 N. W. 106; James v. Cutler, 54 Wis. 172, 10 N. W. 147. See, also, § 1376, and Pom. Equit. Rem.

(a) This section is cited in Smith v. Butler, 11 Or. 46, 4 Pac. 517; Miles v. Miles, (Miss.) 37 South. 112.

recovered by accident.[2] [b] Marriage settlements may be corrected when, through mistake, they do not represent the original agreement between the parties, either with respect to their subject-matter or their terms, and especially where the formal instrument does not correspond with the preliminary writings.[3] Family compromises and settlements may certainly be set aside or corrected, but the jurisdiction is exercised with great caution, and never unless the mistake is palpable so as to indicate a surprise, or unless there are incidents of inequitable conduct by some of the parties.[4] Equity has a very narrow jurisdiction to correct mistakes in wills, but only when the error appears upon the face of the will itself, so that both the mistake and the correction can be ascertained and supplied by the context, from a plain interpretation of the terms of the instrument as it stands. A resort to extrinsic evidence is never permitted, either to show a mistake or to ascertain the correction. Mistakes which can be thus corrected may be in the names of legatees or devisees, in the description of property, or in other terms.[5] [c] The jurisdiction to grant

2 See *ante*, § 836.

3 Higginson v. Kelly, 1 Ball & B. 252; Wright v. Goff, 22 Beav. 207; Breadalbane v. Chandos, 2 Mylne & C. 711; Bold v. Hutchinson, 5 De Gex, M. & G. 558, 566; Hanley v. Pearson, L. R. 13 Ch. Div. 545; In re Daniel's Settlement, L. R. 1 Ch. Div. 375; In re Bird's Trusts, L. R. 3 Ch. Div. 214; Smith v. Iliffe, L. R. 20 Eq. 666; Cogan v. Duffield, L. R. 20 Eq. 789; In re De la Touche's Settlement, L. R. 10 Eq. 599; Elwes v. Elwes, 3 De Gex, F. & J. 667. As to setting aside a marriage settlement, see Evans v. Carrington, 2 De Gex, F. & J. 481; Merryweather v. Jones, 4 Giff. 509; Hartopp v. Hartopp, 21 Beav. 259.

4 See *ante*, §§ 850, 855.

5 When evidence of circumstances is admitted to explain an ambiguity this is not for the purpose of correcting a mistake. The following cases illustrate the extent and limits of this jurisdiction: In re Aird's Estate, L. R. 12 Ch. Div. 291; Whitfield v. Langdale, L. R. 1 Ch. Div. 61; Barber v. Wood, L. R. 4 Ch. Div. 885; Newman v. Piercey, L. R. 4 Ch. Div. 41; Wilson v. Morley, L. R. 5 Ch. Div. 776; Travers v. Blundell, L. R. 6 Ch. Div. 436; Homer v. Homer, L. R. 8 Ch. Div. 758; Garland v. Beverley, L. R.

(b) See, also, §§ 1364, 1376, 1377.

(c) In re Northen's Estate, 28 Ch. Div. 153; Home for Incurables v. Noble, 172 U. S. 383, 19 Sup. Ct. 226.

the relief of reformation may be exercised with respect to

9 Ch. Div. 213; In re Nunn's Trusts, L. R. 19 Eq. 331; Farrer v. St. Catharine's College, L. R. 16 Eq. 19; Hardwick v. Hardwick, L. R. 16 Eq. 168; McKechnie v. Vaughan, L. R. 15 Eq. 289; In re Ingle's Trusts, L. R. 11 Eq. 578; Hall v. Lietch, L. R. 9 Eq. 376; Box v. Barrett, L. R. 3 Eq. 244; Hart v. Tulk, 2 De Gex, M. & G. 300; Campbell v. Bouskell, 27 Beav. 325; Taylor v. Richardson, 2 Drew. 16; Snyder v. Warbasse, 11 N. J. Eq. 463; Wood v. White, 32 Me. 340; 52 Am. Dec. 654; Jackson v. Payne, 2 Met. (Ky.) 567; Goode v. Goode, 22 Mo. 518; 66 Am. Dec. 630; Trexler v. Miller, 6 Ired. Eq. 248; Johnson v. Hubbell, 10 N. J. Eq. 332; 66 Am. Dec. 773; Yates v. Cole, 1 Jones Eq. 110; 59 Am. Dec. 602; McAlister v. Butterfield, 31 Ind. 25; Erwin v. Hamner, 27 Ala. 296; Machem v. Machem, 28 Ala. 374; Alter's Appeal, 67 Pa. St. 341; 5 Am. Rep. 433; Nutt v. Nutt, 1 Freem. (Miss.) 128; and see Kerr on Fraud and Mistake, 448–453. The rules upon this subject belong to the general doctrine concerning the interpretation of wills, and will be found in works which treat of wills. The subject of correcting mistakes in wills, mentioned in the text, needs a little fuller explanation. There is no jurisdiction of equity to entertain suits for the reformation of wills analogous to that for the reformation of conveyances, agreements, and the like. The power to correct mistakes in wills is simply a part of the more general function of construction and interpretation, and may be exercised, if at all, in administration suits, or in any other suits wherein the rights of parties under the will are adjudicated. In many of the states it would be exercised by courts having a probate jurisdiction in the proceedings for the final settlement and distribution of the estate. However exercised, the power only exists within very narrow limits. The only possible modes of correcting mistakes in wills are by transposing, rejecting, or supplying words or clauses; and the fundamental principle is settled, that *both the error, and the correction of it, must appear with certainty on the face of the will itself*, and extrinsic evidence can never be resorted to for that purpose. Courts find little difficulty in transposing the order of words or dispositions so that all shall be reconciled, and an effect be given to each and to the whole. This is not an infrequent step in the process of interpretation. Rejecting a word or clause is also not an extreme measure where the context clearly requires it. To supply a word or clause demands a very strong and unusual case, where it must certainly appear that something has been omitted by inadvertency. Even then the alternative, that the whole disposition should be rejected as unmeaning, might be adopted. If a clause is to be rejected, the necessity for it must arise from the face of the will itself. If a word or clause is to be supplied, the necessity for such a supply, *and also the very word or clause itself to be supplied*, must appear from the face of the will. The case of Du Bois v. Ray, 35 N. Y. 162, which contains a full citation of authorities, furnishes an excellent example. Children which a named person "may leave" was read as though changed to "may have." The case of patent ambiguities, which admit extrinsic evidence in order to identify the person or thing intended, is not an exception to the foregoing conclusions, since patent ambiguities

written instruments operating *inter vivos*, whether they

are in no true sense of the term mistakes. I add a few illustrations of such correction of errors, taken from the decisions.

Cases of Supplying Words.— Where, from the will generally, it is clear that certain words are omitted from part of it, and also what these words are, the omission may be supplied. Thus where there was a gift to A and B, and "if either died before twenty-one, and without issue," his share to go to the other, and "if both died without issue," then the property to go to a third person, C; the words "before twenty-one" were supplied in the latter part, so that the clause should read, "if both died before twenty-one and without issue," then the property to go to C: Kirkpatrick v. Kirkpatrick, 13 Ves. 476; Sheppard v. Lessingham, Amb. 122; Spalding v. Spalding, Cro. Car. 185. In another case, a similar gift to A and B, and if either died "without *leaving* issue," then to the other, and if both should die "without issue," then the property was to go over to C; the word "leaving" was supplied in the last clause, so that it should read "if both died without *leaving* issue," then over to C, since the latter form was necessary at the time to render the executory devise over valid: Radford v. Radford, 1 Keen, 486. These examples sufficiently illustrate the correction by simply supplying words.

Cases of Rejecting Words.— Particular words, inconsistent with the clearly expressed provisions and purposes of the will, may be rejected, but only by an inspection of the will itself, without aid from extrinsic evidence. Thus where freehold lands were devised to A for ninety-nine years, with remainder, *after the death* of A, to his eldest son in tail, and then to his other sons successively, the words giving an absolute term of ninety-nine years to A were rejected, and he was left to take a life estate in accordance with the other limitations: Coryton v. Helyar, 2 Cox, 340; and see Chapman v. Gilbert, 4 De Gex, M. & G. 366. In a devise to A and to his heirs *for their lives*, the words "for their lives" were rejected as unmeaning and inconsistent: Doe v. Stenlake, 12 East, 515; Doe v. Thomas, 3 Ad. & E. 123; Hugo v. Williams, L. R. 14 Eq. 224. In a bequest to "my *aforesaid* nephews and nieces," the word "aforesaid" was rejected, none having been before mentioned in the will: Campbell v. Bouskell, 27 Beav. 325.

Transposing and Changing Words.— If the testator's language is without meaning as it stands, but can be made intelligible by a transposition of words, this will sometimes be done to carry out the intent clear from the will as a whole. Thus if it be *quite clear* from the context that in describing Whiteacre he means Blackacre, and in describing Blackacre he means Whiteacre, a transposition of the names will be allowed, so as to make the disposition correspond with the limitation: See Mosley v. Massey, 8 East, 149; Doe v. Allcock, 1 Barn. & Ald. 137, per Holroyd, J. But any such correction must be made without the aid of extrinsic evidence; it must clearly appear from the will what the mistake is, and must be equally clear from the will what correction is needed; e. g., a will contained several numbered schedules, and the testator in a certain clause referred to one number, by evident mistake, for another, and this was corrected: Hart v. Tulk, 2 De Gex, M. & G. 300. In Marshall v. Hopkins, 15 East, 309, there

are executed contracts, such as deeds of conveyance, mort-

was a devise of a "messuage, lands, and appurtenances in the occupation of A," and these words "in the occupation of A," were read as coming directly after the word "messuage," so that the whole should be the "messuage in the occupation of A, lands and appurtenances," since the rest of the will showed certainly that this correction was necessary to make sense.

"*Or*" *Changed to "And.*" — One of the most common instances of correction is the changing "or" to "and," and *vice versa*. This change is most often made when the intention of the will is clear to provide for a person *and his issue*, but in the gift over to third persons in the event of there being no issue, the contingency is expressed in such a manner that, if read literally, it would, under the settled rules of law, wholly defeat the plain intention: e. g., a devise to A and to his heirs, and if A died under twenty-one *or* without issue, then the property was to go over to a third person, C; A died *under* twenty-one, but leaving a child; "or" was read "and," so that it was held that *both* events must happen, viz., A's death under twenty-one, and his death without issue, before the gift over to C could take effect: See Soulle v. Gerrard, Cro. Eliz. 525; Moore, 422; Walsh v. Peterson, 3 Atk. 193; Framlingham v. Brand, 3 Atk. 390; Greated v. Greated, 26 Beav. 621; Miles v. Dyer, 5 Sim. 435. Also, where there was a gift to A in either of two events, his attaining the age of twenty-five *or* his marrying, and a gift of the property over to B in case A died under twenty-five *or* died unmarried, the last "or" was read "and" as a matter of necessity, to make it correspond with the meaning of the gift to A: Grant v. Dyer, 2 Dow, 73. The cases are numerous in which "or" has been changed to "and," but these instances are sufficient as illustrations.

"*And*" *Changed to "Or.*" — In the same manner "and" is occasionally read "or," for the purpose of carrying out the testator's intention; but never without an imperative necessity for the change, apparent on the face of the will: See In re Sanders's Trusts, L. R. 1 Eq. 675; In re Kirkbride's Trusts, L. R. 2 Eq. 400; e. g., where the will gave a bequest to a *class* of persons at a particular time,— at the testator's death, — "*and* to such of them as shall then be living," the word "and" was a plain mistake for "or," and a change to "or" was necessary to carry into effect the plain intent: Hetherington v. Oakman, 2 Younge & C. Ch. 299; Maynard v. Wright, 26 Beav. 285. These examples show that the power of courts to correct actual mistakes in wills, as a part of their function of interpretation, by supplying, rejecting, transposing, or substituting words, is confined within very narrow and well-defined limits, and is never to be exercised except when the general purpose or scheme of the will is clear beyond a doubt, and as clearly and positively demands the correction, in order that this purpose and scheme may be carried into effect.

As I have before stated, these are all the instances of true *mistakes* in the language of wills which furnish an occasion for the power to correct. In order to complete this general view, however, I will add a few illustrations of *misdescriptions*, either of property given or of the beneficiaries to whom it is given, which become known from the general evidence of the surrounding circumstances which is always admissible. Such *misdescriptions*, being

gages, leases, or executory agreements, such as bonds,

discovered by the extrinsic evidence, *may* be harmonized, explained, and made effective through the instrumentality of such evidence. But it should be carefully observed that this process of adjusting the *misdescriptions* to the actual conditions of fact is in no proper sense a *correction of mistakes*.

Misdescription of the Property Given.— In respect to such misdescriptions the maxim *Falsa demonstratio non nocet*, often controls and prevents a failure of the gift. Where the description consists of two parts, one of which is accurate and sufficient if it stood alone, and the second is incomplete and erroneous, this maxim generally applies, — always does so if the property answers to the accurate part of the description, and there is no other property of the testator to which such description in any of its parts can apply. Thus if the property is accurately described in other respects, an error as to the county in which it is stated to be situated is immaterial, if the testator had no other property answering to the description: Hastead v. Searle, 1 Ld. Raym. 728. If the property is commonly known by some particular name, as Whiteacre, and is devised by that name, the addition of some further erroneous description, as that it is in the occupancy of A, while in fact it was in that of B, does not defeat the gift: Blague v. Gold, Cro. Car. 447; and see Howard v. Conway, 1 Coll. C. C. 87; Stephens v. Powys, 1 De Gex & J. 24. Lands being correctly described as at or near A, in the parish of B, the inaccurate addition of their being in the testator's occupation would not defeat the gift: White v. Birch, 36 L. J. Ch. 174; but see Doe v. Parkin, 5 Taunt. 321. Under the description, "my farm called Whiteacre, in the occupation of A," lands forming part of the farm, but not occupied by A, would be included in the devise: Goodtitle v. Southern, 1 Moore & S. 299; Down v. Down, 7 Taunt. 343; and see, in respect to such kinds of description, Slingsby v. Grainger, 7 H. L. Cas. 273, per Lord Cranworth; Press v. Parker, 2 Bing. 456; Polden v. Bastard, L. R. 1 Q. B. 156; Doe v. Martin, 4 Barn. & Adol. 771; Bodenham v. Pritchard, 1 Barn. & C. 350; Waite v. Morland, 12 Jur., N. S., 763.

Description Consisting of Several Terms.— If the description is ambiguous, it is a leading principle that if there are several terms of the description applied to the subject-matter of the gift, every such term *may* be material, and if there *is* property corresponding with the description in *every* particular, it alone will in general pass, to the exclusion of other property which answers to the description only in part. For example, a testator having said that he owned certain lands in A subject to a mortgage, devised *the said lands;* this was held not to include lands of the testator in A which were not mortgaged: Pullin v. Pullin, 3 Bing. 47. A devise of lands at A, held of B, in the occupation of C, would not carry land not in C's occupation, there being other lands in his occupation and so answering to the description: Morrell v. Fisher, 4 Ex. 591. Where a testator devised his "messuages *at, in, or near* A, and purchased from B," and it appeared that he owned two houses about twenty yards from A, and four other houses about four hundred yards from A, and that all six had been purchased from B by one conveyance, it was held that the devise embraced only the two first mentioned, as being *at, in, or near* A: Doe v. Bower, 3 Barn. & Adol. 453.

policies of insurance, notes, bills of exchange, and the like.[6]

Property Answering the Description.— It is a settled general rule that where there *is* property answering the description, then no other will pass.[d] Thus if an estate is situated in two counties, towns, or places, A and B, even if there is no division line, and the whole is used and enjoyed as one property, and the testator devises only by the description, "my house, lands, farms, etc., *in* A," that part of the estate alone which is in A will pass by the gift: Webber v. Stanley, 16 Com. B., N. S., 698; Pedley v. Dodds, L. R. 2 Eq. 819; Smith v. Ridgway, L. R. 1 Ex. 331; Lister v. Pickford, 34 Beav. 576; Doe v. Oxenden, 3 Taunt. 147; 4 Dow, 65; but see Harman v. Gurner, 35 Beav. 478. The testator had purchased a house and some lands, situated in two towns, from A, and he devised by description all his "house, farm, and lands situate in" *one* of the towns, and the land situate in the other town was held not to be included in the gift: Doe v. Lyford, 4 Moore & S. 550. A testator possessed four pieces of land, A, B, C, and D, all held under one lease, and devised the A, B, and C tracts, and the D tract was held not to pass: West v. Lawday, 11 H. L. Cas. 375. On the other hand, a devise mentioning four houses as given, the court held from the context that five were meant and were included in the devise: Sampson v. Sampson, L. R. 8 Eq. 479.

Names of Beneficiaries.— Cases of mistakes in the names of devisees and legatees are very numerous. In very many instances the ambiguity is such that extrinsic evidence is necessary to identify the person intended. This particular kind of error properly belongs, therefore, to the general subject of extrinsic evidence in aid of the interpretation of wills. Where there is some error in the name, the beneficiary is sometimes connected with other description which will identify the individual, and obviate the error by bringing it within the maxim, *Falsa demonstratio non nocet:* e. g., a bequest to A B, the right name, with the erroneous addition, "legitimate son of C," has been sustained: Standen v. Standen, 2 Ves. 589; Giles v. Giles, 1 Keen, 688. Where a devise was to the second son of Edward W., of a certain place, the second son of Joseph W., of that place, was held entitled to take: Lord Camoys v. Blundell, 1 H. L. Cas. 778. Collateral descriptions of the beneficiary are often sufficient to identify him, and to obviate an error in his name; e. g., under a bequest to William A., eldest son of Charles A., it was held that Andrew A., who was the eldest son, was entitled: Pitcairn v. Brase, Finch, 403; and see Dowsett v. Sweet, Amb. 175; Stringer v. Gardiner, 4 De Gex & J. 468. Under a bequest to "Clare Hannah, the wife of A.," the wife of A. was held entitled, although her name was simply Hannah, and she had a daughter named Clare Hannah: Adams v. Jones, 9 Hare, 485; and see Ryall v. Hannam, 10 Beav. 536; Hodgson v. Clarke, 1 De Gex, F. & J. 394. These are a very few out of a great number of examples of errors in the names and descriptions of beneficiaries which have been corrected by the context, and in the light of the surrounding circumstances.

[6] See cases cited *ante*, under § 870.

(d) See, also, In re Seal, [1894] 1 Ch. 316.

There is, of course, no power to reform wills.[7 e] The relief of cancellation may be granted with respect to deeds of conveyance, mortgages, agreements concerning land, and other similar transactions, subject always to the important limitation that the party can obtain no adequate remedy at law.[8 f] With respect to mistakes in awards, the jurisdiction exists, but will be exercised only within very narrow limits. If a mistake appears on the face of the award itself, or in some contemporaneous writing, or is voluntarily admitted by the arbitrator, or he states circumstances which clearly show an error, equity may relieve by setting aside or perhaps correcting the award; otherwise there is no ground for interference.[9 g] A court of equity may, perhaps, under special circumstances, exercise its jurisdiction by correcting mistakes in judgments and decrees and other records, where the error is clerical or ministerial, and not judicial, and there is no other means of obtaining the relief.[10 h] Where an instrument has been surrendered or dis-

7 Sherwood v. Sherwood, 45 Wis. 357; 30 Am. Rep. 757.

8 See *ante*, § 870.

9 Mordue v. Palmer, L. R. 6 Ch. 22; Morgan v. Mather, 2 Ves. 15; Knox v. Symmonds, 1 Ves. 369; Mills v. Bowyers' Soc., 3 Kay & J. 66; Houghton v. Bankart, 3 De Gex, F. & J. 16; Haigh v. Haigh, 3 De Gex, F. & J. 157; Goodman v. Sayers, 2 Jacob & W. 249; Young v. Walter, 9 Ves. 364; Roosevelt v. Thurman, 1 Johns. Ch. 220; Bouck v. Wilber, 4 Johns. Ch. 405; Underhill v. Van Cortland, 2 Johns. Ch. 339; 17 Johns. 405; Winship v. Jewett, 1 Barb. Ch. 173; Hartshorn v. Cuttrell, 2 N. J. Eq. 297; Ryan v. Blunt, 1 Dev. Eq. 386. If the award is within the submission, no mistake of the arbitrator, either of law or of fact, established by extrinsic evidence will be a ground for the interference of equity. The subject of awards and of the proceedings thereon has in many states been so regulated by statute that the jurisdiction of equity over them has become unimportant, if not obsolete.

10 Barnesly v. Powell, 1 Ves. Sr. 119, 284, 289; Colwell v. Warner, 36

(e) Bingel v. Volz, 142 Ill. 214, 31 N. E. 13, 34 Am. St. Rep. 64, 16 L. R. A. 321; Sturgis v. Work, 122 Ind. 134, 22 N. E. 996, 17 Am. St. Rep. 349; Chambers v. Watson, 56 Iowa, 676, 10 N. W. 239.

(f) See *post*, § 1376; and Pom. Equit. Rem.

(g) Brush v. Fisher, 70 Mich. 469, 38 N. W. 446, 14 Am. St. Rep. 510; In re Curtis, 64 Conn. 501, 42 Am. St. Rep. 200, 30 Atl. 769. In Barrows v. Sweet, 143 Mass. 316, 9 N. E. 665, and Frick v. Christian Co., 1 Fed. 250, the mistake was admitted by the arbitrator.

(h) Greeley v. De Cottes, 24 Fla. 475, 5 South. 239; Smith v. Butler,

charged, or an encumbrance or charge has been satisfied through mistake, the jurisdiction may be exercised by granting such relief as will replace the party entitled in his original position, either by setting aside the formal discharge, or by compelling a re-execution of the instrument.[11] [i] The jurisdiction extends to the settlement of accounts, made according to the intention of the parties, but based upon or involving a mistake. Relief will be granted as the circumstances may require, either by setting aside the settlement, or by permitting a party to surcharge or falsify.[12] [j] Finally, the equitable jurisdiction may be exercised by the relief of a pecuniary recovery for money paid under a mistake, whenever no adequate remedy can be obtained by an action at law.[13] The affirmative reliefs of reformation and of cancellation are, however, subject to the limitation that they are never conferred against a *bona fide* purchaser for value and without notice.[14]

Conn. 224; Loss v. Obry, 22 N. J. Eq. 52; Wheeler v. Kirtland, 23 N. J. Eq. 13; Gump's Appeal, 65 Pa. St. 476; Byrne v. Edmonds, 23 Gratt. 200; Kearney v. Sacer, 37 Md. 264; Barthell v. Roderick, 34 Iowa, 517; Palmer v. Bethard, 66 Ill. 529; Chapman v. Hurd, 67 Ill. 234; Stites v. Wiedner, 35 Ohio St. 555; Pool v. Docker, 92 Ill. 501; Young v. Morgan, 9 Neb. 169; but see Wardlaw v. Wardlaw, 50 Ga. 544.

11 Swaggerty v. Neilson, 8 Baxt. 32; Lemon v. Phœnix etc. Ins. Co., 38 Conn. 294; Scholefield v. Templer, Johns. 155; East Ind. Co. v. Donald, 9 Ves. 275; East Ind. Co. v. Neave, 5 Ves. 173.

12 Gething v. Keighley, L. R. 9 Ch. Div. 547; Stuart v. Sears, 119 Mass. 143; Russell v. The Church, 65 Pa. St. 9; McCrae v. Hollis, 4 Desaus. Eq. 122; Mounin v. Beroujon, 51 Ala. 196; Barnett v. Barnett, 6 J. J. Marsh. 499; Waggoner v. Minter, 7 J. J. Marsh. 173.

13 See *ante*, §§ 851, 869.

14 See *ante*, § 776.

11 Or. 46, 4 Pac. 517. See also Pom. Eq. Rem., chapter on relief against Judgments.

(i) This section is cited to this effect in White v. Stevenson, (Cal.) 77 Pac. 829. See, also, Riegel v. American L. Ins. Co., 140 Pa. St. 193, 21 Atl. 392, 23 Am. St. Rep. 225, 11 L. R. A. 857. As to reinstatement of mortgages released by mistake, see the valuable monographic note, 58 L. R. A. 788.

(j) Russell v. Stevenson, (Wash.) 75 Pac. 627.

SECTION III.

ACTUAL FRAUD.

ANALYSIS.

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§ 872. Objects and Purposes.[a]— Fraud, in some of its phases, has long been an occasion for the exercise of jurisdiction both at law and in equity. The various reliefs on the ground of fraud which are possible from the nature of the legal and the equitable modes of procedure and remedies are the following: At law: 1. The affirmative relief of rescission, whereby the defrauded party is permitted to rescind the contract or other transaction, or, more accurately, to treat it as rescinded,— to restore himself thereby to his original position of right, and by means of an appropriate action to recover back the money or other property of which he had been deprived, or which he had parted with; 2. The affirmative relief whereby the defrauded party suffers the transaction to stand, and by action recovers pecuniary damages as compensation for the injury sustained by him from the deceit; 3. Defensive relief, whereby the party sets up the fraud as a defense, and thereby defeats any action brought to enforce the apparent fraudulent obligation. In equity: 1. The affirmative relief of cancellation, whereby the defrauded party procures an instrument, obligation, transaction, or other matter affecting his rights and liabilities to be set aside and annulled, and himself to be restored to his original position of right, and as a consequence to re-establish his

(a) This section is cited in Cowley v. Smyth, 46 N. J. Law, 380, 50 Am. Rep. 432; Bickley v. Commercial Bank of Columbia, 43 S. C. 528, 21 S. E. 886.

title, or to recover possession and enjoyment of property; 2. The affirmative relief of reformation by which a written instrument is corrected, and perhaps re-executed, when, through fraud of the other party, it failed to express the real relations which existed between the two parties; 3. The affirmative relief of a pecuniary recovery where the liability arose from the fraud of the other party, and no cancellation is necessary as the foundation of the recovery; 4. Defensive relief, whereby the fraud is set up by way of defense to defeat any suit brought to enforce an apparent obligation or liability.[b] In the discussions of the present and the following sections, I propose, in the first place, to describe the nature of fraud in equity, actual and constructive, to explain the essential elements entering into the conception of it, to define its kinds and classes, to enumerate its most important instances, and to show the various forms which it ordinarily assumes in the affairs of mankind. In the second place, I shall describe the equitable jurisdiction occasioned by fraud, define its extent and limits, explain the principles which regulate its exercise, and enumerate the important instances of its exercise, and the various reliefs, affirmative and defensive, which are thereby granted. The full treatment of some of these peculiar reliefs, such as cancellation and reformation, is postponed to a subsequent chapter. This discussion deals with fraud in equity, and will only refer incidentally, and by way of illustration, to fraud at law. Whatever amounts to fraud, according to the legal conception, is also fraud in the equitable conception; but the converse of this statement is not true. The equitable theory of fraud is much more comprehensive than that of the law, and contains elements entirely different from any which enter into the legal notion.

§ 873. Description — Essential Elements.—It is utterly impossible to formulate any single statement which shall

(b) This paragraph is cited in Green v. Turner, 80 Fed. 41 (fraud as a defense).

accurately define the equitable conception of fraud, and which shall contain all of the elements which enter into that conception; these elements are so various, so different under the different circumstances of equitable cognizance, so destitute of any common bond of unity, that they cannot be brought within any general formula. To attempt such a definition would therefore be not only useless, but actually misleading. It has been shown in a former chapter[1] that the jurisdiction of chancery was originally rested upon two fundamental notions, equity and conscience, or good faith. The first of these embraced all cases where a party, acting according to the rules of the law, and not doing anything contrary to conscience or good faith, might obtain an *undue* advantage over another, which, though strictly legal, equity would not permit him to retain. The second embraced all those cases where a party, although perhaps still keeping within the limits of the strict law, so as to be sustained by the law courts, had committed some unconscientious act or breach of good faith, and had thereby obtained an undue advantage over another, which advantage, even though legal, equity would not suffer him to retain. The relief given by equity in *all* cases of fraud is plainly referable to this second head of the original jurisdiction. Every fraud, in its most general and fundamental conception, consists in obtaining an undue advantage by means of some act or omission which is unconscientious or a violation of good faith in the broad meaning given to the term by equity,— the *bona fides* of the Roman law. Furthermore, it is a necessary part of this conception that the act or omission itself, by which the undue advantage is obtained, should be *willful;* in other words, should be knowingly and intentionally done by the party; but it is not *essential* in the equitable notion, although it *is* in the legal, that there should be a knowledge of and an intention to obtain the *undue* advantage which

[1] Vol. 1, § 55.

results. The *willfulness* of the act or omission is the element which distinguishes fraud from other matters by which an undue advantage may be obtained so as to furnish an occasion for the equitable jurisdiction. Thus it has been shown that in accident an occurrence *external* to the parties happens without any intent or other mental condition, and an undue advantage thereby accrues to one of them.[a] In mistake there is indeed a mental condition or conviction of the understanding, but it wholly results from ignorance or misapprehension, and prevents the *free* action of the will; there is, therefore, a complete absence of willfulness or intention in the true and legal meaning of those terms.[b] In all phases of fraud, on the other hand, there is a mental condition, a conviction of the understanding, a free operation of the will, and an intention to do or omit the very act by which the undue advantage is obtained. The following description is perhaps as complete and accurate as can be given so as to embrace all the varieties recognized by equity: Fraud in equity includes all willful or intentional acts, omissions, and concealments which involve a breach of either legal or equitable duty, trust, or confidence, and are injurious to another, or by which an undue or unconscientious advantage over another is obtained.[2]

2 This general statement, to which I have added the necessary terms "willful or intentional," is given, slightly varied, by Mr. Fonblanque: 1 Fonblanque's Equity, bk. 1, c. 2, sec. 3; adopted by Judge Story: 1 Story's Eq. Jur., sec. 187; and by Mr. Kerr: Kerr on Fraud and Mistake, 42. It is plain that the definitions sometimes given by text-writers and judges, in which "artifice," "trick," "subterfuge," "circumvention," "cunning," and like terms are employed as necessary ingredients of fraud, are inaccurate and misleading when applied to the equitable conception, and are not even appropriate in describing fraud at law. It would also be very improper to include "an intent to deceive" as one of the essential elements of fraud in equity. The proposed Civil Code of New York gives the following definitions of fraud as affecting the entering into contracts (secs. 757, 758), which are adopted by the present Civil Code of California (secs. 1572, 1573). These definitions, in accordance with the plan of these codes, embrace both

(a) See § 823. (b) See § 839.

§ 874. Four Forms and Classes of Fraud in Equity.— In the leading and celebrated case of Earl of Chesterfield v. Janssen, Lord Hardwicke, while not attempting to formulate any general definition, arranged all the forms of fraud recognized by equity in four classes,— a division based upon their intrinsic qualities, and which has been followed by nearly all subsequent writers and judges. These classes are: 1. Frauds which are actual, arising from facts and circumstances of imposition; 2. Frauds apparent from the intrinsic nature and subject of the bargain itself; 3. Frauds presumed from the circumstances and condition of the parties; 4. Frauds which are an imposition and deceit on third persons not parties to the transaction.[1] In pursuance of

fraud in equity and at law: "Actual fraud, within the meaning of this chapter [i. e., on contracts], consists in any of the following acts, committed by a party to the contract, or with his connivance, with intent to deceive another party thereto, *or* to induce him to enter into the contract: 1. The suggestion, as a fact, of that which is not true, by one who does not believe it to be true; 2. The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true; 3. The suppression of that which is true, by one having knowledge or belief of the fact; 4. A promise made without any intention of performing it.[c] Any other act fitted to deceive."

"Constructive fraud consists, — 1. In any breach of duty which, without an actually fraudulent intent, gains an advantage to the person in fault, or any one claiming under him, by misleading another to his prejudice, or to the prejudice of any one claiming under him; 2. In any such act or omission as the law specially declares to be fraudulent, without respect to actual fraud." These codes give a further and somewhat different definition of fraud or "deceit" as the ground of an obligation imposed by law, and of a legal action for damages: N. Y. Civ. Code, sec. 849; Cal. Civ. Code, sec. 1710.

[1] Earl of Chesterfield v. Janssen, 2 Ves. Sr. 125; 1 Atk. 301; 1 Lead. Cas. Eq., 4th Am. ed., 773. In his most instructive opinion, Lord Hardwicke said upon this particular subject: "This court has an undoubted jurisdiction to relieve against every species of fraud. *First*, then, fraud, which is *dolus malus*, may be actual, arising from facts and circumstances of imposition, which is the plainest case. *Secondly*, it may be apparent from the intrinsic nature and subject of the bargain itself, such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other, which are inequitable and uncon-

(c) See Lawrence v. Gayetty, 78 Cal. 126, 20 Pac. 382, 12 Am. St. Rep. 29; Newman v. Smith, 77 Cal. 22, 18 Pac. 791.

the order, which seems to be simple and natural, I shall include and treat under the description of actual fraud those cases only which belong to the first of these four classes. In all of them, and this seems to be the essential distinction between actual and constructive fraud, there is the element of falsity in fact, and the knowledge of the falsity and the intention to deceive in a *modified and partial* manner at least, in equity no less than in the law. In the three other classes there is no *necessary* element of falsity in fact, and the fraud in each of them arises rather from motives of expediency and policy than from any intent of the parties.[2]

scientious bargains. *A third* kind of fraud is that which may be presumed from the circumstances and condition of the parties contracting; and this goes further than the rule of law, which is, that it must be proved, not presumed; but it is wisely established in this court to prevent taking surreptitious advantage of the weakness or necessity of another, which knowingly to do is equally against conscience as to take advantage of his ignorance. *A fourth* kind of fraud may be collected or inferred, in the consideration of this court, from the nature and circumstances of the transaction, as being an imposition and deceit on other persons not parties to the fraudulent agreement. It may sound odd that an agreement may be infected by being a deceit on others not parties; but such there are, and against such there has been relief. Of this kind have been marriage brokerage contracts, neither of the parties therein being deceived; but they tend necessarily to the deceit on one party to the marriage, or of the parent, or of the friend." He adds some further illustrations and explanations of this fourth class, and then says: "The last head of fraud on which there has been relief is that which infects catching bargains with heirs, reversioners, or expectants, in the life of their fathers. These have generally been mixed cases, compounded of all or several species of fraud; there being sometimes proof of actual fraud, which is always decisive." Lord Hardwicke plainly does not intend in this last instance to add a fifth and distinct class; he is simply giving a special instance or form, which may fall wholly or partly into one or more of the four preceding classes.

2 The following extract shows the opinion of one of the ablest of modern equity judges, concerning the difference between "actual fraud" in equity as well as at law, and constructive fraud. In Smallcombe's Case, L. R. 3 Eq. 769, 771, Lord Romilly said: "I must say that to treat such a transaction as a fraud is, in my opinion, to confound moral principles and to introduce an element of great confusion into the doctrine of courts of equity, the fundamental principle of which, as regards fraud, is, as it appears to me, that nothing can be called fraud, and nothing can be treated as fraud, except an act which involves *grave moral guilt*. I feel strongly, and I have

§ 875. Nature of Actual Fraud.[a]—Although it is not possible to give any complete definition of fraud, yet it is possible to describe the various elements which are essential to the conception of actual fraud. In the vast majority of instances, actual fraud occurs in negotiations or dealings which are incidents of some agreement, executed or executory. Even in transactions which are not agreements, such as the execution of a will, the operation and effect of fraud are the same as in the case of agreements. There are undoubtedly some special transactions capable of being affected by fraud, which cannot readily be brought

frequently endeavored to point out, the injurious consequence of allowing such expressions to be used as 'equitable fraud,' or 'that which courts of equity call fraud,' or 'constructive fraud,' when in fact no act has been done by any one which involves moral culpability. The only exception, that I am aware of, is, that the phrase 'constructive fraud' has sometimes been applied to cases where an innocent partner has been made liable for the fraudulent acts of his copartner. The expression is not a proper one even there, because the innocent party has been guilty of no fraud, but he is in many cases properly made liable for, and compelled to redress, the wrong committed by his really fraudulent copartner." It should be observed that this opinion of Lord Romilly is opposed to that of very many equally able judges, and in one important particular it conflicts with direct decisions. It is finally settled that at law there can be no fraud without moral culpability; but in equity even actual fraud may exist without the knowledge and wrongful intent which constitute the immorality at law. Furthermore, the phrase "constructive fraud," or "equitable fraud," has been constantly used by courts from the earliest day; and it would produce great confusion to refuse the name "fraud" to those acts which have hitherto constituted constructive fraud, and to describe them by some other term. The settled terminology of the law is one of its most important features. Although this division is not followed by all writers, — e. g., Story and Snell, — yet "actual" and "constructive," in equity, are separated by a very clear and certain line. The *essential* fact in actual fraud is *untruth*. In the law it must be willful, — a falsehood; in equity it may be, but is not necessarily, willful. In constructive fraud there is no necessary untruth. The equitable conception of constructive fraud embraces a great variety of transactions; some are absolutely void from illegality, others are voidable, others still simply have a presumption against their validity, and require affirmative proof of their fairness. In constructive fraud the invalidity arises from general motives of policy, good morals, and fair dealing, and not from the fact of untruth.[a]

§ 874, (a) See also § 922.

§ 875, (a) This section is cited in Gammill v. Johnson, 47 Ark. 335, 1 S. W. 610.

within this general description,— as, for example, the fraudulent obtaining of a judgment at law. These special cases will be considered by themselves. With all these varieties of external form, actual fraud in the numberless agreements, transactions, and dealings of mankind may, in its intrinsic nature, be reduced to two essential forms,— false representation and fraudulent concealments,— *suggestio falsi* and *suppressio veri*. The discussion of actual fraud mainly consists, therefore, in analyzing these two forms and in determining their necessary constituents.

§ 876. **First. Misrepresentations.**[a]— A misrepresentation, in order to constitute fraud, must contain the following essential elements: 1. Its form as a statement of fact; 2. Its purpose of inducing the other party to act; 3. Its untruth; 4. The knowledge or belief of the party making it; 5. The belief, trust, and reliance of the one to whom it is made; 6. Its materiality. These elements will be examined separately.

§ 877. **I. The Form — An Affirmation of Fact.**[a]— A misrepresentation must be an affirmative statement or affirmation of some fact, in contradistinction to a concealment or failure to disclose, and to a mere expression of opinion.[1]

[1] In Jennings v. Broughton, 5 De Gex, M. & G. 125, 17 Beav. 234, which was brought to set aside the sale of shares in a certain mine on account of misrepresentations by the vendors, Knight Bruce, L. J., stating the requisites of a misrepresentation, said (p. 130): "First, in the statements or representations concerning the mine, was there any untrue assertion material in its nature, that is to say, which, taken as true, added substantially to the value or promise of the mine, and was not evidently conjectural merely?" Doggett v. Emerson, 3 Story, 700; Hough v. Richardson, 3 Story, 659; Daniel v. Mitchell, 1 Story, 172; Warner v. Daniels, 1 Wood. & M. 90; Hammatt v. Emerson, 27 Me. 308; 46 Am. Dec. 598; Stone v. Denny, 4 Met. 151; Hazard v. Irwin, 18 Pick. 95; Rohrschneider v. Knickerbocker Ins. Co., 76 N. Y. 216; 32 Am. Rep. 290; Verplanck v. Van Buren, 76 N. Y. 247; Dambmann v. Schulting, 75 N. Y. 55, 61; Beardsley v. Duntley, 69 N. Y. 577; Perkins v. Partridge, 30 N. J. Eq. 82; Leutz v. Earnhart, 12 Heisk. 711;

§ 876, (a) This section is cited in Gammill v. Johnson, 47 Ark. 335, 1 S. W. 610.

§ 877, (a) This section is cited in Lawrence v. Gayetty, 78 Cal. 126, 20 Pac. 382, 12 Am. St. Rep. 29; Bethell v. Bethell, 92 Ind. 318; Miles v. Miles, (Miss.) 37 South. 112.

In the great majority of instances it is made by means of language written or spoken; but it may consist of conduct alone, of external acts, when, through this instrumentality, it is intended to convey the impression, or to produce the conviction, that some fact exists, and such result is a natural consequence of the acts.[2] A misrepresentation of the law is not considered as amounting to fraud, because, as it is generally said, all persons are presumed to know the law; and it might perhaps be added that such a statement would rather be the expression of an opinion than the assertion of a fact.[3] [c] A statement of intention *merely*

Derrick v. Lamar Ins. Co., 74 Ill. 404; McShane v. Hazlehurst, 50 Md. 107; Cowles v. Watson, 14 Hun, 41; Slaughter's Adm'r v. Gerson, 13 Wall. 379; McAleer v. Horsey, 35 Md. 439; Printup v. Fort, 40 Ga. 276; Bowman v. Caruthers, 40 Ind. 90; Babcock v. Case, 61 Pa. St. 427; 100 Am. Dec. 654; Thorn v. Helmer, 4 Abb. App. 408; Morris Canal Co. v. Emmett, 9 Paige, 168; 37 Am. Dec. 388; Stebbins v. Eddy, 4 Mason, 414; Winston v. Gwathmey, 8 B. Mon. 19; Suessenguth v. Bingenheimer, 40 Wis. 370; Gifford v. Carvill, 29 Cal. 589; Pike v. Fay, 101 Mass. 134, 137; Cooper v. Lovering, 106 Mass. 77, 79; Taylor v. Fleet, 1 Barb. 471; Oberlander v. Spiess, 45 N. Y. 175; New Brunswick etc. R'y v. Conybeare, 9 H. L. Cas. 711; 1 De Gex, F & J. 578; Attwood v. Small, 6 Clark & F. 232; Lowndes v. Lane, 2 Cox, 363; Winch v. Winchester, 1 Ves. & B. 375.

2 It was so held in Lovell v. Hicks, 2 Younge & C. 46, where fictitious and fraudulent experiments were performed, so as to induce a party to enter into a contract concerning a patent right. See also Crawshay v. Thompson, 4 Man. & G. 357, 387; McCall v. Davis, 56 Pa. St. 431; 94 Am. Dec. 92. The point is also illustrated by Denny v. Hancock, L. R. 6 Ch. 1, although the decision was rested upon misdescription rather than fraudulent misrepresentation. A purchaser was so misled as to their boundaries, by the appearance of the grounds, that the contract was not enforced. This was, of course, a mistake of his; but the mistake consisted of his obtaining from the appearance an impression which was natural, but was at the same time contrary to the real fact; the appearance thus operated as a misdescription. When two parties have made an agreement, and in reducing it to writing, one of them knowingly alters it in a material manner, and procures the other to execute or to accept the writing in ignorance of the alteration, this conduct is fraud:[b] Kilmer v. Smith, 77 N. Y. 226; 33 Am. Rep. 613; Hay v. Star Ins. Co., 77 N. Y. 235; 33 Am. Rep. 607; Rider v. Powell, 28 N. Y. 310.

3 Eaglesfield v. Marquis of Londonderry, L. R. 4 Ch. Div. 693; Rashdall v. Ford, L. R. 2 Eq. 750, 754; Upton v. Tribilcock, 91 U. S. 45; Grant v.

(b) Bethell v. Bethell, 92 Ind. 318; Harrington v. Brewer, 56 Mich. 301, 22 N. W. 813.

(c) Quoted in Abbott v. Treat, 78 Me. 121, 125, 3 Atl. 44. See, also, Jaggar v. Winslow, 30 Minn. 263, 15 N. W. 242.

cannot be a misrepresentation amounting to fraud, since such a statement is not the affirmation of any external fact, but is, at most, only an assertion that a present mental condition or opinion exists.[4][e] That the *fact,* however, con-

Grant, 56 Me. 573; Reed v. Sidener, 32 Ind. 373; Drake v. Latham, 50 Ill. 270; Fish v. Cleland, 33 Ill. 238, 243; Steamboat Belfast v. Boon, 41 Ala. 50, 68; Smither v. Calvert, 44 Ind. 242; Upton v. Englehart, 3 Dill. 496; People v. San Francisco, 27 Cal. 655; Jordan v. Stevens, 51 Me. 78; 81 Am. Dec. 556. It has been shown in the preceding section that when a party has been led to act in ignorance or mistake of the law, through the inequitable conduct of another, he may be relieved on the ground of *mistake:*[d] See *ante,* § 847.

[4] Citizens' Bank v. First Nat. Bank of N. O., L. R. 6 H. L. 352; Jorden v. Money, 5 H. L. Cas. 185; Long v. Woodman, 58 Me. 49; Grove v. Hodges, 55 Pa. St. 504, 519.

It must not be understood that no rights would flow from such a statement. A representation of a future intention, absolute in form, deliberately made for the purpose of influencing the conduct of the other party, and then acted upon by him, is generally the source of a right, and may amount to a contract, enforceable as such by a court of equity: See De Beil v. Thomson, 3 Beav. 469; 12 Clark & F. 61, note; Hammersley v. De Biel, 12 Clark & F. 45; Bold v. Hutchinson, 20 Beav. 250; 5 De Gex, M. & G. 558; Neville v. Wilkinson, 1 Brown Ch. 543; Money v. Jordan, 2 De Gex, M. & G. 318, 332, per Lord Cranworth; Ainslie v. Medlycott, 9 Ves. 13, 21, per Sir William Grant; Jameson v. Stein, 21 Beav. 5; Gale v. Lindo, 1 Vern. 475; Scott v. Scott, 1 Cox, 366; Maunsell v. White, 4 H. L. Cas. 1039, 1056, per Lord Cranworth; 1 Jones & L. 539, 557; Loxley v. Heath, 27 Beav. 523; 1 De Gex, F. & J. 489; Moore v. Hart, 1 Vern. 110, 201; Luders v. Anstey, 4 Ves. 501; 5 Ves. 213; Saunders v. Cramer, 3 Dru. & War. 87; Montgomery v. Reilly, 1 Bligh, N. S., 364; Payne v. Mortimer, 1 Giff. 118; 4 De Gex & J. 447; Skidmore v. Bradford, L. R. 8 Eq. 134; Moorhouse v. Colvin, 15 Beav. 341; Caton v. Caton, L. R. 2 H. L. 127, 142.

(d) See Schneider v. Schneider, (Iowa) 98 N. W. 159.

(e) Gray v. Suspension Car Truck Co., 127 Ill. 187, 19 N. E. 874; Love v. Teter, 24 W. Va. 741. That a promise made with the intention in the mind of the promisor not to perform may be a misrepresentation of a subsisting fact, and hence a fraud, see Edgington v. Fitzmaurice, L. R. 29 Ch. Div. 459; Becker v. Schwerdtle, 141 Cal. 386, 74 Pac. 1029; Brison v. Brison, 75 Cal. 527, 17 Pac. 691, 7 Am. St. Rep. 189; Stebbins v. Petty, (Ill.) 70 N. E. 673; McCready v. Phillips, 56 Neb. 446, 76 N. W. 885; Hill v. Gettys, (N. C.) 47 S. E. 449; Chicago, T. & M. C. Ry. Co. v. Titterington, 84 Tex. 218, 19 S. W. 472. In Edgington v. Fitzmaurice, 29 Ch. Div. 459, 483, occurs Lord Bowen's well known *dictum* that "the state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much a fact as anything else."

cerning which the statement is made is future does not of itself prevent the misrepresentation from being fraudulent. The statement of matter in the future, if affirmed *as a fact,* may amount to a fraudulent misrepresentation, as well as a statement of a fact as existing at present.[5 f]

§ 878. Misrepresentations of Matter of Opinion.—Since the very corner-stone of the doctrine is that the statement must be an affirmation of a fact, it has sometimes been said, but very incorrectly, that a misrepresentation cannot be made of a matter of opinion. The true rule is, that a fraudulent misrepresentation cannot itself be the *mere expression of an opinion* held by the party making it. The reason is very simple; while the person addressed has a right to rely on any assertion of a fact, he has no right to rely upon the mere expression of an opinion held by the party addressing him, in whatever language such expression be made; he is assumed to be equally able to form his own

5 Piggott v. Stratton, 1 De Gex, F. & J. 33, 49, per Lord Chancellor Campbell, who says the doctrine is "well established that if A deliberately makes an assertion to B, intending it to be acted upon by B, and it is acted upon by B, A is estopped from saying that it is not true. If it turns out to be false, A is answerable for the damage which may have accrued to B, and B is entitled, in respect of anything done in the belief that it was true, to object to any denial of its truth by A": Hutton v. Rossiter, 7 De Gex, M. & G. 9, 22, 23; Hawes v. Marchant, 1 Curt. 136; Lobdell v. Baker, 3 Met. 469; Osgood v. Nichols, 5 Gray, 420; Audenried v. Betteley, 5 Allen, 384; 81 Am. Dec. 755; Plumer v. Lord, 9 Allen, 455; 85 Am. Dec. 773; Kimball v. Ætna Ins. Co., 9 Allen, 540; 85 Am. Dec. 786; Langdon v. Doud, 10 Allen, 433, 437; Andrews v. Lyons, 11 Allen, 349; Turner v. Coffin, 12 Allen, 401; Fall River Nat. Bank v. Buffington, 97 Mass. 498; Vibbard v. Roderick, 51 Barb. 616; Brookman v. Metcalf, 4 Rob. (N. Y.) 568; Vanderpool v. Brake, 28 Ind. 130; Ridgway v. Morrison, 28 Ind. 201; Davidson v. Young, 38 Ill. 145; Chouteau v. Goddin, 39 Mo. 229; and cases in last note. Some of these cases may be referred to the doctrine of equitable estoppel; but it is plain that where the representation is that of a *fact* in the future, *and not a mere promise,* and it is relied upon, and turns out to be false, the rights and remedies of the injured party are the same as those which arise from the fraudulent misrepresentation of an *existing* fact. There is nothing inconsistent in this result with the rule that no equitable estoppel arises from a *mere* promise.

(f) See Kerberg's Case, [1892] 3 Ch. 1; Abbott v. Abbott, 18 Neb. 503, 26 N. W. 361.

opinion, and to come to a correct judgment in respect to the matter, as the party with whom he is dealing, and cannot justly claim, therefore, to have been misled by the opinion, however erroneous it may have been.[1 a] For this reason, the *general* praise of his own wares by a seller, commonly called "puffing," for the purpose of enhancing them in the buyer's estimation, has always been allowed, provided it is kept within reasonable limits; that is, provided the praise is general, and the language is not the positive affirmation of a *specific* fact affecting the quality, so as to be an express warranty, and is not the intentional assertion of a *specific* and material fact, known to the party to be false, so as to be a fraudulent misrepresentation.[2] The foregoing rule as to expressions of opinion cannot be pushed beyond the plain reasons upon which it rests. Wherever the statement, although relating to matter of opinion, is the affirmation *of a fact,* it may be a fraudulent representation. Such an affirmation might be made in several forms. The very fact concerning which the statement is made may be the existence of an opinion. The existence of an opinion may be a fact material to the proposed transaction, and a statement that such an opin-

[1] Jennings v. Broughton, 5 De Gex, M. & G. 125; Mead v. Bunn, 32 N. Y. 275; Sawyer v. Prickett, 19 Wall. 146; Hepburn v. Dunlop, 1 Wheat. 189; Hazard v. Irwin, 18 Pick. 95, 105; Watts v. Cummins, 59 Pa. St. 84; Curry v. Keyser, 30 Ind. 214; Sieveking v. Litzler, 31 Ind. 13, 17; Stow v. Bozeman, 29 Ala. 397; Hubbell v. Meigs, 50 N. Y. 480, 489; Banta v. Savage, 12 Nev. 151; Coil v. Pittsburg F. Coll., 40 Pa. St. 439, 445; Pike v. Fay, 101 Mass. 134; Mooney v. Miller, 102 Mass. 217; Cooper v. Lovering, 106 Mass. 77, 79; Gifford v. Carvill, 29 Cal. 589; Suessenguth v. Bingenheimer, 40 Wis. 370; Speiglemyer v. Crawford, 6 Paige, 254; Wambaugh v. Bimer, 25 Ind. 368; Juzan v. Toulmin, 9 Ala. 662; 44 Am. Dec. 448; Glasscock v. Minor, 11 Mo. 655; Smith v. Richards, 13 Pet. 26; Hough v. Richardson, 3 Story, 659; Warner v. Daniels, 1 Wood. & M. 90.

[2] French v. Griffin, 18 N. J. Eq. 279; Hunter v. McLaughlin, 43 Ind. 38.

(a) Gale v. Southern B. & L. Ass'n, 116 Fed. 732 (statement as to time when building and loan stock would mature); Holton v. Noble, 83 Cal. 7, 23 Pac. 58; Nounnan v. Sutter Co. L. Co., 81 Cal. 1, 22 Pac. 515, 6 L. R. A. 219; Tryce v. Dittus, 199 Ill. 189, 65 N. E. 220; Johnson v. National B. & L. Ass'n, 125 Ala. 465, 28 South. 2, 82 Am. St. Rep. 257.

ion exists becomes an affirmation of a material fact, and if untrue, it is a misrepresentation. The opinion might either be represented as held by a third person or as held by the very party making the statement. As a single illustration, either the third person or the party himself might be an expert, and their opinion might be material, so that the representation that the opinion was held might be the affirmation of a most material fact. There is still another and perhaps more common form of such misrepresentation. Wherever a party states a matter, which might otherwise be only an opinion, and does not state it *as the mere expression of his own opinion,* but affirms it *as an existing fact* material to the transaction, so that the other party may reasonably treat it as a fact, and rely and act upon it as such, then the statement clearly becomes an affirmation of fact within the meaning of the general rule, and may be a fraudulent misrepresentation. The statements which most frequently come within this branch of the rule are those concerning value. The foregoing distinctions, which I have attempted to explain, and which have sometimes been lost sight of, will go far, I think, to harmonize whatever apparent conflict of decision may be found in some of the reported cases.[3 b]

[3] It cannot be denied that there is apparently a direct conflict of decision upon the effect of representations concerning value. The distinctions drawn in the text seem to me to be in perfect accordance with principle, and to be just and practical, and they will tend to remove most of the conflict, which is apparent rather than real. Statements of value are sometimes nothing more than the expression of the party's own opinion, and there is a group of decisions in which they are so treated. On the other hand, statements of value may be affirmations of a specific material fact, and there is a group of decisions in which they are so treated, and held to be fraudulent misrepre-

(b) In the following cases, statements of value were held to be mere expressions of opinion: Gordon v. Butler, 105 U. S. 553; Southern Development Co. v. Silva, 125 U. S. 247, 8 Sup. Ct. 881; Rendell v. Scott, 70 Cal. 514, 11 Pac. 779; Dillman v. Nadlehoffer, 119 Ill. 567, 7 N. E. 88; Crocker v. Manley, 164 Ill. 282, 45 N. E. 577, 56 Am. St. Rep. 196; Bossingham v. Syck, 118 Iowa, 192, 91 N. W. 1047; Chrysler v. Carraday, 90 N. Y. 276, 43 Am. Rep. 166; Akin v. Kellogg, 119 N. Y. 441, 23 N. E. 1046.

§ 879. II. The Purpose for Which the Representation is Made.[a]— It is an essential requisite, both in equity and at law, that the representation, whatever be its form, must be made for the purpose and with the design of procuring the other party to act,— of inducing him to enter into the

sentations. There is no necessary conflict between these two groups of decisions, although the language of the judicial opinions has not always recognized and preserved the distinction between the two forms. Haygarth v. Wearing, L. R. 12 Eq. 320, 327, 328, is directly in point, and sustains the distinctions stated in the text in the fullest manner. The plaintiff had inherited a piece of land. She was completely ignorant concerning it and its value; the defendant was well acquainted with it and with its value. He stated to her that it was not worth more than one hundred pounds, and she therefore sold and conveyed it to him for that sum. It was really worth five hundred pounds, which the defendant well knew. The suit is brought to set aside the sale and to recover the land; and the relief was granted, although the objection was strongly urged that such a representation was merely a matter of opinion. The court first decided that no fiduciary relation existed between the two parties, so that the case must depend upon general rules applicable alike to all persons dealing with each other. Wickens, V. C., said: "Independently of any fiduciary relation, this court holds that a person obtaining a conveyance of real estate on the faith of certain representations, which are afterwards shown to be untrue, must submit to have the conveyance treated as fraudulent and void against the person deceived. In this case, the representation that he made to her was, that the value of what she had to sell was about one hundred pounds. This was not a mere purchaser's assessment [i. e., estimate or opinion], but a deliberate statement made to her by a person having full knowledge, which statement was asked by her for her guidance in the transaction, and was acted upon by her in reliance on its good faith and honesty." See also Turner v. Harvey, 1 Jacob, 169, 178, 179; Rawlins v. Wickham, 3 De Gex & J. 304; 1 Giff. 355 (a misrepresentation as to amount of indebtedness); Martin v. Jordan, 60 Me. 531; Coon v. Atwell, 46 N. H. 510; Simar v. Canaday, 53 N. Y. 298; 13 Am. Rep. 523; Van Epps v. Harrison, 5 Hill, 63; 40 Am. Dec. 314; McAleer v. Horsey, 35 Md. 439; Reid v. Flippen, 47 Ga. 273; Morehead v. Eades, 3 Bush, 121; Sievcking v. Litzler, 31 Ind. 17; Harvey v. Smith, 17 Ind. 272; Davis v. Jackson, 22 Ind. 233; McFadden v. Robison, 35 Ind. 24; Allin v. Millison, 72 Ill. 201; Neil v. Cummings, 75 Ill. 170; Faribault v. Sater, 13 Minn. 223; Gifford v. Carvill, 29 Cal. 589; Cruess v. Fessler, 39 Cal. 336.

It has been held that statements as to the cost of property cannot be fraudulent misrepresentations, entitling the injured party to a rescission, if no fiduciary relation existed: Cooper v. Lovering, 106 Mass. 77, 79; Mooney v. Miller, 102 Mass. 217, 220; Hemmer v. Cooper, 8 Allen, 334;

(a) This section is cited in San Antonio Nat. Bank v. Bamberger, 77 Tex. 48, 13 S. W. 959, 19 Am. St. Rep. 738.

contract or engage in the transaction.[1b] It must therefore be, of necessity, preliminary to the actual conclusion of the transaction, and in the great majority of instances it is made during and forms a part of a negotiation between the parties, which terminates in the contract or other trans-

Tuck v. Downing, 76 Ill. 71; Noetling v. Wright, 72 Ill. 390; Holbrook v. Connor, 60 Me. 578; 11 Am. Rep. 212. In this last case, Mr. Justice Dickerson dissented, holding what is, as it seems to me, the more accurate and reasonable doctrine. In Cowles v. Watson, 14 Hun, 41, a representation that property cost five hundred thousand dollars, when it only cost half that amount, was held a statement of fact, and not a mere opinion. In the following cases, statements involving value were held representations of fact, and not mere expressions of opinion:[c] Jordan v. Volkenning, 72 N. Y. 300, 306 (a gross exaggeration of value); Perkins v. Partridge, 30 N. J. Eq. 82; Leutz v. Earnhart, 12 Heisk. 711; Derrick v. Lamar Ins. Co., 74 Ill. 404; Foxworth v. Bullock, 44 Miss. 457; but see Suessenguth v. Bingenheimer, 40 Wis. 370. With respect to matters of opinion stated as facts, or stated as a fact to be held by a certain person,[d] see Haygarth v. Wearing, L. R. 12 Eq. 320; Attwood v. Small, 6 Clark & F. 232; Wakeman v. Dalley, 51 N. Y. 27; 10 Am. Rep. 551; Shaeffer v. Sleade, 7 Blackf. 178. In Schramm v. O'Connor, 98 Ill. 539, a mere exaggeration of the value and excellence of land was held matter of opinion only.

[1] Rawlins v. Wickham, 3 De Gex & J. 304; Jennings v. Broughton, 5 De Gex, M. & G. 126, 130; Reynell v. Sprye, 1 De Gex, M. & G. 660; Western Bank v. Addie, L. R. 1 Sc. App. 145; West v. Jones, 1 Sim., N. S., 205, 208;

(c) In the following cases, statements involving value were held representations of fact, and not mere expressions of opinion: Morgan v. Dinges, 23 Neb. 271, 36 N. W. 544, 8 Am. St. Rep. 121; Fairchild v. McMahon, 139 N. Y. 290, 34 N. E. 779, 36 Am. St. Rep. 701, affirming 65 Hun, 621, 20 N. Y. Supp. 31 (statement as to price paid); Brown v. Holden, 120 Iowa, 191, 94 N. W. 482; Coulter v. Clark, 160 Ind. 311, 66 N. E. 739; Boles v. Merrill, 173 Mass. 491, 73 Am. St. Rep. 308, 53 N. E. 894 (statement as to number of customers of a business, and amount it was earning); Stoll v. Wellborn, (N. J. Eq.) 56 Atl. 894 (representation that brand of whisky had certain market value); Zang v. Adams, 23 Colo. 408, 58 Am. St. Rep. 249, 48 Pac. 509 (statement of cost).

(d) See Speed v. Hollingsworth, 54 Kan. 436, 38 Pac. 496 (statement of quantity of land not mere opinion); Nelson v. Allen, 117 Wis. 91, 93 N. W. 807 (statement as to boundary not mere opinion); Hurlbert v. T. D. Kellogg Lumber & Mfg. Co., 115 Wis. 225, 91 N. W. 673; American Cotton Co. v. Collier, 30 Tex. Civ. App. 105, 69 S. W. 1021. Vendor referred vendee to D for D's opinion, knowing D to be a fugitive from justice, and intending to mislead vendee. Held, responsible for D's statements: Witherwax v. Riddle, 121 Ill. 140, 13 N. E. 545.

(b) As to False Representations Made to Third Persons, see Chubbuck v. Cleveland, 37 Minn. 466, 35 N. W. 362, 5 Am. St. Rep. 864; San Antonio Nat. Bank v. Bamberger, 77 Tex. 48, 13 S. W. 959, 19 Am. St.

action.[2] There are, however, very important exceptions to this general statement. There are cases where the misrepresentations cannot be said to form a part of any negotiation or treaty between the parties. The false statements may be made with the design that they should be acted upon by some one, but without any design or knowledge of their being acted upon by any particular person. For example, it is now well settled that prospectuses issued by promoters or directors of companies, reports or circulars and similar publications addressed to all whom it may concern, may be fraudulent misrepresentations giving rise to any appropriate equitable or even legal relief.[3 c] Such being the object of the representation, it must

Traill v. Baring, 4 De Gex, J. & S. 318, 326, 329; Attwood v. Small, 6 Clark & F. 232; Att'y-Gen. v. Ray, L. R. 9 Ch. 397; Hill v. Lane, L. R. 11 Eq. 215, 219; Eaton etc. Co. v. Avery, 83 N. Y. 31; 38 Am. Rep. 389; Rohrschneider v. Knickerbocker Ins. Co., 76 N. Y. 216; 32 Am. Rep. 290; Verplank v. Van Buren, 76 N. Y. 247; Smith v. Richards, 13 Pet. 26; Tyler v. Black, 13 How. 230; Hough v. Richardson, 3 Story, 659; Smith v. Babcock, 2 Wood. & M. 246; Pratt v. Philbrook, 33 Me. 17; Harding v. Randall, 15 Me. 332; Hunt v. Moore, 2 Pa. St. 105; Joice v. Taylor, 6 Gill & J. 54; 25 Am. Dec. 325; McAleer v. Horsey, 35 Md. 439; Taymon v. Mitchell, 1 Md. Ch. 496; Lanier v. Hill, 25 Ala. 554; Smith v. Robertson, 23 Ala. 312; Oswald v. McGehee, 28 Miss. 340; Slaughter's Adm'r v. Gerson, 13 Wall. 379; Bowman v. Caruthers, 40 Ind. 90.

2 Harris v. Kemble, 1 Sim. 111, 122, per Sir John Leach.

3 The leading case is Kisch v. Cent. R'y of Venezuela, 3 De Gex, J. & S. 122; L. R. 2 H. L. 99. See also Barrett's Case, 3 De Gex, J. & S. 30; Reese River Min. Co. v. Smith, L. R. 4 H. L. 64; Smith's Case, L. R. 2 Ch. 604; Ross v. Estates Invest. Co., L. R. 3 Ch. 682; Hallows v. Fernie, L. R. 3 Ch. 467, 475; New Brunswick etc. R'y v. Muggeridge, 1 Drew & S. 363; Peek v. Gurney, L. R. 6 H. L. 377; Swift v. Winterbotham, L. R. 8 Q. B. 244; Paddock v. Fletcher, 42 Vt. 389; Rohrschneider v. Knickerbocker Ins. Co., 76 N. Y. 216; 32 Am. Rep. 290; Phelps v. Wait, 30 N. Y. 78; Bruff v. Mali, 36 N. Y. 200; McClellan v. Scott, 24 Wis. 81. The relief may be a rescission of the purchase made by the defrauded person, or any other proper equitable remedy, or a recovery of damages at law from the fraudulent directors, officers, or promoters. This subject is more fully examined *post*, § 881.

Rep. 738; monographic note, 85 Am. St. Rep. 368–391; but see Crawford v. Osmun, 70 Mich. 461, 38 N. W. 573.

(c) Smith v. Chadwick, 20 Ch. Div. 27; Edgington v. Fitzmaurice, 29 Ch. Div. 459; Arnison v. Smith, 41 Ch. Div. 348; Bosley v. N. M. Co., 123 N. Y. 555, 25 N. E. 990.

relate to and be directly connected with the very contract or other transaction in question; must deal with its subject-matter or other material terms, and not be confined to other and distinct relations, transactions, or matters in which the parties are concerned. In the language of an eminent judge, a misrepresentation concerning any subject-matter "must be material in its nature,— that is to say, one which, taken as true, would add substantially to the value or promise of" that subject-matter.[4] [d]

§ 880. **Presumption of the Design to Induce Action.**— In order that a statement may be a fraudulent misrepresentation, the party making it need not have any malignant feeling towards the other, nor any desire to injure, nor need he be actuated by any corrupt or wicked motive; for equity looks at the relations of the statement towards the real facts, and the results which will naturally flow from it, rather than at the mental condition, temper, and feelings of the person who makes it.[1] If, therefore, a representation made prior to the transaction, and directly relating to it, is of such a character that it would naturally and reasonably induce, or tend to induce, any ordinary person to act upon it, and enter into the contract or engage in the transaction, and is in fact followed by such action on the part of the other person, then it will be presumed that it was made for the purpose and with the design of inducing that person to do what he has done,— that is, to enter into the agreement or engage in the transaction. The design will be inferred from the natural and necessary consequences.[2] [a] It is not necessary that all the representa-

[4] Jennings v. Broughton, 5 De Gex, M. & G. 126, 130, per Knight Bruce, L. J.; Harris v. Kemble, 1 Sim. 111.

[1] Traill v. Baring, 4 De Gex, J. & S. 318, 326, 328; Gibson v. D'Este, 2 Younge & C. Ch. 542; Wilde v. Gibson, 1 H. L. Cas. 605.

[2] Traill v. Baring, 4 De Gex, J. & S. 318, 326, 328; Jennings v. Broughton, 5 De Gex, M. & G. 126, 130; Rawlins v. Wickham, 3 De Gex & J. 304; Rey-

(d) See, also, §§ 890, 898.

(a) A limitation upon this doctrine was made in Nash v. Minnesota, etc., Co., 163 Mass. 574, 47 Am. St. Rep. 489, 40 N. E. 1039, 28 L. R. A. 753, where it was held that in an action

tions by which a party is induced to act should be untrue. The cases hold that where certain statements have been made all in their nature capable, more or less, of leading the party to whom they are addressed to adopt a particular line of conduct, and any one of them is untrue, the

nell v. Sprye, 1 De Gex, M. & G. 660, 708–710; Wilson v. Short, 6 Hare, 366, 377; Conybeare v. New Brunswick etc. Co., 1 De Gex, F. & J. 578; 9 H. L. Cas. 711; Attwood v. Small, 6 Clark & F. 232; West v. Jones, 1 Sim., N. S., 205; Aberaman Iron Works v. Wickens, L. R. 4 Ch. 101; 5 Eq. 485; Leyland v. Illingworth, 2 De Gex, F. & J. 248; Western Bank of Scotland v. Addie, L. R. 1 H. L. S. 145. Torrance v. Bolton, L. R. 8 Ch. 118, 14 Eq. 124, is a very illustrative case of the effect of misrepresentations in equity. A vendee was misled by a wrong description of the property sold. The description was held to be misleading; that the *onus* was on the vendor to show that *the purchaser was not misled;* that an actual fraudulent intent — an intent to deceive — was not necessary to set aside a contract of sale; it is enough that such contract is unconscientious. The case of National Exch. Co. v. Drew, 2 Macq. 103, contains a very full and instructive discussion of fraud. The company sued defendants to recover a sum of money which it had advanced to enable them to purchase stocks of the company. Defendants set up false representations, by which they were induced to make the purchase. The house of lords held that the loan and the purchase formed one transaction, and the fraud vitiated the whole. The case of Reynell v. Sprye, 1 De Gex, M. & G. 660, illustrates in the clearest manner the *principles* of equity in dealing with fraud. I quote a passage from the opinion of Cranworth, L. J., which bears not only upon the element now under consideration, — the purpose of inducing the other person to act, — but also upon the more difficult question of the knowledge and intent to mislead of the one making the statement. He says (p. 708): "Once make out that there has been anything like deception, and no contract resting in any degree on that foundation can stand. It is impossible so to analyze the operations of the human mind as to be able to say how far any particular representation may have led to the formation of any particular resolution, or the adoption of any particular line of conduct. No one can do this with certainty even as to himself, still less as to another. Where certain statements have been made, *all in their nature capable, more or less, of leading the party to whom they are addressed to adopt a particular line of conduct,* it is impossible to say of any one such representation so made, that even if it had not been made, the same resolution would have been taken, or the same conduct followed. Where, therefore, in a negotiation between two parties, one of them induces the other to contract on the

for deceit in representing that defendant had examined the title to mortgaged real estate and had found it perfect, whereas defendant knew there was a prior mortgage, the latter may show that the words were not used with the intention to state anything falsely, and explain what

whole contract or other transaction is considered as having been obtained fraudulently; the court cannot discriminate among the different statements, nor say that the untrue representation is not the very one which induced the party to act. The foregoing general proposition, that it is sufficient if the statement is of such a character as would naturally induce any ordinary person to enter upon a particular line of conduct, and is actually followed by such conduct, is the *practical* rule by which the courts determine whether a misrepresentation possesses the particular element of fraud — the purpose or design — now under consideration.[3]

faith of the representations made to him, any one of which has been untrue, the whole contract is considered in this court as having been obtained fraudulently. Who can say that the untrue statement may not have been precisely that which turned the scale in the mind of the party to whom it was addressed? The case is not at all varied by the circumstance that the untrue representation, or any of the untrue representations, may in the first instance have been the result of innocent error. If, after the error has been discovered, the party who has innocently made the incorrect representation, suffers the other party to continue in error, and to act on the belief that no mistake has been made, this, from the time of the discovery, becomes, in the contemplation of this court, a fraudulent misrepresentation, even though it was not so originally. These are all principles of such obvious justice as to require neither argument nor authority to illustrate and enforce them, and they need but to be stated, in order to command immediate assent. The only question can be in each particular case, how far the facts bring it within the principle": Nicol's Case, 3 De Gex & J. 387, per Chelmsford, L. C., and Turner, L. J. See also Taylor v. Fleet, 1 Barb. 471; Wells v. Millett, 23 Wis. 64; Eaton etc. Co. v. Avery, 83 N. Y. 31; 38 Am. Rep. 389; Rohrschneider v. Knickerbocker Ins. Co., 76 N. Y. 216; 32 Am. Rep. 290.

[3] It may be observed that the two requisite elements of a fraudulent misrepresentation which have been examined, — that the representation must be an affirmation of fact, and the design of inducing the other party to act, — are recognized and adopted alike by courts of law and of equity; decisions at law may therefore be properly cited to illustrate these two requisites in equity.

his understanding and intention were. There was a strong dissent by Holmes, J., concurred in by Field, C. J., in which the learned justice said: "When a man makes such a representation, he knows that others will understand his words according to their usual and proper meaning, and not by the accident of what he happens to have in his head, and

§ 881. False Prospectuses, Reports, Circulars, and the Like.—The nature of fraudulent misrepresentations, their requisite element of being designed and naturally operating to induce third persons to act, and other important features, are so fully illustrated by the rules concerning the effect of prospectuses, circulars, reports, and other similar documents issued by the promoters, directors, or officers of corporations, as established by very recent decisions, that a brief statement of these rules may be proper. I do not intend at present to consider the general subject of the relations subsisting between corporations, or their directors or officers, on the one side and stockholders, creditors, or third persons dealing with them on the other, but simply to give the conclusions which have been settled by the courts concerning the effect of such documents, published by or in the name of the company, addressed to all whom they may concern, which have misled third persons, and induced them to purchase shares of stock in the corporation. These conclusions cannot be better expressed than in the very language which has been used by eminent judges: "Those who issue a prospectus, holding out to the public the great advantages which accrue to persons who will take shares in a proposed undertaking, and inviting them to take shares on the faith of the representations therein contained, are bound to state everything with strict and scrupulous accuracy, and not only to abstain

it seems to me one of the first principles of social intercourse that he is bound at his peril to know what that meaning is. In this respect it seems to me that there is no difference between the law of fraud and that of torts, or of contract or estoppel. . . . . Of course, if the words used are technical, or have a peculiar meaning in the place where they were used, this can be shown; if by the context or the subject-matter or the circumstances the customary meaning of the words is modified, this can be shown by proof of the circumstances, the subject-matter, and the contract; but when none of these things appears, a defendant cannot be heard to say that for some reason he had in his mind and intended to express by the words something different from what the words appear to mean and were understood by the plaintiff to mean, and are interpreted by the court to mean, whether the action be in tort or contract."

from stating *as fact* that which is not so, but to omit no one fact within their knowledge the existence of which might in any degree affect the nature, or extent, or quality of the privileges or advantages which the prospectus holds out as inducements to take shares."[1] While *mere* exaggerated views of the prospects and advantages of the company contained in a prospectus, circular, or report might not be fraudulent, still all statements should be fair, *bona fide,* and honest.[2] "If it can be shown that a material representation which is not true is contained in the prospectus, or in *any* document forming the foundation of the contract between the company and the share-holder, and the share-holder comes within a reasonable time, and under proper circumstances, to be released from that contract, the courts are bound to relieve him from it. Contracts of this description between an individual and a company, so far as misrepresentation or suppression of the truth is concerned, are to be treated like contracts between any two individuals."[3] It is settled, therefore, that a person who has been induced by the misrepresentations of such documents to purchase shares of stock or to enter into a contract with the company for their purchase may, if he acts without delay upon learning the truth, obtain relief against the company, either by being struck off from the list of stockholders and contributaries in the proceeding instituted for its winding up and final settlement, or by means of an equitable suit brought against the company for the purpose of rescinding his purchase of shares, and of recovering back the money which he paid for them. He may even, in a proper case, obtain relief against the fraud-

1 New Brunswick etc. R'y v. Muggeridge, 1 Drew. & S. 363, 381, per Kindersley, V. C.; Cent. R'y of Venezuela v. Kisch, L. R. 2 H. L. 99, 113, per Lord Chelmsford; Henderson v. Lacon, L. R. 5 Eq. 249, 263, per Lord Hatherley.

2 Kisch v. Cent. R'y of Ven., 3 De Gex, J. & S. 122, 135, per Turner, L. J.; Denton v. Macneil, L. R. 2 Eq. 352.

3 In re Reese River Mining Co., L. R. 2 Ch. 604, 609, per Turner, L. J.

ulent directors personally by means of an equitable suit for an accounting and repayment of the money, or by means of an action at law for the recovery of damages on account of the deceit.[4][a] Relief against the directors personally requires a much stronger case of fraud than relief against the company. The purchase of shares may be set aside, and the purchaser relieved from his liability as a contributory, without any knowledge of the untruth on the part of those who issued the document. Recovery from the directors personally requires knowledge of the untruth on their part, or else that the statement should be made under such circumstances that knowledge will be imputed to them.[5][c] It is also settled that the stockholder must take

[4] Kisch v. Cent. R'y of Venezuela, 3 De Gex, J. & S. 122; Central R'y etc. v. Kisch, L. R. 2 H. L. 99; Reese River Mining Co. v. Smith, L. R. 4 H. L. 64; New Sombrero etc. Co. v. Erlanger, L. R. 5 Ch. Div. 73; In re Hereford etc. Co., L. R. 2 Ch. Div. 621; In re Coal Gas Co., L. R. 1 Ch. Div. 182; In re London etc. Bank, L. R. 7 Ch. 55; In re Estates Investment Co., L. R. 4 Ch. 497; Ross v. Estates Investment Co., L. R. 3 Ch. 682; 3 Eq. 122; In re Reese River Mining Co., L. R. 2 Ch. 604; Peek v. Gurney, L. R. 13 Eq. 79; Hill v. Lane, L. R. 11 Eq. 215; McNiell's Case, L. R. 10 Eq. 503; Kent v. Freehold etc. Co., L. R. 4 Eq. 588; Smith v. Reese River Mining Co., L. R. 2 Eq. 264; Rohrschneider v. Knickerbocker Ins. Co., 76 N. Y. 216; 32 Am. Rep. 290. In the following cases relief was refused on the ground that the representations were not fraudulent, since they were either mere estimates of value in a business which was well known to be very hazardous, or even ambiguous, or were simply exaggerations:[b] In re Mercantile Trading Co., L. R. 4 Ch. 475; Hallows v. Fernie, L. R. 3 Ch. 467, 475; 3 Eq. 520; In re Coal Co., L. R. 20 Eq. 114; Ship v. Crosskill, L. R. 10 Eq. 73, 82, 83; Heymann v. European etc. R'y, L. R. 7 Eq. 154; Denton v. Macneil, L. R. 2 Eq. 352. The misrepresentation must be the *proximate* cause of the purchase of the shares: Barrett's Case, 3 De Gex, J. & S. 30.

[5] Hill v. Lane, L. R. 11 Eq. 215; Peek v. Gurney, L. R. 13 Eq. 79; 6 H. L. 377; Ship v. Crosskill, L. R. 10 Eq. 73, 82, 83; Henderson v. Lacon, L. R. 5 Eq.

(a) Smith v. Chadwick, 20 Ch. Div. 27; Edgington v. Fitzmaurice, 29 Ch. Div. 459; Arnison v. Smith, 41 Ch. Div. 348; Hayden v. Green, 66 Kan. 204, 71 Pac. 236; Bosley v. N. M. Co., 123 N. Y. 555, 25 N. E. 990; Mulholland v. Washington Match Co., (Wash.) 77 Pac. 497.

(b) Shick v. Citizens' Enterprise Co., 15 Ind. App. 329, 57 Am. St. Rep. 230, 44 N. E. 48.

(c) See, also, Derry v. Peek, 14 App. Cas. (H. L.) 337, cited *post*, note to § 884; Hubbard v. Weare, 79 Iowa, 678, 44 N. W. 915. That knowledge of the untruth of the representa-

the requisite proceedings to be relieved against the company at once upon his discovery of the truth; any unreasonable delay, and any act on his part tending to show acquiescence, will debar him of relief.[6 d]

§ 882. III. Untruth of the Statement.— The statement of fact must be untruth, or else there is no *misrepresentation.* The entire doctrine of the law and of equity concerning that species of fraud which consists in *suggestio falsi* is based upon the assumption that the representation is in fact untrue, as this very name itself shows. This is the premise of fact which is assumed in every case which dis-

249; Cargill v. Bower, L. R. 10 Ch. Div. 502. For examples of actions at law, see Swift v. Winterbotham, L. R. 8 Q. B. 244; Bagshaw v. Seymour, 4 Com. B., N. S., 873; Clark v. Dickson, 6 Com. B., N. S., 453.

The rule is settled in England, that a director of a corporation is not liable for the fraud of co-directors or other officers or agents, — e. g., in false prospectuses, — unless he has either expressly authorized or tacitly permitted its commission: Cargill v. Bower, L. R. 10 Ch. Div. 502; following Weir v. Barnett, L. R. 3 Ex. Div. 32; on appeal, L. R. 3 Ex. Div. 238; and holding that Peek v. Gurney, L. R. 6 H. L. 377, is not opposed to this view.

6 The decisions require promptness on his part. In one of the cases a delay of three months after learning the facts was held fatal: Sharpley v. Louth etc. R'y, L. R. 2 Ch. Div. 663; Smith's Case, L. R. 2 Ch. 604; Peek v. Gurney, L. R. 13 Eq. 79; Ashley's Case, L. R. 9 Eq. 263; Scholey v. Central R'y etc., L. R. 9 Eq. 266, note; Heymann v. European etc. R'y, L. R. 7 Eq. 154; Whitehouse's Case, L. R. 3 Eq. 790; Mixer's Case, 4 De Gex & J. 575, 586. When a person has thus been induced to purchase shares, he cannot rescind his purchase and be struck off from the list of contributaries, nor maintain an action against the company for that purpose, nor to recover back the amount paid, after the winding up of the company, nor even after the proceedings to wind up have been commenced, since after the establishment of these proceedings by an order of the court the corporation is ended as a legal being; but this restriction does not seem to apply to suits brought to enforce a liability against the fraudulent directors personally: Burgess's Case, L. R. 15 Ch. Div. 507; Oakes v. Turquand, L. R. 2 H. L. 325; Stone v. City & Co. Bank, L. R. 3 C. P. D. 282; Houldsworth v. City of Glasgow Bank, L. R. 5 App. C. 317, 323; Tennent v. City of Glasgow Bank, L. R. 4 App. C. 615, 621; Kent v. Freehold etc. Co., L. R. 3 Ch. 493; In re London etc. Bank, L. R. 12 Eq. 331; In re Overend etc. Co., L. R. 3 Eq. 576.

tion by the person making it is not necessary for rescission of the purchase, see Karberg's Case, [1892] 3 Ch. 1.

(d) Quoted in Hatch v. Lucky Bill Min. Co., 25 Utah, 405, 71 Pac. 865. For a case where laches were held not to exist, see Karberg's Case, [1892] 3 Ch. 1. See, also, §§ 917, 965.

cusses the nature of fraud, and decides whether it does or does not exist in any particular instance. This requisite element needs, therefore, no examination and no citation of special authorities; it is not susceptible of any exception or limitation.

§ 883. IV. The Intention, Knowledge, or Belief of the Party Making the Statement.— This element — the mental state or condition of the party making the representation — is the most important and characteristic feature of fraud, both in equity and at law. It is, moreover, that constituent of fraud with respect to which there exists the principal difference or divergence between the theory which prevails in equity and that which forms a part of the law. It will aid us, therefore, in obtaining a more accurate notion of the equitable conception by comparison, to present a very brief summary of the doctrine on this subject which has been settled by courts of law.

§ 884. The Knowledge and Fraudulent Intention Requisite at Law.— The court of queen's bench at one time maintained, in a series of decisions, the following doctrines: Whenever one party to a transaction, A, made a representation of fact which was in reality untrue, and the other party, B, relied upon the statement, and was induced by it to do or to omit something, and thereby suffered some damage, such representation was fraudulent, and A was liable for his actual fraud, even though he had made the statement without any knowledge of its untruth,— his liability was independent of his knowledge or ignorance of its actual falsity. This theory admitted the possibility of fraud at law where there was no moral delinquency; it denied that moral wrong was an *essential* element in the legal conception of fraud. The same view was for a time accepted and adopted by a considerable number of decisions in different American states.[1] These cases have, however, been overruled,

[1] Fuller v. Wilson, 3 Q. B. 58; 3 Q. B. 1009; Taylor v. Ashton, 11 Mees. & W. 401; Evans v. Collins, 5 Q. B. 804.

and the theory itself has been abandoned, in England, and even generally, if not universally, throughout the states of our own country.[a] It is now a settled doctrine of the law that there can be no fraud, misrepresentation, or concealment without some *moral* delinquency; there is no actual *legal* fraud which is not also a *moral* fraud.[2] [b] This immoral element consists in the necessary guilty knowledge and consequent intent to deceive,— sometimes designated by the technical term, the *scienter*. The very essence of the legal conception is the fraudulent intention flowing from the guilty knowledge. No misrepresentation is fraudulent at law, unless it is made with actual knowledge of its falsity, or under such circumstances that the law must necessarily impute such knowledge to the party at the time when he makes it. It is well settled that fraudulent misrepresentations may assume the three following forms or phases at law: 1. A party making an untrue statement has at the time an actual, positive knowledge of its falsity; he states what he absolutely knows to be untrue. This is the simplest, plainest, and most direct species of fraud. 2. A party making an untrue statement does not at the time have any belief that it is true.[c] The making an untrue statement, of the

2 Evans v. Collins, 5 Q. B. 820, reversing 5 Q. B. 804; Barley v. Walford, 9 Q. B. 197; Moens v. Heyworth, 10 Mees. & W. 147; Ormrod v. Huth, 14 Mees. & W. 650. Untrue representations honestly made do not constitute fraud at law: Wakeman v. Dalley, 51 N. Y. 27; 10 Am. Rep. 551; Marsh v. Falker, 40 N. Y. 562, 566.

(a) A line of cases holds that the ignorance of a party making a positive assertion is decisive of his fraud, without regard to the unreasonableness of his belief in the truth of the assertion. These cases thus adopt the *equitable* rule stated in § 887. See by way of illustration, Cooper v. Schlesinger, 111 U. S. 148, 4 Sup. Ct. 360; Chatham Furnace Co. v. Moffatt, 147 Mass. 403, 18 N. E. 168, 9 Am. St. Rep. 727, and cases cited; Bullitt v. Farrar, 42 Minn. 8, 43 N. W. 566, 18 Am. St. Rep. 485, 6 L. R. A. 149.

(b) Quoted in Cowley v. Smyth, 46 N. J. Law, 380, 50 Am. Rep. 432. See, also, Boddy v. Henry, 113 Iowa, 462, 85 N. W. 771, 53 L. R. A. 769; Warfield v. Clark, 118 Iowa, 69, 91 N. W. 833.

(c) "There can be no variance in the principle upon which one is held liable for damage who asserts the

truth of which the party of course has no knowledge, and which he does not even believe to be true, is tantamount to the making of a statement which the party knows to be untrue. 3. Finally, a party making an untrue statement, having at the time no knowledge whatever on the subject, *and no reasonable grounds to believe it to be true,* is guilty of fraud, and his claiming that he believed it to be true cannot remove its fraudulent character. A definite statement of what the party does not know to be true, where he has no reasonable grounds for believing it to be true, will, if false, have the same legal effect as a statement of what the party positively knows to be untrue.[3 d] In each of these three

[3] Evans v. Edmonds, 13 Com. B. 777, 786, per Maule, J.; Smout v. Ilbery, 10 Mees. & W. 1, 10, per Alderson, B.; Taylor v. Ashton, 11 Mees. & W. 401; Young v. Covell, 8 Johns. 23; 5 Am. Dec. 316; Benton v. Pratt, 2 Wend. 385; 20 Am. Dec. 623; Tyson v. Passmore, 2 Pa. St. 122; 44 Am. Dec. 181; Fisher v. Worrall, 5 Watts & S. 478, 483; Joice v. Taylor, 6 Gill & J. 54; 25 Am. Dec. 325. In Evans v. Edmonds, 13 Com. B. 777, Maule, J., said: "I conceive that if a man, having no knowledge whatever on the subject, takes upon himself to represent a certain state of facts to exist, he does so at his peril; and if it be done either with a view to secure some benefit to himself, or to deceive a third person, he is in law guilty of a fraud, for he takes upon himself to warrant his own belief of the truth of that which he so asserts." In Young v. Covell, 8 Johns. 23, 5 Am. Dec. 316, the court said of an action for deceit, that "it cannot be maintained without proving actual fraud in the defendant, or an intention to deceive the plaintiff by false representations. The simple fact of misrepresentation, unaccompanied by fraudulent design, is not sufficient." See also Stitt v. Little, 63 N. Y. 427; Eaton, C., & B. Co. v. Avery, 83 N. Y. 31; 38 Am. Rep. 389; Hubbell v. Meigs, 50 N. Y. 480; Hathorne v. Hodges, 28 N. Y. 486; Hathaway v. Johnson, 55 N. Y. 93; 14 Am. Rep. 186; Indianapolis etc. R. R. v. Tyng, 63 N. Y. 653, 655; Butler v. Collins, 12 Cal. 457; McBean v. Fox, 1 Ill. App. 177; Collins v. Evans, 5 Q. B. 820; Ormrod v. Huth, 14 Mees. & W. 650; Pasley v. Freeman, 3 Term Rep. 51; National Exch. Co. v. Drew, 2 Macq. 103.

existence of a fact, knowing that in truth it does not exist, and that upon which a like responsibility is visited upon one who, conscious that he is ignorant concerning the subject-matter of which he speaks, still falsely asserts that, within his own personal knowledge, a fact stated by him does in truth exist": Riley v. Bell, 120 Iowa, 618, 95 N. W. 170.

(d) This third rule of the text, at one time supposed to be well established, was overturned in the case of Derry v. Peek, 14 App. Cas. (H. L.) 337; reversing Peek v. Derry, 37 Ch. Div. 541; followed in Glasier v. Rolls,

phases there is *moral* wrong, and a very slight, if any, difference in the degree of the culpability. In each there is actual knowledge of the untruth, or else the law conclusively imputes knowledge to the party, and treats him as though actually possessing it.

42 Ch. Div. 436; Angus v. Clifford, [1891], 2 Ch. 449 (important for its analysis and explanation of Derry v. Peek by Lindley, L. J., Bowen, L. J., and Kay, L. J.); Low v. Bouverie, [1891], 3 Ch. 82 (holding that Derry v. Peek did not touch the law of estoppel). The house of lords, in Derry v. Peek, 14 App. Cas (H. L.) 337, unanimously held that the absence of reasonable grounds for belief, while it may be evidence of a fraudulent intent, does not, of itself, constitute such fraud as will justify an action for damages either at law or in equity. Lord Bramwell remarks (p. 351): "To believe without reasonable grounds is not moral culpability, but (if there be such a thing) mental culpability." Lord Herschell, who delivered the leading opinion, sums up (p. 374): "First, in order to sustain an action of deceit, there must be proof of fraud, and nothing short of it will suffice. Secondly, fraud is proved when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement being fraudulent, there must, I think, always be an honest belief in its truth." The decision, though, of course, binding on English courts, has been most severely criticised both in England and in this country: see especially an article by Sir Frederick Pollock in 5 Law Quarterly Review, 410. The disastrous effects anticipated from the decision, as far as company directors and promoters issuing a prospectus are concerned, were promptly averted by the Directors' Liability Act of 1890. See, also, Nash v. Minnesota, etc., Co., 163 Mass. 574, 47 Am. St. Rep. 489, 40 N. E. 1039, 28 L. R. A. 753; Kountze v. Kennedy, 147 N. Y. 124, 41 N. E. 414, 49 Am. St. Rep. 651, 29 L. R. A. 360; Cahill v. Applegarth, (Md.) 56 Atl. 794. It should be noticed in this connection that in exercising the concurrent jurisdiction to award damages for fraud the English courts of equity follow the *legal* definition of fraud, and not the equitable. Thus in Arkwright v. Newbold, 17 Ch. Div. 320, Cotton, L. J., remarks: "An action of deceit is a common-law action, and must be decided on the same principles, whether it be brought in the chancery division or any of the common-law divisions." This language is adopted by Lord Blackburn in Smith v. Chadwick, 9 App. Cas. (H. L.) 193; and by Lord Herschell in Derry v. Peek, at p. 360. These equitable actions of deceit, therefore, furnish no authority for determining when the equitable remedies of rescission, cancellation, etc., are proper.

It has recently been held in England that Derry v. Peek leaves untouched the rule of agency that a person professing to have authority as agent, who induces another to act in a matter of business on the faith of his

§ 885. Knowledge or Intention Requisite in Equity.— There are undoubtedly some authorities which, taken literally, would make *moral* wrong a necessary ingredient of fraud in equity as well as at law, since they require a guilty knowledge of the untruth as an essential element.[1] This view is, however, certainly incorrect. It is fully settled by the ablest courts, English and American, that there may be actual fraud — not merely constructive fraud — in equity without any feature or incident of *moral* culpability; that the actual fraud consisting of misrepresentation is not necessarily immoral. A person making an untrue statement, without knowing or believing it to be untrue, and without any intent to deceive, may be chargeable with actual fraud in equity.[2] [a]

[1] Thus in Adams's treatise, 6th Am. ed., 176, 364, the author, after stating that there are two classes of fraud, the first by means of willful misrepresentation, and the second by procuring acts to be done by persons under duress or incapacity, adds: "In order to constitute a fraud of the first class, there must be a representation, express or implied, *false within the knowledge of the party making it*, reasonably relied upon by the other party," etc.

[2] In Traill v. Baring, 4 De Gex, J. & S. 318, 328, Turner, L. J., said: "I desire, in the first place, to absolve the defendants from all imputation of any *intention* of actual fraud. But that by no means disposes of the case; for there are many states of circumstances in which there is technical fraud, in which transactions are fraudulent in the eyes of this court, or characterized by the designation of fraud, although there may be no moral fraud. The question really here is, whether this case does or does not fall within the range of those cases in which this court holds a transaction to be fraudulent, although it may not be morally so." In Ship v. Crosskill, L. R. 10 Eq. 73, 83, Lord Romilly said: "I fully adopt the distinction expressed by Lord Redesdale, between fraud properly so called, and what is having that authority, is liable on an implied warranty of his authority, if it turns out that his authority did not exist: Oliver v. Bank of England, [1902] 1 Ch. 610, 627.

Derry v. Peek has, of course, failed to receive universal recognition in this country; thus, in Giddings v. Baker, 80 Tex. 308, 16 S. W. 33, it was held that a party making false representations is liable at law if, by the exercise of ordinary diligence he could have known that his statement was not true. See, also, Houston v. Thornton, 122 N. C. 365, 65 Am. St. Rep. 699, 29 S. E. 827 (negligence of directors in permitting false statement to be made makes them liable); Trimble v. Reid, 19 Ky. Law Rep. 604, 41 S. W. 319.

(a) Quoted in Potter's Appeal, 56 Conn. 1, 12 Atl. 513, 7 Am. St. Rep. 272. This section is cited in Coolidge v. Rhodes, 199 Ill. 24, 64 N. E. 1074. See, also, Neely v. Rembert, (Ark.) 71 S. W. 259.

Whatever would be fraudulent at law will be so in equity; but the equitable doctrine goes farther, and includes instances of fraudulent misrepresentations which do not exist in the law. There are, however, well-established limits to this equitable conception, which should be carefully observed. Every wrongful act, even by persons in positions of trust and confidence, which gives occasion for a remedy is not fraudulent. Breaches of their duty by persons in fiduciary relations, acts of agents in excess of their authority, and the like, are not, as such, instances of actual fraud, although they may sometimes fall within the division of "constructive fraud."[3] I shall, in further illustration of this subject, enumerate and describe the different phases and forms of fraudulent misrepresentations recognized by equity, some of them being identical with those found in the law.

§ 886. **Forms of Fraudulent Misrepresentations in Equity.**[a]— 1. Where a party makes a statement which is untrue, and has at the time an actual, positive knowledge of its untruth, and the necessarily resulting intent to deceive,— the *scienter* at law. This is the most direct, and in some respects the highest, form of fraud.[1] Wherever the facts of the state-

called constructive fraud, where persons have really been guilty of no moral fraud, but by a species of construction of equity they are said to be guilty of a fraud." In using the word "constructive" here, the master of rolls plainly does not refer to that main division of fraud called "constructive" in contrast with the division called "actual." He is speaking of those instances belonging to the general division "actual," in which the fraud arises from the construction of equity, in contradistinction to the fraud at law, which must always be immoral. See also Hovenden v. Lord Annesley, 2 Schoales & L. 607, 617, per Lord Redesdale; Rawlins v. Wickham, 3 De Gex & J. 304, 316.

3 Stewart v. Austin, L. R. 3 Eq. 299, 306, holding that an act in excess of authority by an agent is not equitable fraud.

1 In Patch v. Ward, L. R. 3 Ch. 203, 207, Lord Cairns well describes this form as follows: "Actual fraud, such that there is on the part of the person chargeable with it the *malus animus*, the *mala mens* putting itself in motion and acting in order to take an undue advantage of some other per-

(a) This classification is quoted in McMullin's Adm'r v. Sanders, 79 Va. 356.

ment are the acts of the very party making it, which are represented as having been done by him, if the statement is untrue, the knowledge of its untruth is necessarily and conclusively imputed to the party. In all cases involving such kind of misrepresentation, if knowledge of the untruth be a requisite element of the liability, such knowledge will be conclusively presumed.[2] In suits involving misrepresentations of this form, if the party charged with the fraud is examined as a witness in his own behalf, the better rule is, that he cannot be asked, as a part of his examination in chief, whether or not he believed his representation to be true.[3] 2. If a person makes an untrue statement, and has at the time no knowledge of its truth, and even has no *belief* in its truth, he is chargeable with fraud in equity as well as

son for the purpose of actually and knowingly defrauding him": Hill v. Lane, L. R. 11 Eq. 215; Ship v. Crosskill, L. R. 10 Eq. 73, 82, 83; Henderson v. Lacon, L. R. 5 Eq. 249, 262; Rawlins v. Wickham, 3 De Gex & J. 304, 312; Reynell v. Sprye, 1 De Gex, M. & G. 660, 691; West v. Jones, 1 Sim., N. S., 205, 208; Chesterfield v. Janssen, 2 Ves. Sr. 124, 155; Neville v. Wilkinson, 1 Brown Ch. 543, 546; Attwood v. Small, 6 Clark & F. 232; Evans v. Bicknell, 6 Ves. 173, 182; Bankhead v. Alloway, 6 Cold. 56, 75; Wampler v. Wampler, 30 Gratt. 454; Laidlaw v. Organ, 2 Wheat. 178, 195; Smith v. Richards, 13 Pet. 26, 36; Frenzel v. Miller, 37 Ind. 1; 10 Am. Dec. 62.

2 This conclusion necessarily follows from the form of the representation and the nature of man's mind and memory. In Henderson v. Lacon, L. R. 5 Eq. 249, 262, the suit was brought to hold directors of a company personally liable for false representations contained in a prospectus which untruly stated that they had done certain acts. Page Wood, V. C. (Lord Hatherley), after holding that in such a suit it is necessary to fix upon the directors the *scienter* as in an action for deceit, that they must have guilty knowledge of the untruth of their statements, adds: "In this instance it appears to me that the *scienter* is clearly fixed upon the directors, from the moment you find a representation concerning *their own acts* which is incorrect, and which they must be taken to have known to be incorrect, and to have knowingly stated, and thereby to have misled the party complaining of the misrepresentation." See also Ship v. Crosskill, L. R. 10 Eq. 73, 83, 84; New Brunswick etc. Co. v. Muggeridge, 1 Drew. & S. 363.

3 Hine v. Campion, L. R. 7 Ch. Div. 344. To allow the party charged under such circumstances to testify in his own behalf that he had a belief, or that he had no wrongful intent, and the like, is a violation, as it seems to me, of the plainest and most fundamental principles of judicial evidence. If he asserts his belief or denies his intent, and reliance is placed in what he says, then his liability is destroyed and the controversy is ended.

in law. Making a statement which the party does not believe to be true is only slightly removed in culpability from the making a statement which the party knows to be false.[4]

§ 887. **The Same.**— 3. Where a person makes an untrue statement, and has at the time no knowledge of its truth, and there are no reasonable grounds for his believing it to be true, he is chargeable with fraud, although he had no absolute knowledge of its untruth, and may claim to have had a belief in its truth.[1 a] This is the mode in which the rule is ordinarily laid down by courts of law, and sometimes by courts of equity. The equity cases have, however, settled the rule in somewhat broader terms, omitting entirely the qualification "that there are no reasonable grounds for the person's believing his statement to be true." In other words, it is settled in equity by an overwhelming array of authority that where a person makes a statement of fact, which is actually untrue, and he has at the time no knowledge whatever of the matter, he is chargeable with fraud, and his claim to have believed in the truth of his statement cannot be regarded as at all material. The definite assertion of something which is untrue, concerning which the party has no knowledge at all, is tantamount in its effects to the assertion of something which the party knows to be untrue.[2 b]

4 Jennings v. Broughton, 5 De Gex, M. & G. 126, 130; Haight v. Hayt, 19 N. Y. 464; White v. Merritt, 7 N. Y. 352; 57 Am. Dec. 527; Doggett v. Emerson, 3 Story, 700; Hough v. Richardson, 3 Story, 659; Daniel v. Mitchell, 1 Story, 172; Warner v. Daniels, 1 Wood. & M. 90; Hammatt v. Emerson, 27 Me. 308; 46 Am. Dec. 598; Stone v. Denny, 4 Met. 151; Hazard v. Irwin, 18 Pick. 95; Twitchell v. Bridge, 42 Vt. 68; Cabot v. Christie, 42 Vt. 121; 1 Am. Rep. 313; Fisher v. Mellen, 103 Mass. 503 (asserting as fact known to the party what was only opinion).

1 Jennings v. Broughton, 5 De Gex, M. & G. 126, 130.

2 It might, perhaps, be said that these two modes of stating the doctrine were virtually the same; because if the party had no knowledge at all

(a) Quoted in Bethell v. Bethell, 92 Ind. 318; McMullin's Adm'r v. Sanders, 79 Va. 356. See, also, Southern Development Co. v. Silva, 125 U. S. 247, 8 Sup. Ct. 881; Coolidge v. Rhodes, 199 Ill. 24, 64 N. E. 1074; Bethell v. Bethell, 92 Ind. 318, 327.

(b) Quoted in McMullin's Adm'r v. Sanders, 79 Va. 356. See, also, Potter's Appeal, 56 Conn. 1, 12 Atl. 513,

§ 888. The Same.[a]—4. Where a person makes a statement of fact which is untrue, but at the time of making it he honestly believes it to be true, and this belief is based upon

concerning the matter, he certainly would have no reasonable grounds for believing his statement to be true. It is plain, however, that the equity courts intend their language to be broader than that of the law courts, and to include instances not falling within the legal formula. The qualification "there are no reasonable grounds for believing his statement" seems to imply circumstances which operate *affirmatively* to prevent the party from forming a belief. The language of the equity courts, in omitting this qualification, seems to be wholly negative, and to require only an absence of knowledge: Rawlins v. Wickham, 3 De Gex & J. 304, 313, 316; Traill v. Baring, 4 De Gex, J. & S. 318, 326, 328, 329; West v. Jones, 1 Sim., N. S., 205, 208; Att'y-General v. Ray, L. R. 9 Ch. 397, 405; Smith v. Reese R. M. Co., L. R. 2 Eq. 264, 269; Pulsford v. Richards, 17 Beav. 87, 94; Hart v. Swaine, L. R. 7 Ch. Div. 42, 46. In this last case the court say: "The defendant took upon himself to assert that to be true which has turned out to be false, and he made this assertion for the purpose of benefiting himself. Though he may have done this believing it to be true, the result is that he is guilty of a fraud." In Rawlins v. Wickham, 3 De Gex & J. 304, Turner, L. J., said: "If upon a treaty for purchase one of the parties to the contract makes a representation materially affecting the subject-matter of the contract, he surely cannot be heard to say that he knew nothing of the truth or falsehood of that which he represented, and still more surely he cannot be allowed to retain any benefit which he has derived if the representation he has made turns out to be untrue. It would be most dangerous to allow any doubt to be cast upon this doctrine": Torrance v. Bolton, L. R. 8 Ch. 118; 14 Eq. 124; Aberaman Iron Works v. Wickens, L. R. 4 Ch. 101; 5 Eq. 485; Peek v. Gurney, L. R. 13 Eq. 79, 113; Smith v. Richards, 13 Pet. 26; Hough v. Richardson, 3 Story, 659; Smith v. Babcock, 2 Wood. & M. 246; Mason v. Crosby, 1 Wood. & M. 342; Hammatt v. Emerson, 27 Me. 308, 326; 46 Am. Dec. 598; Harding v. Randall, 15 Me. 332; Hazard v. Irwin, 18 Pick. 95; Stone v. Denny, 4 Met. 151; Marsh v. Falker, 40 N. Y. 562; Bennett v. Judson, 21 N. Y. 238; Craig v. Ward, 36 Barb. 377; Taymon v. Mitchell, 1 Md. Ch. 496; Smith v. Mitchell, 6 Ga. 458; Reese v. Wyman, 9 Ga. 430, 439; Thompson v. Lee, 31 Ala. 292; Oswald v. McGehee, 28 Miss. 340; Mitchell v. Zimmerman, 4 Tex. 75; 51 Am. Dec. 717; York v. Gregg, 9 Tex. 85; Buford v. Caldwell, 3 Mo. 477; Glasscock v. Minor, 11 Mo. 655; Converse v. Blumrich, 14 Mich. 109, 123; 90 Am. Dec. 230; Allen v. Hart, 72 Ill. 104; Wilcox v. Iowa W. Univ., 32 Iowa, 367; Hammond v. Pennock, 61 N. Y. 145, 151, 152; Hawkins v. Palmer, 57 N. Y. 664; Sharp v. Mayor, 40 Barb. 256; Twitchell v. Bridge, 42 Vt. 68; Beebe v. Knapp, 28 Mich. 53; Stone v. Covell, 29 Mich. 359; Frenzel v. Miller, 37 Ind. 1; 10 Am. Rep. 62; Graves v. Lebanon Bank, 10 Bush. 23; 19 Am. Rep. 50; Bankhead v. Alloway, 6 Cold. 56; Thompson v. Lee, 31 Ala. 292; Elder v. Allison, 45 Ga. 13.

7 Am. St. Rep. 272; Mohler v. Carder, 73 Iowa, 582, 35 N. W. 647; McMullin's Adm'r v. Sanders, 79 Va. 356.

(a) This section is cited in Lawrence v. Gayetty, 78 Cal. 126, 20 Pac. 382, 12 Am. St. Rep. 29.

reasonable grounds which actually exist, the misrepresentation so made is not fraudulent either in equity or at law.[1] This general proposition is subject, however, to the two following important limitations: 5. Where such an untrue statement is made in the honest belief of its truth, so that it is the result of an innocent error, and the truth is afterwards discovered by the person who has innocently made the incorrect representation, if he then suffers the other party to continue in error, and to act on the belief that no mistake has been made, this, from the time of the discovery, becomes, in equity, a fraudulent representation, even though it was not so originally.[2] [b] 6. Finally, if a statement of fact, actually untrue, is made by a person who honestly believes it to be true, but under such circumstances that the *duty* of knowing the truth rests upon him, which, if fulfilled, would have prevented him from making the statement, such misrepresentation may be fraudulent in equity, and the person answerable as for fraud; forgetfulness, ignorance, mistake, cannot avail to overcome the pre-existing *duty* of knowing and telling the truth.[3] [c]

[1] Cabot v. Christie, 42 Vt. 121, 126; 1 Am. Rep. 313; Fisher v. Mellen, 103 Mass. 503; Wakeman v. Dalley, 51 N. Y. 27; 10 Am. Rep. 551; Marsh v. Falker, 40 N. Y. 562, 566; Weed v. Case, 55 Barb. 534; Hartford Ins. Co. v. Matthews, 102 Mass. 221; Wheeler v. Randall, 48 Ill. 182.

[2] Reynell v. Sprye, 1 De Gex, M. & G. 660, 709, per Lord Cranworth; Traill v. Baring, 4 De Gex, J. & S. 318, 329, 330, per Turner, L. J.; Underhill v. Horwood, 10 Ves. 209, 225.

[3] Burrowes v. Lock, 10 Ves. 470, 475; Rawlins v. Wickham, 3 De Gex & J. 304, 313, 316; Traill v. Baring, 4 De Gex, J. & S. 318, 329, 330; Pulsford v. Richards, 17 Beav. 87, 94; Smith v. Reese River M. Co., L. R. 2 Eq. 264, 269; Slim v. Croucher, 1 De Gex, F. & J. 518, 523, 524; 2 Giff. 37; Price v. Macaulay, 2 De Gex, M. & G. 339, 345; Hutton v. Rossiter, 7 De Gex, M. & G. 9; Ayre's Case, 25 Beav. 513, 522; Ainslie v. Medlycott, 9 Ves. 12, 21; Henderson v. Lacon, L. R. 5 Eq. 249, 262; Swan v. North Br. etc. Co., 2 Hurl. & C. 175, 183; Babcock v. Case, 61 Pa. St. 427, 430; 100 Am. Dec. 654.

(b) Rescission for innocent misrepresentations, believed by the party who was induced by them to act, is tantamount to rescission for mutual mistake, and is freely granted: see, for example, Weise v. Grove, (Iowa) 99 N. W. 191, and cases cited.

(c) See, also, Prewitt v. Trimble, 92 Ky. 176, 36 Am. St. Rep. 586, 17 S. W. 356.

§ 889. **Requisites of a Misrepresentation as a Defense to the Specific Enforcement of Contracts in Equity.**[a]— Having thus described the elements of a misrepresentation, with reference to the knowledge or belief of the person, in order that it may constitute fraud in the contemplation of equity, and having explained the various forms or phases which such a misrepresentation may assume, it will be proper to present in this connection those special features and qualities of a misrepresentation which apply to the particular case of a defense to suits for the enforcement of contracts; the entire view of this subject will thus be completed. In setting up a material misrepresentation to defeat the specific performance of a contract, the element of a *scienter*, of knowledge, of belief with or without reasonable grounds, or of intent, is wholly unnecessary and immaterial. So far as this most essential element of a fraudulent misrepresentation is concerned, it is sufficient to defeat a specific performance that the statement is actually untrue so as to mislead the party to whom it is addressed; the party making it need not know of its falsity, nor have any intent to deceive; nor does his belief in its truth make any difference. With respect to its effect upon the specific performance of a contract, a party making a statement as true, however honestly, for the purpose of influencing the conduct of the other party, is bound to know that it *is* true, and must stand or fall by his representation.[1] The point upon which the defense turns is

[1] In re Banister, L. R. 12 Ch. Div. 131, 142; Ainslie v. Medlycott, 9 Ves. 13, 21; Dyer v. Hargrave, 10 Ves. 506; Wall v. Stubbs, 1 Madd. 80. The following are recent cases which furnish examples of misrepresentations which have been set up to defeat a specific performance:[b] Powell v. Elliot, L. R. 10 Ch. 424; Harnett v. Baker, L. R. 20 Eq. 50; Upperton v. Nickolson, 6 Ch. 436; 10 Eq. 228; Whittemore v. Whittemore, L. R. 8 Eq. 603; Denny v. Hancock, L. R. 6 Ch. 1; Leyland v. Illingworth, 2 De Gex, F. & J. 248, 252, 254; Price v. Macaulay, 2 De Gex, M. & G. 339; Swimm v. Bush, 23

(a) This section is cited in McMullin's Adm'r v. Sanders, 79 Va. 356.

(b) Jacob v. Revell, [1900] 2 Ch. 858; Kelly v. C. P. R. R. Co., 74 Cal. 557, 16 Pac. 386, 5 Am. St. Rep. 470; Isaacs v. Skrainka, 95 Mo. 517, 8 S. W. 427.

the *fact* of the other party having been misled by a representation calculated to mislead him, and not the existence of a design to thus mislead. It follows as a plain consequence of this general doctrine that if a party makes a misrepresentation, whereby another is induced to enter into an agreement, he cannot escape from its effects by alleging his forgetfulness at the time of the actual facts.[2] Where the misrepresentation does not extend to the entire scope of the agreement, or even to any of its most important parts, but relates merely to some incidental, subordinate, or collateral feature of it, the court, instead of denying all relief to the plaintiff, may direct a specific performance, with an abatement of the price, or other form of compensation, to the defendant.[3] [d] Of course, when the representation is so coupled with knowledge, or want of belief, or intent, as to constitute actual fraud in any of its phases, it will *a fortiori* defeat the remedy of specific performance.

§ 890. V. Effect of the Representation on the Party to Whom It is Made — His Reliance upon It.[a] — Another element of a

Mich. 99; Holmes's Appeal, 77 Pa. St. 50. In none of these cases, with one or two exceptions, was there the slightest suggestion of any intent to deceive on the part of the vendor; nor even an allegation that he knew of the wrong statement. The question of his knowledge, belief, or intent was wholly immaterial, because the decision need not turn upon it. It is the fact of the other party's being misled, and not the design to mislead him, which constitutes the defense in this class of cases.[c] It is apparent, therefore, that the language which judges have used concerning misrepresentations in such cases should not be confounded with the terms which are employed in describing the elements of a misrepresentation in order that it may be fraudulent.

2 Burrowes v. Lock, 10 Ves. 470, 476; Price v. Macaulay, 2 De Gex, M. & G. 339; Bacon v. Bronson, 7 Johns. Ch. 194; 11 Am. Dec. 449. The same is true in suits for rescission and other relief based upon actual fraud.

3 See several of the cases in the last note but one.

(c) This passage is quoted in Pennybacker v. Laidley, 33 W. Va. 624, 11 S. E. 39.

(d) Quoted in McMullin's Adm'r v. Sanders, 79 Va. 356. The same principle has been applied in favor of a defendant in a suit to foreclose a purchase-money mortgage, where the vendor has made false representations as to the quantity of land conveyed: McMichael v. Webster, 57 N. J. Eq. 295, 41 Atl. 714, 73 Am. St. Rep. 630.

(a) This section is cited in Hicks v. Stevens, 121 Ill. 186, 11 N. E. 241.

fraudulent misrepresentation, without which there can be no remedy, legal or equitable, is, that it must be relied upon by the party to whom it is made, and must be an immediate cause of his conduct which alters his legal relations. Unless an untrue statement is believed and acted upon, it can occasion no legal injury. It is essential, therefore, that the party addressed should trust the representation, and be so thoroughly induced by it that, judging from the ordinary experience of mankind, in the absence of it he would not, in all reasonable probability, have entered into the contract or other transaction.[1] [b] It is not necessary that the false repre-

[1] It is certainly incorrect to lay down this rule as it is often found both in judicial opinions and text-books, namely: "The inducement must be so strong that without it the party would not have entered into the contract." It is clearly impossible, from the nature of the case, to state such a future and contingent matter with absolute certainty; the mode in which the rule is formulated in the text is the only one consistent with the truth, and is all that the law really means or can demand. In the great case of Attwood v. Small, 6 Clark & F. 232, 447, in which the whole doctrine of fraud was fully explained, Lord Brougham thus states this rule: "Now, my lords, what inference do I draw from these cases? It is this, that general fraudulent conduct signifies nothing; that general dishonesty of purpose signifies nothing; that attempts to overreach go for nothing, unless all this dishonesty of purpose, all this fraud, all this intention and design, can be connected with the particular transaction, and not only connected with the particular transaction, but *must be made to be the very ground upon which this transaction took place,* and must have given rise to this contract." The rule was also well expressed in Pulsford v. Richards, 17 Beav. 87, 96: "To use the expression of the Roman law, it must be a representation *dans locum contractui,* — that is, a representation giving occasion to the contract, — the proper interpretation of which appears to me to be the assertion of a fact on which the person entering into the contract relied, and in the absence of which *it is reasonable to infer* that he would not have entered into it; or the suppression of a fact the knowledge of which it is reasonable to infer would have made him abstain from the contract altogether": Reynell v. Sprye, 1 De Gex, M. & G. 660, 691, 708, 709; Jennings v. Broughton, 5 De Gex, M. & G. 126; Rawlins v. Wickham, 3 De Gex & J. 304; Nelson v. Stocker, 4 De Gex & J. 458; Lord Brooke v. Rounthwaite, 5 Hare, 298, 306; Vigers v. Pike, 8 Clark & F. 562, 650; Conybeare v. New Brunswick etc. Co., 1 De Gex, F. & J. 578; Smith v. Reese River M. Co., L. R. 2 Ch. 604, 613; 2

(b) The text is quoted in Pennybacker v. Laidley, 33 W. Va. 624, 11 S. E. 39. See, also, Farrar v. Churchill, 135 U. S. 609, 10 Sup. Ct. 771; Estep v. Armstrong, 69 Cal. 536, 11 Pac. 132; Sears v. Hicklin, 13 Colo. 143, 21 Pac. 1022; Hicks v. Stevens, 121 Ill. 186, 11 N. E. 241; Provident Loan Trust Co. v. McIntosh, (Kan.) 75 Pac.

sentation should be the sole inducement; others may concur with it in influencing the party. Where several representations have been made, and one of them is false, the court has no means of determining, as was well said by Lord Cranworth, that this very one did not turn the scale.[2 c] The misrepresentations must, however, be concerning something really material. Statements, although false, respecting matters utterly trifling, which cannot affect the value or character of the subject-matter, so that if the truth had been known the party would not probably have altered his conduct, are not an occasion for the interposition of equity.[3 d]

Eq. 264; Evans v. Bicknell, 6 Ves. 174, 182–192; Nicol's Case, 3 De Gex & J. 387; Hough v. Richardson, 3 Story, 659; Daniel v. Mitchell, 1 Story, 172; Mason v. Crosby, 1 Wood. & M. 342; Tuthill v. Babcock, 2 Wood. & M. 298; Ferson v. Sanger, 1 Wood. & M. 138; Prescott v. Wright, 4 Gray, 461; Taylor v. Fleet, 1 Barb. 471, 475; Morris Canal Co. v. Emmett, 9 Paige, 168; 37 Am. Dec. 388; Masterton v. Beers, 1 Sweeny, 406; 6 Rob. (N. Y.) 368; Levick v. Brotherline, 74 Pa. St. 149, 157; Percival v. Harger, 40 Iowa, 286; Bryan v. Hitchcock, 43 Mo. 527; Klopenstein v. Mulcahy, 4 Nev. 296; Slaughter's Adm'r v. Gerson, 13 Wall. 379; Wampler v. Wampler, 30 Gratt. 454; McShane v. Hazlehurst, 50 Md. 107; McBean v. Fox, 1 Ill. App. 177; Roseman v. Canovan, 43 Cal. 110; Long v. Warren, 68 N. Y. 426; Chester v. Comstock, 40 N. Y. 575, note; Taylor v. Guest, 58 N. Y. 262; Laidlaw v. Organ, 2 Wheat. 178, 195.

2 Reynell v. Sprye, 1 De Gex, M. & G. 660, 708, 709; Addington v. Allen, 11 Wend. 374 (an action for deceit, in which the court said: "Although other inducements besides the representations may have operated in the giving credit, it is enough if the vendor is *moved* by such representations, so that without them the goods would not have been parted with").

3 Percival v. Harger, 40 Iowa, 286; Winston v. Gwathmey, 8 B. Mon. 19; Geddes v. Pennington, 5 Dow, 159.

498; Ruffner v. Riley, 81 Ky. 165; Severance v. Ash, 81 Me. 278, 17 Atl. 69; Cochrane v. Pascault, 54 Md. 1; Powell v. Adams, 98 Mo. 598, 12 S. W. 295; Parker v. Hayes, 39 N. J. Eq. 469; Houghton v. Graybill, 82 Va. 573. If the words used were capable of two meanings, one true and the other false, the plaintiff in an action of deceit must show that he took them in the false sense: Smith v. Chadwick, 9 App. Cas. (H. L.) 187, affirming 20 Ch. Div. 27.

(c) See *ante*, § 880, note, for the opinion in Reynell v. Sprye. In support of the text, see, also, Oliver v. Bank of England, [1902] 1 Ch. 610; Linhart v. Foreman's Adm'r, 77 Va. 540.

(d) See, also, §§ 879, 898.

§ 891. **The Party must be Justified in Relying on the Representation.**[a]— The foregoing requisite, that the representation must be relied upon, plainly includes the supposition that the party is justified, under all the circumstances, in thus relying upon it. This branch of the rule presents by far the greatest practical difficulties in the decision of cases, because, although the rule is well settled, and is most clearly just, its application must depend upon the facts of each particular case, and upon evidence which is often obscure and conflicting. In determining the effect of a reliance upon representations, it is most important to ascertain, in the first place, whether the statement was such that the party was justified in relying upon it, or was such, on the other hand, that he was *bound* to inquire and examine into its correctness himself. In respect to this alternative, there is a broad distinction between statements of fact which really form a part of, or are essentially connected with, the substance of the transaction, and representations which are mere expressions of opinion, hope, or expectation, or are mere general commendations. It may be laid down as a general proposition that where the statements are of the first kind, and especially where they are concerning matters which, from their nature or situation, may be assumed to be within the knowledge or under the power of the party making the representation, the party to whom it is made has a right to rely on them, he is justified in relying on them, and in the absence of any knowledge of his own, or of any facts which should arouse suspicion and cast doubt upon the truth of the statements, he is not bound to make inquiries and examination for himself. It does not, under such circumstances, lie in the mouth of the person asserting the fact to object or complain because the other took him at his word; if he claims that the other party was not misled, he is bound to show clearly that such party did know the

(a) This section is cited in Coolidge v. Rhodes, 199 Ill. 24, 64 N. E. 1074.

real facts; the burden is on him of removing the presumption that such party relied and acted upon his statements.[1] [b] The rule is equally well settled with respect to the second alternative. Where the representation *consists* of general commendations, or mere expressions of opinion, hope, expectation, and the like, and where it relates to matters which, from their nature, situation, or time, cannot be supposed to be within the knowledge or under the power of the party making the statement, the party to whom it is made is not justified in relying upon it and assuming it to be true; he is bound to make inquiry and examination for himself so

[1] Reynell v. Sprye, 1 De Gex, M. & G. 660, 691, 708; Rawlins v. Wickham, 3 De Gex & J. 304; Conybeare v. New Brunswick etc. Co., 1 De Gex, F. & J. 578. In Leyland v. Illingworth, 2 De Gex, F. & J. 248, 253, 254, in which it was held that the purchaser had a right to rely on a certain statement made by the vendor, and was not bound to inquire for himself, Turner, L. J., said: "If the question had been, whether the supply of water was adequate or inadequate, the case would probably have fallen within the authorities referred to, in opposition to the purchaser's claim. It would have been a question of opinion, not of fact, and the purchaser would have been put upon inquiry. But there is no such question in this case. The description is a representation of a fact," etc. See also Dyer v. Hargrave, 10 Ves. 505; Fenton v. Browne, 14 Ves. 144; Wall v. Stubbs, 1 Madd. 80; Stewart v. Alliston, 1 Mer. 26; Trower v. Newcome, 3 Mer. 704; Lowndes v. Lane, 2 Cox, 363; Scott v. Hanson, 1 Sim. 13; Harris v. Kemble, 1 Sim. 111; 5 Bligh, N. S., 730; Price v. Macaulay, 2 De Gex, M. & G. 339; Aberaman Iron Works v. Wickens, L. R. 4 Ch. 101; 5 Eq. 485; Martin v. Cotter, 3 Jones & L. 496, 507; Brealey v. Collins, Younge, 317; Lord Brooke v. Rounthwaite, 5 Hare, 298; Cox v. Middleton, 2 Drew. 209; Farebrother v. Gibson, 1 De Gex & J. 602; Cook v. Waugh, 2 Giff. 201; Johnson v. Smart, 2 Giff. 151; Boynton v. Hazelboom, 14 Allen, 107; 92 Am. Dec. 738; Best v. Stow, 2 Sand. Ch. 298; Holmes's Appeal, 77 Pa. St. 50; Swimm v. Bush, 23 Mich. 99; Beardsley v. Duntley, 69 N. Y. 577; Wilkin v. Barnard, 61 N. Y. 628; McShane v. Hazlehurst, 50 Md. 107; Slaughter's Adm'r v. Gerson, 13 Wall. 379; Drake v. Latham, 50 Ill. 270; Fish v. Cleland, 33 Ill. 238; Banta v. Palmer, 47 Ill. 99; David v. Park, 103 Mass. 501; Bradbury v. Bardin, 35 Conn. 577; Batdorf v. Albert, 59 Pa. St. 59; Watts v. Cummins, 59 Pa. St. 84; Brandon v. Forest Co., 59 Pa. St. 187; Spalding v. Hedges, 2 Pa. St. 240; Morehead v. Eades, 3 Bush, 121 (a very instructive case).

(b) Quoted in Hicks v. Stevens, 121 Ill. 186, 11 N. E. 241. See, also, the leading case of Redgrave v. Hurd, L. R. 20 Ch. Div. 1, 13, 14, *et seq.*; Gammill v. Johnson, 47 Ark. 335, 1 S. W. 610; Bank of Woodland v. Hiatt, 58 Cal. 234; Wenzel v. Shulz, 78 Cal. 221, 20 Pac. 404; Dillman v.

as to ascertain the truth; and in the absence of evidence, it will be presumed that he has done so, and acted upon the result of his own inquiry and examination.[2] Any repre-

[2] Dyer v. Hargrave, 10 Ves. 505; Fenton v. Browne, 14 Ves. 144; Brealey v. Collins, Younge, 317; Lord Brooke v. Rounthwaite, 5 Hare, 298; Abbott v. Sworder, 4 De Gex & S. 448; Colby v. Gadsden, 34 Beav. 416; Attwood v. Small, 6 Clark & F. 232; Hough v. Richardson, 3 Story, 659; Pratt v. Philbrook, 33 Me. 17; Brown v. Leach, 107 Mass. 364; Veasey v. Doton, 3 Allen, 380; Clark v. Everhart, 63 Pa. St. 347; Winters's Appeal, 61 Pa. St. 307; Tindall v. Harkinson, 19 Ga. 448; Glasscock v. Minor, 11 Mo. 655; Wright v. Gully, 28 Ind. 475. As illustrations, in the often-quoted case of Jennings v. Broughton, 5 De Gex, M. & G. 126, 17 Beav. 234, it was held that in a contract for the sale of a mine, there was an essential difference between a representation of what was actually to be seen or had been seen at the works,— the veins of ore, the amount of ore actually mined, and the like, — and a general statement of the expectations, prospects, and capacities of the mine,— the latter being in their very nature contingent and speculative, and respecting which the buyer was as able to judge as the seller.[c] In Trower v. Newcome, 3 Mer. 704, an advowson had been sold at auction, the written description stating that "a voidance of the preferment was likely soon to occur," but not speaking at all of the then present incumbent. At the sale, the auctioneer verbally announced that "the living would be void on the death of a person aged eighty-two." This statement was, of course, made without authority, and so did not bind the vendor; for otherwise it seems to be a representation in the clearest possible manner of a most material fact. In truth, the then incumbent was only thirty-two years old. Sir William Grant held that the representation in the written description was so vague and general, and so entirely a matter of speculation or opinion, that the purchaser was only put on inquiry by it, and could not claim to have been misled. In Scott v. Hanson, 1 Sim. 13, 1 Russ. & M. 128, a statement that the land sold "was uncommonly rich water-meadow," was only a general commendation. In Hume v. Pocock, L. R. 1 Ch. 379, 1 Eq. 423, it was held that the mere assertion by a vendor that he has a good title, on which the vendee relies without any investigation, is not necessarily such a misrepresentation as will defeat an enforcement of the contract. In Jefferys v. Fairs, L. R. 4 Ch. Div. 448, a representation made without knowledge or any possible intent to mislead was held no ground for interference, because it was of such a nature that the purchaser took his chance.

Nadlehoffer, 119 Ill. 567, 7 N. E. 88; Speed v. Hollingsworth, 54 Kan. 436, 38 Pac. 496; Cottrill v. Krum, 100 Mo. 397, 13 S. W. 753, 18 Am. St. Rep. 549; McGhee v. Bell, 170 Mo. 121, 70 S. W. 493, 59 L. R. A. 761; McMichael v. Webster, 57 N. J. Eq. 295, 41 Atl. 714, 73 Am. St. Rep. 630; Hull v. Fields, 76 Va. 594; Linhart v. Foreman's Adm'r, 77 Va. 540; Rorer Iron Co. v. Trout, 83 Va. 397, 2 S. E. 713, 5 Am. St. Rep. 285; Mulholland v. Washington Match Co., (Wash.) 77 Pac. 497.

(c) See, also, Southern Development Co. v. Silva, 125 U. S. 247, 8 Sup. Ct. 881.

sentation, in order that one may be justified in relying upon it, must be, in some degree at least, reasonable; at all events, it must not be so self-contradictory or absurd that no reasonable man could believe it. It must not, also, be so vague and general in its terms that it conveys no certain meaning.[3]

§ 892. When He is or is not Justified in Relying.—As a generalization from the authorities, the various conditions of fact and circumstance with respect to the question how far a party is justified in relying upon the representation made to him may be reduced to the four following cases, in the first three of which the party is not, while in the fourth he is, justified in relying upon the statements which are offered as inducements for him to enter upon certain conduct:[1] 1. When, before entering into the contract or other transac-

[3] Trower v. Newcome, 3 Mer. 704, per Sir William Grant; Irving v. Thomas, 18 Me. 418, 424, per Shipley, J.; Savage v. Jackson, 19 Ga. 305; Halls v. Thompson, 1 Smedes & M. 443.

[1] The doctrine is so admirably summed up by Lord Langdale, M. R., in Clapham v. Shillito, 7 Beav. 146, 149, 150, that I shall extract a passage from his opinion. "Cases have frequently occurred in which, upon entering into contracts, misrepresentations made by one party have not been, in any degree, relied on by the other party. If the party to whom the representations were made himself resorted to the proper means of verification, before he entered into the contract, it may appear that he relied upon the result of his own investigation and inquiry, and not upon the representations made to him by the other party. Or if the means of investigation and verification be at hand, and the attention of the party receiving the representations be drawn to them, the circumstances of the case may be such as to make it incumbent on a court of justice to impute to him a knowledge of the result, which upon due inquiry he ought to have obtained, and thus the notion of a reliance on the representations made to him may be excluded. Again, when we are endeavoring to ascertain what reliance was placed on representations, we must consider them with reference to the subject-matter and the relative knowledge of the parties. If the subject is capable of being accurately known, and one party is, or is supposed to be, possessed of accurate knowledge, and the other is entirely ignorant, and a contract is entered into after representations made by the party who knows, or is supposed to know, without any means of verification being resorted to by the other, it may well enough be presumed that the ignorant man relied on the statements made to him by him who was supposed to be better informed; but if the subject is in its nature uncertain, if all that is known about it is matter of inference from something else, and if the parties making and receiving representations on the subject have equal knowledge and means of acquiring knowledge, and equal skill, it is not easy to presume that representations made by one would have much, or any, in-

tion, he actually resorts to the proper means of ascertaining the truth and verifying the statement; 2. When, having the opportunity of making such examination, he is charged with the knowledge which he necessarily would have obtained if he had prosecuted it with diligence; 3. When the representation is concerning generalities equally within the knowledge or the means of acquiring knowledge possessed by both parties;[a] 4. But when the representation is concerning facts of which the party making it has, or is supposed to have, knowledge, and the other party has no such advantage, and the circumstances are not those described in the first or the second case, then it will be presumed that he relied on the statement; he is justified in doing so.

§ 893. **Information or Means of Obtaining Information Possessed by the Party Receiving the Representation.**— I purpose to examine under this head the first two cases mentioned in the foregoing summary; they are the ones which present by far the greatest practical difficulties in the administration of justice. If, after a representation of fact, however positive, the party to whom it was made institutes an inquiry for himself, has recourse to the proper means of obtaining information, and actually learns the real facts, he cannot claim to have relied upon the misrepresentation and to have been misled by it. Such claim would simply be untrue. The same result must plainly follow when, after the representation, the party receiving it has given to him a sufficient opportunity of examining into the real facts, when his attention is directed to the sources of information, and he commences, or purports or professes to commence, an investigation. The plainest motives of expediency and of

fluence upon the other." The third and fourth cases in the text above are discussed in the preceding paragraph (§ 891). The first and second are in reality only one; they involve the same principle, and the only difference between them is in the mode of proof,— a fact being directly proved by direct evidence in the first, which is irresistibly inferred by a legal presumption in the second.

(a) The author's classification is quoted in Farnsworth v. Duffner, 142 U. S. 43, 12 Sup. Ct. 164, by Mr. Justice Brewer.

justice require that he should be charged with all the knowledge which he might have obtained had he pursued the inquiry to the end with diligence and completeness. He cannot claim that he did not learn the truth, and that he was misled.[1] [a]

[1] One ground of this latter branch of the rule is the practical impossibility in any judicial proceeding of ascertaining exactly how much knowledge the party obtained by his inquiry; and the opportunity which a contrary rule would give to a party of repudiating an agreement or other transaction fairly entered into, with which he had become dissatisfied:[b] Nelson v. Stocker, 4 De Gex & J. 458; Conybeare v. New Brunswick etc. Co., 1 De Gex, F. & J. 578; Nicol's Case, 3 De Gex & J. 387; Cargill v. Bower, L. R. 10 Ch. Div. 502; Pratt v. Philbrook, 33 Me. 17; Brown v. Leach, 107 Mass. 364; Clark v. Everhart, 63 Pa. St. 347; Wright v. Gully, 28 Ind. 475; Glasscock v. Minor, 11 Mo. 655; Tindall v. Harkinson, 19 Ga. 448; Wilkin v. Barnard, 61 N. Y. 628; Morehead v. Eades, 3 Bush, 121 (a very instructive case, in which this aspect of the doctrine is discussed by Robertson, J.); David v. Park, 103 Mass. 501; Spalding v. Hedges, 2 Pa. St. 240; Batdorf v. Albert, 59 Pa. St. 59; Watts v. Cummins, 59 Pa. St. 84; Brandon v. Forest Co., 59 Pa. St. 187; Fish v. Cleland, 33 Ill. 238; Banta v. Palmer, 47 Ill. 99; Brown v. Leach, 107 Mass. 364; Rockafellow v. Baker, 41 Pa. St. 319; 80 Am. Dec. 624. In illustration of the first branch of the rule given in the text, Lord Holt said, in deciding an action at law for deceit (the principle being the same in law and in equity), as follows: Lysney v. Selby, 2 Ld. Raym. 1118, 1120: "If the vendor gives in his particular of the rents, and the vendee says he will trust him and inquire no further, but rely on his particular, then, if the particular be false, an action will lie; but if the vendee will go and inquire further what the rents are, then it seems unreasonable he should have any action, though the particular be false, because he did not rely on the particular." The great case of Attwood v. Small, 6 Clark & F. 232, is an admirable illustration of the second branch of the rule, and was finally decided in the house of lords by an application of its doctrine. Attwood had bargained to sell his works, and had made representations in regard to them, and these statements were claimed to be false. But during the negotiations the vendee had sent a committee to the works for the express purpose of examining into the truth of the statements. As a matter of fact, they made a very superficial and incomplete examination, and did not discover all the

(a) Quoted in Neely v. Rembert, (Ark.) 71 S. W. 259; Oppenheimer v. Clunie, 142 Cal. 313, 75 Pac. 889. See the important case of Colton v. Stanford, 82 Cal. 356, 23 Pac. 16, 16 Am. St. Rep. 137; also, Southern Development Co. v. Silva, 125 U. S. 247, 8 Sup. Ct. 881; Farrar v. Churchill, 135 U. S. 609, 10 Sup. Ct. 771; Farnsworth v. Duffner, 142 U. S. 43, 12 Sup. Ct. 164; Shappirio v. Goldberg, 192 U. S. 232, 24 Sup. Ct. 259; Magee v. Verity, 97 Mo. App. 486, 71 S. W. 472; Herron v. Herron, 71 Iowa, 428, 32 N. W. 407; but see Light v. Jacobs, 183 Mass. 206, 66 N. E. 799.

(b) Quoted in Neely v. Rembert, (Ark.) 71 S. W. 259.

§ 894. **Knowledge Possessed by the Same Party — Patent Defects.**— The same principle is applied under a somewhat different condition of circumstances. If the party receiving a misrepresentation is, at the time when it is made, either from knowledge acquired previously or obtained at that very moment, fully aware of the truth, acquainted with the facts as they really are, he cannot claim to be misled, and cannot defeat or disaffirm or rescind the transaction on the ground that it was entered into through false representations. The case of patent defects is merely an application of this equitable doctrine. If, in a contract of sale or of leasing, representations are made by the vendor concerning some incidents, qualities, or attributes of the subject-matter which are open and visible, so that the falsity of the statement is patent to any ordinary observer, and it is made to appear that the purchaser, at or shortly before the concluding the contract, had seen the thing itself which constitutes

truth; but they had the opportunity to make a thorough investigation; they were engaged in the same business, and were therefore experts; they were satisfied with what they saw, and reported favorably, and the contract was concluded. On a suit for rescission of the agreement, the house of lords held that the vendees, by their own acts, had cut off any claim to being misled, and must be charged with the full knowledge which they might have obtained. If a party *chooses to judge for himself*, and then does not thoroughly use all the opportunities and sources of information offered or open to him, he cannot be permitted to set up his own carelessness or imprudence, and claim to have been misled. Jennings v. Broughton, 5 De Gex, M. & G. 126, 17 Beav. 234, illustrates the same rule in a striking manner. Plaintiff had bought an interest in a mine, statements concerning it having been made by the vendors. The suit was brought to rescind the sale, on the ground that these statements were grossly fraudulent. The vendee had visited the mine, before concluding the bargain, to look for himself. The statements were concerning matters which he might have found out during his investigation, and it was held by the master of rolls and by the court of appeal that he must be taken to have ascertained the truth, and could not claim to have been misled by the misrepresentations. Lowndes v. Lane, 2 Cox, 363, is another illustrative case. A purchaser had bought property consisting partly of woods, on the representation that these woods had yielded, from timber cut and sold, £250 a year, on the average, for fifteen years. This statement was practically false, and was very misleading. But before concluding the contract a writing was delivered to him and kept in his possession, which, if examined by him, would have disclosed all the real facts and shown the untruth of the previous statements. He was held chargeable with the knowledge which he might and ought thus to have obtained.

the subject-matter, then a knowledge of the facts is chargeable upon such party; he is assumed to have made the agreement knowingly, and cannot allege that he was misled by the false representations.[1] [a] This special rule concerning patent defects requires that the thing concerning which the statements are made should be seen or otherwise personally known by the purchaser, and that the defects should be plainly open and patent to any ordinary observer, and especially that no means should be used to conceal them, or to divert the buyer's attention from them, or in any way to prevent a fair inquiry.[2]

§ 895. **When the Knowledge or Information must be Proved, and not Presumed.**— The principle discussed in the two preceding paragraphs[1] is subject, however, to the following most important qualification, which is based upon the proposition heretofore stated, that whenever a positive representation of fact is made, the party receiving it is, in general, entitled to rely and act upon it, and is not bound to verify it by an independent investigation. Where a representation is made of facts which are or may be assumed to be within the knowledge of the party making it, the knowledge of the receiving party concerning the real facts, which shall prevent his relying on and being misled by it, must be

§ 894, [1] Nelson v. Stocker, 4 De Gex & J. 458; Dyer v. Hargrave, 10 Ves. 505; Bowles v. Round, 5 Ves. 508; Pope v. Garland, 4 Younge & C. 394; Shackleton v. Sutcliffe, 1 De Gex & S. 609; Grant v. Munt, Coop. 173; Hough v. Richardson, 3 Story, 659; Fed. Cas. No. 6,722; Veasey v. Doton, 3 Allen, 380; Winter's Appeal, 61 Pa. St. 307; Slaughter's Adm'r v. Gerson, 13 Wall. 379.

§ 894, [2] If the parties do not stand upon an equality, and one, having better means of knowledge than the other, uses any means to conceal the true facts, or to divert the inquiry from them, the transaction thus procured would be fraudulent: Mead v. Bunn, 32 N. Y. 275.

§ 895, [1] That is, the principle underlying the first and second cases mentioned *ante*, in § 892.

(a) Quoted in Oppenheimer v. Clunie, 142 Cal. 313, 75 Pac. 899. See, in general, Holst v. Stewart, 161 Mass. 516, 37 N. E. 755, 42 Am. St. Rep. 442; Brady v. Finn, 162 Mass. 260, 38 N. E. 506; Bacon v. Leslie, 50 Kans. 494, 34 Am. St. Rep. 134, 31 Pac. 1066 (purchaser had resided near the property for twenty years).

clearly and conclusively established by the evidence.[a] The *mere existence of opportunities* for examination, or of sources of information, is not sufficient, even though by means of these opportunities and sources, in the absence of any representation at all, a constructive notice to the party would be inferred; the doctrine of constructive notice does not apply where there has been such a representation of fact.[2 b] If one party — a vendor, for example — claims that the invalidating effects of his misrepresentations are obviated, and that the purchaser was not misled by them, either because they were concerning patent defects in the subject-matter, or because he was from the outset acquainted with the real facts, or because he had made inquiry, and had thereby ascertained the truth, the foregoing qualification plainly applies; it is plainly incumbent on the vendor to prove the alleged knowledge of the purchaser by clear and positive evidence, and not to leave it a matter of mere inference or implication; *an opportunity or means of obtaining the knowledge* is not enough.[3 c] The qualification

2 Drysdale v. Mace, 2 Smale & G. 225, 230.

3 Price v. Macaulay, 2 De Gex, M. & G. 339, 346, per Knight Bruce, L. J.: "Supposing, however, that the defendant [a purchaser] had actually known at the time of the purchase what were the real state and condition of the

(a) Quoted in Hicks v. Stevens, 121 Ill. 186, 11 N. E. 241. This section is cited in Wenzel v. Shulz, 78 Cal. 221, 20 Pac. 404.

(b) It is held that false statements by vendor of lands as to boundaries, title, etc., may be relied on, though the vendee might have consulted the records: Olson v. Orton, 28 Minn. 36, 8 N. W. 878; Backer v. Pyne, 130 Ind. 288, 30 N. E. 21, 30 Am. St. Rep. 231; Baker v. Maxwell, 99 Ala. 558, 14 South. 468; Hoock v. Bowman, 42 Nebr. 80, 47 Am. St. Rep. 691, 60 N. W. 387 (reviewing many cases); but see Anderson v. Rainey, 100 N. C. 321, 5 S. E. 182. In Holst v. Stewart, 161 Mass. 516, 37 N. E. 755, 42 Am. St. Rep. 442, it was held that a purchaser of land may rely upon representations as to the time of the passing of trains, although the means of knowledge are equally open to both parties. It is said, on the other hand, that the grantor cannot claim to have been misled by similar false statements on the part of the grantee, being conclusively presumed to know the state of his own title: Robbins v. Hope, 57 Cal. 493. See, also, § 810.

(c) See, also, Redgrave v. Hurd, 20 Ch. Div. 1, and especially the remarks of Jessel, M. R., at p. 21;

applies no less plainly to the case where the party receiving a representation has given to him an opportunity of examining into the real facts, or where his attention is directed to the sources of information. The mere opportunity or the means of investigation are not sufficient. Undoubtedly, if there had been no representation, they might or would have put the party upon an inquiry, and would, therefore, amount in law to a constructive notice of the facts which might have been learned by such inquiry; but the positive representation of a fact cannot be counteracted by such implication. It must be shown that the party proceeded, in some measure, to avail himself of the opportunity,— that he took some steps in making an independent investigation,— so that, although his examination might not have been complete and successful, yet he must be charged with the knowledge he would have acquired by means of a thorough investigation. In other words, it must appear that, through the opportunity and means of inquiry, he received *some* information concerning the actual facts, so that, from considerations of expediency, he should not be allowed to allege his failure to obtain *all* the knowledge which he might have acquired.[4]

subject-matter of the contract, it may be that he would not be entitled to complain. But in order to enable a vendor to avail himself of that defense in such a case, he *must show very clearly* that the purchaser knew that to be untrue which was represented to him as true; for no man can be heard to say that he is to be assumed not to have spoken the truth. . . . . It is said that subsequently he had such *notice as might have led him* to ascertain how the facts stood. That, however, is not sufficient in a case of misrepresentation; *he must be shown clearly to have had information* of the real state of the facts communicated to his mind." See also Wilson v. Short, 6 Hare, 366, 378; Dyer v. Hargrave, 10 Ves. 505; Higgins v. Samels, 2 Johns. & H. 460; Harnett v. Baker, L. R. 20 Eq. 50; Rawlins v. Wickham, 3 De Gex & J. 304, 314, 318–320; Attwood v. Small, 6 Clark & F. 232; Smith v. Reese River Co., L. R. 2 Eq. 264; Conybeare v. New Brunswick etc. Co., 1 De Gex, F. & J. 578; 9 H. L. Cas. 711; Kisch v. Cent. R'y of Venezuela, 3 De Gex, J. & S. 122; L. R. 2 H. L. 99, 125.

4 Price v. Macaulay, 2 De Gex, M. & G. 339, 346; Gibson v. D'Este, 2 Younge & C. Ch. 542, 572; the great case of Attwood v. Small, 6 Clark & F. 232, well

Bank of Woodland v. Hiatt, 58 Cal. 234; Wenzel v. Shulz, 78 Cal. 221, 20 Pac. 404; Hicks v. Stevens, 121 Ill. 186, 11 N. E. 241; Speed v. Hollingsworth, 54 Kan. 436, 38 Pac. 496.

§ 896. **Words of General Caution.**—The rule that some independent *knowledge* of the true facts must be brought home to the party receiving such a representation, in order to counteract its effects in misleading him, and to prevent his reliance upon it, is of wide application. Nothing done by the party making the statement, and no extrinsic circumstances, will avail, unless they clearly lead to the conclusion that the transaction was concluded upon the strength of in-

illustrates this position. The vendors of the works made certain positive representations concerning the property. The mere fact that the vendees could have visited the works, and by a personal examination have ascertained all the facts for themselves, would not lessen the effect of this representation. Even had the vendors invited the purchasers to come, given them an express opportunity to investigate, directed their attention to this means of verification, etc., this would not have altered the result. The vendees would have had a right to say: "No, you have made a statement concerning an existing condition of fact which is all within your own knowledge; true, we can come and verify this statement for ourselves, but we are willing to rely on your representation and complete the purchase." Had they done so, they would have been justified in doing it, and could have rescinded the contract. But they did not do so. They acted on the opportunity; they availed themselves of the means; they took some steps in making an investigation, and thus some information as to the true condition of affairs was communicated to their minds. That the investigation was not thorough, and the knowledge obtained perfect, was their own fault; whatever it was, they relied on *it*, and not on the representation of the vendors. Cox v. Middleton, 2 Drew. 209, is also illustrative. A vendor, in negotiating the sale of a house, stated that it was "substantially and well built," which was false. Although the vendee could very easily have inspected the house, and examined for himself how it was built, he was not obliged to do so, and did not, and it was held that this opportunity which he had did not impair the effect of the misrepresentation.[d]

It is also decided in several cases, that where a vendor makes untrue statements respecting a lease, — respecting its covenants and provisions, — although the law would charge the vendee with constructive notice of what these covenants, etc., are, yet such notice does not obviate the effects of the false statements; the representation overrides what would otherwise be taken at law as a knowledge on the part of the purchaser, and he can take advantage of it as against the vendor: Van v. Corpe, 3 Mylne & K. 269; Flight v. Barton, 3 Mylne & K. 282; Pope v. Garland, 4 Younge & C. 394, 401.

There is no contradiction between these conclusions and the rules stated in the two preceding paragraphs (§§ 893, 894). The question is, Did the

(d) The important case of Redgrave v. Hurd, L. R. 20 Ch. Div. 1, furnished a fresh point of departure for the more recent English cases. The decision of Fry, J., in that case was reversed by the Court of Appeal on a

formation, or substantial grounds for forming a judgment, other than the representation itself. A positive representation of fact cannot be obviated by any general statement of the party making it, or by any extrinsic circumstances which merely admit of or warrant an inference contrary to the representation, even though of themselves such state-

party rely on the representation, or on his own knowledge? To obviate the effect of the representation, it must be clearly and conclusively shown that he relied *on his own knowledge.* This the general doctrine and the qualification both demand.e But neither of them requires that this knowledge be perfect, complete, accurate. Where there is an opportunity or means of examination, the party may decline to use it, for he has a right to rely on the representation of fact, and to remain personally in ignorance. If, however, he takes steps in an investigation, and thus obtains some independent knowledge, and afterwards concludes the agreement, he must be assumed to have concluded it upon the strength of that acquired knowledge, however partial and deceptive, and not upon the representation. Where, however, there is no investigation made after the representation, in order to test it, but the vendor claims that his statements have not misled, because the defects were patent, or because the buyer was, from the outset, acquainted with all the facts, there it is the completeness and accuracy of the purchaser's knowledge alone which counteracts the effects of the representation and shows that it was not relied upon and did not mislead; in such case, therefore, it must be shown that the purchaser's knowledge of all the material facts covered by the misrepresentation was full, accurate, and perfect. The vital question in each case, however, is, Did the party receiving the representation rely upon it in concluding the agreement or other transaction? or did he rely upon his own knowledge?

review of the evidence, Baggallay, L. J., remarking (p. 23) that the vendee's investigation "was of a most cursory character, which could not have enabled the defendant to ascertain the truth or falsity of the representation that had been made." Attwood v. Small, *supra,* 6 Clark & F. 232, which was relied upon by the court below, was considered and explained by Jessel, M. R., who concludes (p. 17): "In no way, as it appears to me, does the decision, or any of the grounds of decision, in Attwood v. Small, support the proposition that it is a good defense to an action for rescission of a contract on the ground of fraud that the man who comes to set aside the contract inquired to a certain extent, but did it carelessly and inefficiently, and would, if he had used reasonable diligence, have discovered the fraud." The following language of Jessel, M. R., has frequently been quoted as expressing the result of Redgrave v. Hurd (pp. 13, 14): "Nothing can be plainer, I take it, on the authorities in equity than that the effect of false representation is not got rid of on the ground that the person to whom it was made has been guilty of negligence."

(e) Quoted in Turner v. Houpt, 53 N. J. Eq. (8 Dick.) 526, 33 Atl. 28.

ments or such circumstances might be sufficient to put the other party upon the inquiry. This is simply another application of the principle that the right of a party receiving a representation to rely upon it cannot be taken away or interfered with by inference or implication.[1] If, therefore, the party accompanies or follows his misrepresentation by words of general caution, or by advice to the other that he consult his friends or professional advisers before concluding the agreement, he does not thereby counteract any effect upon the transaction which his untrue statement would otherwise produce.[2] [a] Nor does even the sale of a thing "with all its faults" render a contract valid which might otherwise be impeached or defeated by means of the vendor's representations.[3]

1 Wilson v. Short, 6 Hare, 366, 377.

2 Reynell v. Sprye, 1 De Gex, M. & G. 660, 709, 710, per Lord Cranworth; Dobell v. Stevens, 3 Barn. & C. 623, 625; Prescott v. Wright, 4 Gray, 461; Russell v. Branham, 8 Blackf. 277. In the often quoted case of Reynell v. Sprye, 1 De Gex, M. & G. 660, Lord Cranworth, in answer to the objection that Reynell was cautioned by Sprye, and was negligent in not consulting his advisers, said: "No such question can arise in a case like the present, where one contracting party has intentionally misled the other, by describing his rights as being different from what he knew them really to be. In such a case it is no answer to the charge of imputed fraud to say that the party alleged to be guilty of it recommended the other to take advice, or even put into his hands the means of discovering the truth. However negligent the party may have been to whom the incorrect statement has been made, yet that is a matter affording no ground of defense to the other. No man can complain that another has too implicitly relied on the truth of what he has himself stated."

3 Where this condition is a part of the agreement, the purchaser must take the subject-matter with all its defects, patent or latent; but the vendor is not protected against his false representations: Schneider v. Heath, 3 Camp. 506; Early v. Garrett, 9 Barn. & C. 928; Springwell v. Allen, 2 East, 446, note. The case of Harris v. Kemble, 1 Sim. 111, 120, 5 Bligh, N. S., 730, which came before Sir John Leach, M. R., Lord Chancellor Lyndhurst, and the house of lords, is a very instructive discussion of the doctrine concerning misrepresentations in most of its phases. A contract relating to a theater was made between the joint owners of it, for a sale of the share of one to the other. It was claimed that misrepresentations had been made as to the profits. These representations were based upon the books of accounts,

(a) Quoted in Hicks v. Stevens, 121 Ill. 186, 11 N. E. 241.

§ 897. Prompt Disaffirmance Necessary.[a]— All these considerations as to the nature of misrepresentations require great punctuality and promptness of action by the deceived party upon his discovery of the fraud. The person who has been misled is required, as soon as he learns the truth, with all reasonable diligence to disaffirm the contract, or abandon the transaction, and give the other party an opportunity of rescinding it, and of restoring both of them to their original position. He is not allowed to go on and derive all possible benefits from the transaction, and then claim to be relieved from his own obligations by a rescission or a refusal to perform on his own part. If after discovering the untruth of the representations, he conducts himself with reference to the transaction as though it were still subsisting and binding, he thereby waives all benefit of and relief from the misrepresentations.[1 b]

which were open to both parties, and were justified by the accounts as they appeared on the books. Sir John Leach, for these reasons, held against the claim, and decided that the representations did not avoid the contract. This decision was beyond all doubt right, if the premises of fact were correct. Lord Lyndhurst and the house of lords, considering that the agreement was unquestionably procured by the representations, and that they were made for the purpose of obtaining it, found as a fact that the accounts were not equally plain to both parties; on the contrary, they were purposely kept in such a manner that the party not familiar with them could not get at their real condition and ascertain the true state of the business without the aid of an expert accountant. They therefore held that the party had been misled, and the contract was rescinded.

1 See cases *ante*, under §§ 817–820, as to effects of acquiescence and delay. Vigers v. Pike, 8 Clark & F. 562, 630, per Lord Cottenham; Whitney v.

(a) This section is cited in Merrill v. Wilson, 66 Mich. 232, 33 N. W. 716; Oppenheimer v. Clunie, 142 Cal. 313, 75 Pac. 899; National Mut. B. & L. Ass'n v. Blair, 98 Va. 490, 36 S. E. 513; Rector, etc. of Univ. of Virginia v. Snyder, 100 Va. 567, 42 S. E. 337.

(b) Quoted in Romanoff Land & Min. Co. v. Cameron, 137 Ala. 214, 33 South. 864; Evans v. Duke, 140 Cal. 22, 73 Pac. 732; Greenwood v. Fenn, 136 Ill. 146, 26 N. E. 487; Citizens' St. R. Co. v. Horton, 18 Ind. App. 335, 48 N. E. 22, 45 Cent. Law J. 485. See *post*, § 917. See, also, Shappirio v. Goldberg, 192 U. S. 232, 24 Sup. Ct. 259; Oppenheimer v. Clunie, 142 Cal. 313, 75 Pac. 899; Merrill v. Wilson, 66 Mich. 232, 33 N. W. 716; Acer v. Hotchkiss, 97 N. Y. 395.

§ 898. VI. Materiality of the Misrepresentation.— The last element of a misrepresentation, in order that it may be the ground for any relief, affirmative or defensive, in equity or at law, is its materiality. The statement of facts of which it consists must not only be relied upon as an inducement to some action, but it must also be so material to the interests of the party thus relying and acting upon it, that he is pecuniarily prejudiced by its falsity, is placed in a worse position than he otherwise would have been. The party must suffer some pecuniary loss or injury as the natural consequence of the conduct induced by the misrepresentation. In short, the representation must be so material that its falsity renders it unconscientious in the person making it to enforce the agreement or other transaction which it has caused. Fraud without resulting pecuniary damage is not a ground for the exercise of remedial jurisdiction, equitable or legal; courts of justice do not act as *mere* tribunals of conscience to enforce duties which are *purely* moral.[2] [a]

Allaire, 4 Denio, 554 (when a party, after the making a contract, but before its performance, discovers the fraud of the other, and still goes on and performs his part, he is thereby precluded from the equitable remedy of cancellation, and also from the remedy of recovering back the consideration, but not from the legal remedy of damages for deceit); Woodcock v. Bennet, 1 Cow. 711; 13 Am. Dec. 568; Voorhees v. De Meyer, 2 Barb. 37; Masson's Appeal, 70 Pa. St. 26, 29; Anthony v. Leftwich, 3 Rand. 258; McCorkle v. Brown, 9 Smedes & M. 167; Gibbs v. Champion, 3 Ohio, 335; Pratt v. Carroll, 8 Cranch, 471; McMichael v. Kilmer, 76 N. Y. 36, 46; Schiffer v. Dietz, 83 N. Y. 300; Vernol v. Vernol, 63 N. Y. 45; Van Liew v. Johnson, 4 Hun, 415; Parsons v. Hughes, 9 Paige, 591; Bassett v. Brown, 105 Mass. 551; Northrop v. Bushnell, 38 Conn. 498; Bobb v. Woodward, 50 Mo. 95.

[2] Fellowes v. Lord Gwydyr, 1 Sim. 63; 1 Russ. & M. 83; Slim v. Croucher, 1 De Gex, F. & J. 518; Flint v. Woodin, 9 Hare, 618; Polhill v. Walter, 3 Barn. & Adol. 114; Clarke v. White, 12 Pet. 178; Wells v. Waterhouse, 22 Me. 131; Taylor v. Guest, 58 N. Y. 262; Wuesthoff v. Seymour, 22 N. J. Eq. 66; Marr's Appeal, 78 Pa. St. 66; Abbey v. Dewey, 25 Pa. St. 413; Lindsey v. Lindsey, 34 Miss. 432; Branham v. Record, 42 Ind. 181; Rogers v. Higgins, 57 Ill. 244; Wells v. Millet, 23 Wis. 64; Morrison v. Lods, 39 Cal. 381; Bartlett v. Blaine, 83 Ill. 25; 25 Am. Rep. 346; McShane v. Hazle-

(a) See §§ 879, 890; Seeley v. Reed, 25 Fed. 361; Reay v. Butler, 69 Cal. 580, 11 Pac. 463; Marriner v. Dennison, 78 Cal. 202, 20 Pac. 386; Marsh v. Cook, 32 N. J. Eq. 262. This familiar principle of the text

If any pecuniary loss is shown to have resulted, the court will not inquire into the extent of the injury; it is sufficient

hurst, 50 Md. 107; Bennett v. Judson, 21 N. Y. 238. Fellowes v. Lord Gwydyr, 1 Sim. 63, 1 Russ. & M. 83, is a very instructive case. The defendant, as vendee, entered into a contract of purchase, as he supposed, with one B, through the active instrumentality of A, who falsely represented himself as an agent for B. It turned out that A was the real party in interest, and he sought to enforce the contract. The misrepresentation was set up as a defense. There was nothing proved from which it could be inferred that the defendant would not have made the same contract, on the same terms, with A himself; nor was it shown that he had sustained any loss, damage, or inconvenience from the false statements. The court therefore held the misrepresentations to be immaterial, and to be no defense. In Wuesthoff v. Seymour, 22 N. J. Eq. 66, the vendor, in the negotiation which led to a contract for the sale of land, falsely represented to the vendee that a certain alley on the premises was only a private right of way belonging to a few persons only; in fact, it was a public alley, a public highway. This false representation being set up as a defense in a suit for a specific performance, the court held that it was immaterial; that it worked no material injury to the defendant, since his rights of property were substantially the same in either case. With great deference to the judgment of so able a court, this decision cannot, in my opinion, be supported on principle. The public easement was certainly a far greater encumbrance, and more detrimental to the pecuniary value of the premises, than a private easement in favor of a few specified persons would have been. One fact is a test of the difference. The purchaser might be able, by negotiation with the few persons entitled, to extinguish their easement, but he could not, by any private proceeding or negotiation, extinguish the public easement of the highway. Again, the private easement would be lost by non-user for a specified period; if the public easement could be destroyed at all in this manner, it would require a much longer time. It should be remembered that if *any* pecuniary loss results from the misrepresentation, the *quantum* of it is immaterial.

appears to be flatly contradicted in the remarkable case of Brett v. Cooney, 75 Conn. 338, 53 Atl. 729. Plaintiff and others had an oral understanding not to sell their residence property in a certain locality for an objectionable purpose, to wit, for boarding-house use. Defendants obtained a conveyance from plaintiff by false representation as to the purpose for which it was to be used. Plaintiff retained no property in the vicinity and received full value. It was held, however, that the conveyance should be set aside, the court saying, per Baldwin, J.: "In measuring injury equity does not concern itself merely with money losses. . . . The oral understanding . . . put them under an honorary obligation, which may be properly taken into account in determining whether a case has been made out for equitable relief. . . . What honor and good faith require a man to ask of a court of equity for the profit of others will not be refused without strong cause." While one

if the party misled has been very slightly prejudiced, if the amount is at all appreciable.[3 b]

§ 899. Effects of a Misrepresentation.[a]— Having thus described the elements of a fraudulent misrepresentation in equity, I will add, in order to complete the account, a brief statement of its effects upon the rights of the defrauded, and the duties of the defrauding party. Wherever an agreement or other like transaction has been procured by means of a material fraudulent misrepresentation by one of the parties, the other has an election of equitable remedies. The injured party may, at his option, compel the fraudulent party to make good his representation — that is, to carry it into operation in the nature of a specific performance — when it is of such a nature that it can be thus performed; or he may rescind the agreement, and procure the transaction to be completely canceled and set aside.[1 b] Such a

[3] Cadman v. Horner, 18 Ves. 10; Smith v. Kay, 7 H. L. Cas. 750, 775.

[1] Rawlins v. Wickham, 3 De Gex & J. 304, 321, 322; Clermont v. Tasburgh, 1 Jacob & W. 112; Edwards v. McLeay, 2 Swanst. 287; Coop. t. Eld. 308; Pulsford v. Richards, 17 Beav. 87, 95; Att'y-Gen. v. Ray, L. R. 9 Ch. 397; Pearson v. Morgan, 2 Brown Ch. 388; Evans v. Bicknell, 6 Ves. 174; Savery v. King, 5 H. L. Cas. 627; Western Bank v. Addie, L. R. 1 H. L. S. 145, 162; McFerran v. Taylor, 3 Cranch, 269; Neblett v. Macfarland, 92 U. S. 101; Grymes v. Sanders, 93 U. S. 55, 62; Bacon v. Bronson, 7 Johns. Ch. 194; 11 Am. Dec. 449; Neilson v. McDonald, 6 Johns. Ch. 201; McCall v. Davis, 56 Pa. St. 431; Gatling v. Newell, 9 Ind. 572; Johnson v. Jones, 13 Smedes & M. 580. Courts of equity in administering these two principal remedies, viz., either cancellation or compelling a party to make good his representation by a specific performance, will also grant whatever additional and auxiliary relief may be necessary to render these remedies completely effective. Thus when a person has through fraud obtained the legal title to land or other property, equity constantly treats him as a trustee for the one equitably entitled, and hence has sprung the doctrine of constructive

cannot fail to admire the fine morality of this judgment, it is regrettable that the very eminent judge who pronounced it did not see fit to fortify statements, so unexpected and important, with some discussion of the principle involved in the light of the authorities.

§ 898, (b) The text is quoted in Wainscott v. Occidental, etc., Ass'n, 98 Cal. 253, 33 Pac. 88.

§ 899, (a) This section is cited in McMullin v. Sanders, 79 Va. 356.

§ 899, (b) See, as illustration of compelling the fraudulent party to make good his representations, Piper v. Hoard, 107 N. Y. 73, 13 N. E. 626, 1 Am. St. Rep. 785.

fraudulent misrepresentation, even though it relates only to a portion of a contract, furnishes a complete defense to an enforcement of the whole agreement. The fraudulent party will not be permitted, against the objection of the other, to waive that particular portion with which the false statement is concerned, and to obtain a specific performance of the remainder.[2] A material misstatement of fact, made innocently, and therefore not fraudulent, if it relates to the substantial terms of the agreement, to its very essence, will also constitute a complete defense to the specific execution of the contract, although it may not be a sufficient ground for any affirmative relief.[3] On the other hand, where the misrepresentation, though material and untrue, is innocent, made in a *bona fide* belief of its truth, and therefore not fraudulent, and it relates to or concerns some portion only of the contract, it is not necessarily nor generally a complete defense to the enforcement of the contract. Under such circumstances, there is no rule of equity which prevents a partial enforcement of a contract which is divisible, or the specific execution of it with compensation in respect of its portions, incidents, or features which do not corre-

trusts. The court will also grant an injunction to restrain the fraudulent party from disposing of the property, or from enforcing an executory contract or even a judgment obtained by fraud, and the like.[c]

[2] Viscount Clermont v. Tasburgh, 1 Jacob & W. 112, 119, per Sir Thomas Plumer. The language of the judge in this case plainly describes a fraudulent misrepresentation; all his expressions are utterly inconsistent with an innocent though untrue misdescription or other misstatement. See also Cadman v. Horner, 18 Ves. 10; Boynton v. Hazelboom, 14 Allen, 107; 92 Am. Dec. 738; Thompson v. Tod, 1 Pet. C. C. 380.

[3] See *ante*, § 889, and cases cited. For examples, where the vendor's untrue statement was as to his title to the whole property contracted to be sold; or where it concerned the nature of the entire estate, as representing it to be in fee when it was leasehold or for life; or where it related to some minor feature, but that feature affected the whole subject-matter alike. In such cases a partial enforcement with compensation would plainly be impossible.[d]

(c) See §§ 221, 914, note, 1340, 1363.

(d) See Jacobs v. Revell, [1900] 2 Ch. 858.

spond with the description.[4][e] The destructive effect of fraud upon any contract, conveyance, or other transaction is so essential and far-reaching that no person, however free from any participation in the fraud, can avail himself of what has been obtained by the fraud of another, unless he is not only innocent, but has given some valuable consideration.[5][f] Although the burden of the fraud thus passes by transfer even to an innocent person, the right to relief, it seems, does not necessarily pass in the same manner. The general rule that a misrepresentation must be relied upon

[4] All the numerous instances of a specific performance with compensation or abatement from the price on account of some partial failure of the subject-matter to agree with the description are illustrations and proofs of the statement in the text. In Powell v. Elliott, L. R. 10 Ch. 424, the vendors of a large coal mine made misrepresentations as to the net income, and a specific execution with a deduction from the agreed price was decreed. In Whittemore v. Whittemore, L. R. 8 Eq. 603, there was a serious, but not intentional, misrepresentation as to the amount of land, and the agreement was enforced against the vendee with a corresponding abatement. In Leyland v. Illingworth, 2 De Gex, F. & J. 248, there was a misrepresentation by the vendors as to a water supply, and the vendee was given the option of either being discharged entirely from the contract or of completing it with compensation. Even where the misrepresentation is intentional, and the remedy of rescission would be granted, still the contract is voidable, and not void, and in accordance with the rule stated in the former part of the above paragraph, the injured party may waive his right to a complete defeat, and may insist on a partial specific performance with compensation for the defect, unless the case is such as furnishes no foundation for estimating the amount of the compensation. See also Pratt v. Carroll, 8 Cranch, 471; Voorhees v. De Meyer, 2 Barb. 37; Woodcock v. Bennet, 1 Cow. 711; 13 Am. Dec. 568; Masson's Appeal, 70 Pa. St. 26, 29; Anthony v. Leftwich, 3 Rand. 238, 258; McCorkle v. Brown, 9 Smedes & M. 167; Gibbs v. Champion, 3 Ohio, 335.

[5] Scholefield v. Templer, 4 De Gex & J. 429, 433, per Campbell, L. C.; Topham v. Duke of Portland, 1 De Gex, J. & S. 517, 569, per Turner, L. J.: "I take it to be clear that no person, however innocent he may himself be, can, where there is no valuable consideration, derive a title under the fraud of another": Huguenin v. Baseley, 14 Ves. 273; Russell v. Jackson, 10 Hare, 204, 212; Bowen v. Evans, 2 H. L. Cas. 259; Goddard v. Carlisle, 9 Price, 169; Vane v. Vane, L. R. 8 Ch. 383. This is the converse of the rule that a *bona fide* purchaser for a valuable consideration may acquire a title free from an equity arising out of a prior fraud.

(e) McMullin's Adm'r v. Sanders, 79 Va. 356, 365.

(f) See, also, § 918.

by the party receiving it, in order that it may be a sufficient ground for impeaching or defeating a contract, extends to the assignment of an agreement which, as between the original parties, is affected by a misrepresentation. If a contract between A and B, voidable at the instance of B on account of A's misrepresentation made to him in procuring it, is assigned by B to a third person, C, who is in no such relations with the original parties that he is affected by the fraud, and to whom no false statements are made in obtaining the transfer, the agreement thus assigned, if otherwise binding upon him, would be valid against C; at least its enforcement against him would not be hindered by A's original misrepresentations, since he had not acted upon their faith and credit.[6]

§ 900. Second. Fraudulent Concealments.— A failure to disclose some material fact affecting the subject-matter, however unintentional and blameless, *may* be and often is a sufficient ground to defeat the specific performance of a contract, since that particular relief is only granted when it is just and equitable to both parties. Such a failure to disclose would not be fraudulent; the term "concealment" does not strictly apply to it; and it is only of fraudulent concealments we are now to speak, as one of the two main divisions of actual fraud. Fraudulent concealment implies knowledge and intention. Although there are some species of fraudulent misrepresentations, as has been shown, without these qualities, it is hardly possible to conceive of a fraudulent concealment without a knowledge of the fact suppressed possessed by the party, and an intention not to disclose such fact.[a]

6 Smith v. Clarke, 12 Ves. 477, 484. Fraud only renders contracts voidable, and can be taken advantage of only by the person defrauded, his representatives and privies; the right to a remedy is personal: Harris v. Kemble, 5 Bligh, N. S., 730, 751. The proposition of the text assumes that the contract alone is assigned. If a cause of action on account of the fraud has accrued in B's favor, and that is expressly assigned to C with the con-

(a) Quoted in Griel v. Lomax, 89 Ala. 420, 6 South. 741.

§ 901. **General Doctrine — Duty to Disclose.**— The general doctrine with respect to concealment as a form of actual fraud, and as distinguished from those analogous violations of fiduciary duty which do not constitute actual fraud, but may be included within the term "constructive fraud," may be stated as follows: If either party to a transaction conceals some fact which is material, which is within his own knowledge, *and which it is his duty to disclose,* he is guilty of actual fraud.[1] [a] It is very difficult to lay down any gen-

tract,— which is permissible under modern legislation in many of the states, — the result would be different.

[1] Gibson v. D'Este, 2 Younge & C. Ch. 542; Wilde v. Gibson, 1 H. L. Cas. 605; Edwards v. McLeay, 2 Swanst. 287; Coop. 308; Fox v. Mackreth, 2 Brown Ch. 400, 420; Phillips v. Homfray, L. R. 6 Ch. 770; Baskcomb v. Beckwith, L. R. 8 Eq. 100; Denny v. Hancock, L. R. 6 Ch. 1; Haywood v. Cope, 25 Beav. 140; Lucas v. James, 7 Hare, 410; Drysdale v. Mace, 5 De Gex, M. & G. 103; 2 Smale & G. 225; Dolman v. Nokes, 22 Beav. 402; Bowles v. Stewart, 1 Schoales & L. 209, 224; Roddy v. Williams, 3 Jones & L. 1; Gordon v. Gordon, 3 Swanst. 400; Leonard v. Leonard, 2 Ball & B. 171; Broderick v. Broderick, 1 P. Wms. 240; Rolt v. White, 3 De Gex, J. & S. 360; Mackay v. Douglas, L. R. 14 Eq. 106; Dicconson v. Talbot, L. R. 6 Ch. 32; Vane v. Vane, L. R. 8 Ch. 383; Stanley v. Stanley, L. R. 7 Ch. Div. 589; People's Bank v. Bogart, 81 N. Y. 101; 37 Am. Rep. 481; Brown v. Montgomery, 20 N. Y. 287; 75 Am. Dec. 404; Livingston v. Peru Iron Co., 2 Paige, 390; Bench v. Sheldon, 14 Barb. 66; Nichols v. Pinner, 18 N. Y. 295; 23 N. Y. 264; Hennequin v. Naylor, 24 N. Y. 139; Hall v. Naylor, 18 N. Y. 588; 75 Am. Dec. 269; Allen v. Addington, 7 Wend. 9, 20; Bank of Republic v. Baxter, 31 Vt. 101; Paddock v. Strobridge, 29 Vt. 470; Roseman v. Canovan, 43 Cal. 110, 117; Drake v. Collins, 5 How. (Miss.) 253; Bowman v. Bates, 2 Bibb, 47; 4 Am. Dec. 677; Rawdon v. Blatchford, 1 Sand. 344; Holmes's Appeal, 77 Pa. St. 50; Swimm v. Bush, 23 Mich. 99; Snelson v. Franklin, 6 Munf. 210; McNiel v. Baird, 6 Munf. 316; Emmons v. Moore, 85 Ill. 304; Dameron v. Jamison, 4 Mo. App. 299; Connelly v. Fisher, 3 Tenn. Ch. 382; Young v. Hughes, 32 N. J. Eq. 372; Howard v. Gould, 28 Vt. 523; 67 Am. Dec. 728; Fitzsimmons v. Joslin, 21 Vt. 129; 52 Am. Dec. 46; Hanson v. Edgerly, 29 N. H. 343; Schiffer v. Dietz, 83 N. Y. 300; McMichael v. Kilmer, 76 N. Y. 36, 44; Dambmann v. Schulting, 75 N. Y. 55, 61; Hadley

(a) Quoted in Keen v. James, 39 N. J. Eq. 257, 51 Am. Rep. 29. This section is cited in Horton v. Handvil, 41 N. J. Eq. 57, 3 Atl. 72; Whitman v. Bowden, 27 S. C. 53, 2 S. E. 630; Noyes v. Landon, 59 Vt. 569, 10 Atl. 342. See, also, Stewart v. Wyoming C. R. Co., 128 U. S. 383, 9 Sup. Ct. 101; Griel v. Lomax, 89 Ala. 420, 6 South. 741; Oliver v. Oliver, (Ga.) 45 S. E. 232; People's Bank v. Bogart, 81 N. Y. 108, 37 Am. Rep. 481; Wood v. Amory, 105 N. Y. 281, 11 N. E. 636; Bennett v. McMillin, 179 Pa. St. 146, 36 Atl. 188, 57 Am. St. Rep. 591.

eral formula which shall be more definite than this, and at the same time accurate. The difficulty consists in stating a general rule, in harmony with decisions of authority, as to the duty of either party to disclose facts which are within his knowledge. It is certain that every concealment or failure to disclose material facts known to one party is not fraud in equity or at law, whatever quality it may have before the tribunal of the individual conscience. It has never been contended, in our system of jurisprudence, that a vendor in a contract of sale is bound to disclose all facts which, if known by the buyer, would prevent or tend to prevent him from making the purchase. Much less has it ever been maintained that the buyer is bound to discover all facts known to himself which would enhance the value of the article sold or affect the conduct of the vendor. Even where the buyer purchases on credit, his *mere* failure to disclose his indebtedness, or his embarrassed financial condition, is not necessarily a fraudulent concealment. The same is generally true of all other species of contracts and transactions, except of those species of agreements or en-

v. Clinton etc. Co., 13 Ohio St. 502; 82 Am. Dec. 454; Goninan v. Stephenson, 24 Wis. 75; Hastings v. O'Donnell, 40 Cal. 148. The general doctrine was very clearly stated by Earl, J., in Dambmann v. Schulting, 75 N. Y. 55, 61: "The general rule is, that a party engaged in a business transaction with another can commit a legal fraud only by fraudulent misrepresentations of facts, or by such conduct or such artifice for a fraudulent purpose as will mislead the other party or throw him off from his guard, and thus cause him to omit inquiry or examination which he would otherwise make. A party buying or selling property, or executing instruments, must, by inquiry or examination, gain all the knowledge he desires. He cannot proceed blindly, omitting all inquiry and examination, and then complain that the other party did not volunteer all the information he had. Such is the general rule. But there are exceptions to this rule. Where there is such a relation of trust and confidence between the parties that the one is under some legal or equitable obligation to give full information to the other party,— information which the other party has a right, not merely *in foro conscientiæ*, but *juris et de jure*, to have,— then the withholding such information purposely may be a fraud." All of the foregoing cases show implicitly, and many of them hold expressly, the converse of the rule given in the text, namely, that in all transactions, where there is no legal or equitable duty to make a disclosure, the failure to disclose material facts known to one party alone is not a fraudulent concealment by him.

gagements which are in their very essential nature intrinsically fiduciary, involving a condition of absolute good faith. While the decisions admit these propositions, they are agreed, on the other hand, that it is only *silence* which is permitted. If in addition to the party's silence there is any statement, even any word or act on his own part, which tends affirmatively to a suppression of the truth, to a covering up or disguising the truth, or to a withdrawal or distraction of the other party's attention or observation from the real facts, then the line is overstepped, and the concealment becomes fraudulent. The maxim is, *Aliud est celare, aliud tacere.*[2]

[2] In Turner v. Harvey, Jacob, 169, 178, Lord Eldon, after stating the purchaser's right in general to keep silence, added: "A very little is sufficient to affect the application of that principle. If a word — a single word — be dropped which tends to mislead the vendor, that principle will not be allowed to operate." See also Davies v. Cooper, 5 Mylne & C. 270; Nickley v. Thomas, 22 Barb. 652; Bench v. Sheldon, 14 Barb. 66; Roseman v. Canovan, 43 Cal. 110; Dambmann v. Schulting, 75 N. Y. 55, 61.

Although a party may keep absolute silence and violate no rule of law or equity, yet if he volunteers to speak and to convey information which may influence the conduct of the other party, he is bound to discover the whole truth. A partial statement then becomes a fraudulent concealment, and even amounts to a false and fraudulent misrepresentation. As illustrations: In Nickley v. Thomas, 22 Barb. 652, defendant sold a horse to the plaintiff, knowing that it was balky by habit and had repeatedly balked. He told the plaintiff that the horse "*balked once, and was whipped up and went.*" This was held to be a fraudulent concealment. In Bench v. Sheldon, 14 Barb. 66, plaintiff had lost a flock of sheep, and had searched for them several days without success. Defendant discovered where the sheep were; went to the plaintiff, and without disclosing the fact of his discovery or intimating it in any way, asked the plaintiff if he had found the flock; plaintiff answered that he had not; defendant then remarked that he "supposed plaintiff never would find them," and therefore offered to give plaintiff ten dollars for them; plaintiff assented, and gave the defendant a bill of sale. On discovering these facts, plaintiff brought the suit to recover back the sheep and rescind the sale, and the suit was sustained. The court said that the defendant might have kept silence, but the remark which he volunteered was plainly designed to mislead the plaintiff, and was a fraudulent concealment and misrepresentation. These cases were actions at law, but they illustrate the doctrine in equity as well as at law.[b]

(b) See, also, Newell v. Randall, 32 Minn. 171, 19 N. W. 972, 50 Am. Rep. 562. But it does not follow that because information on some material

§ 902. When Duty to Disclose Exists.[a]— Concealment becomes fraudulent only when it is the duty of the party having knowledge of the facts to discover them to the other; and this brings back the question, When does such duty rest upon either party to any transaction? All the instances in which the duty exists, and in which a concealment is therefore fraudulent, may be reduced to three distinct classes. These three classes are, in general, clearly distinct and separate, although their boundaries may sometimes overlap, or a case may fall within two of them: 1. The first class includes all those instances in which, wholly independent of the form, nature, or object of the contract or other transaction, there is a previous, existing, definite fiduciary relation between the parties, so that the obligation of perfect good faith and of complete disclosure always arises from the existing relations of trust and confidence, and is necessarily impressed upon any transaction which takes place between such persons. Familiar examples are contracts and other transactions between a principal and agent, a client and attorney, a beneficiary and trustee, a ward and guardian, and the like. 2. The second class embraces those instances in which there is no existing special fiduciary relation between the parties, and the transaction is not in its essential nature fiduciary, but it appears that either one or each of the parties, in entering into the contract or other transaction, *expressly* reposes a trust and confidence in the other; or else from the circumstances of the case, the nature of their dealings, or their position towards each other, such a trust and confidence in the par-

points is offered, or is given on request, by a purchaser from a court of chancery, that it must therefore be given on all others as to which it is neither offered or requested, and concerning which there is no implied representation in what is actually stated: Coaks v. Boswell, 11 App. Cas. (H. L.) 232, reversing 27 Ch. Div. 424, and restoring 23 Ch. Div. 302.

(a) This section is cited in Potter's Appeal, 56 Conn. 1, 12 Atl. 513, 7 Am. St. Rep. 272; Griel v. Lomax, 89 Ala. 420, 6 South. 741; Noyes v. Landon, 59 Vt. 569, 10 Atl. 342; Oliver v. Oliver, (Ga.) 45 S. E. 232.

ticular case is *necessarily* implied. The nature of the transaction is not the test in this class. Each case must depend upon its own circumstances. The trust and confidence, and the consequent duty to disclose, may expressly appear by the very language of the parties, or they may be necessarily implied from their acts and other circumstances.[1] [b] 3. The third class includes those instances where

[1] Cases illustrating fiduciary relation and duty to disclose from the particular circumstances of the transaction:[c] Bowles v. Stewart, 1 Schoales & L. 209, 224; Roddy v. Williams, 3 Jones & L. 1; Gordon v. Gordon, 3 Swanst. 400; Leonard v. Leonard, 2 Ball & B. 171; Broderick v. Broderick, 1 P. Wms. 239; Rolt v. White, 3 De Gex, J. & S. 360, 365, per Lord Westbury; Mangles v. Dixon, 1 Macn. & G. 437; 3 H. L. Cas. 702; Mackay v. Douglas, L. R. 14 Eq. 106; Dicconson v. Talbot, L. R. 6 Ch. 32; Vane v. Vane, L. R. 8 Ch. 383; Stanley v. Stanley, L. R. 7 Ch. Div. 589; Hanson v. Edgerly, 29 N. H. 343; Fitzsimmons v. Joslin, 21 Vt. 129; 52 Am. Dec. 46; Howard v. Gould, 28 Vt. 523; 67 Am. Dec. 728; Paddock v. Strobridge, 29 Vt. 470; Bank of Republic v. Baxter, 31 Vt. 101; Brown v. Montgomery, 20 N. Y. 287; 75 Am. Dec. 404; Schiffer v. Dietz, 83 N. Y. 300; Hadley v. Clinton etc. Co., 13 Ohio St. 502; 82 Am. Dec. 454.

Cases illustrating duty to disclose on account of pre-existing fiduciary relations:[d] McLure v. Ripley, 2 Macn. & G. 274; Loader v. Clarke, 2 Macn. & G. 382; Atterbury v. Wallis, 8 De Gex, M. & G. 454; Evans v. Carrington, 2 De Gex, F. & J. 481; Tate v. Williamson, L. R. 1 Eq. 528; 2 Ch. 55; Gen. Exch. Bank v. Horner, L. R. 9 Eq. 480; Peek v. Gurney, L. R. 13 Eq. 79; In re Madrid Bank, L. R. 2 Eq. 216; In re Overend etc. Co., L. R. 3 Eq. 576; Heymann v. European etc. Co., L. R. 7 Eq. 154; In re Coal etc. Co., L. R. 20 Eq. 114; Overend etc. Co. v. Gurney, L. R. 4 Ch. 701; In re Lush's Trusts, L. R. 4 Ch. 591; Sharpe v. Foye, L. R. 4 Ch. 35; In re Coal etc. Co., L. R. 1 Ch. Div. 182; In re Hereford etc. Co., L. R. 2 Ch. Div. 621; Craig v. Phillips, L. R. 3 Ch. Div. 722; Morgan v. Elford, L. R. 4 Ch. 352; New Sombrero etc. Co. v. Erlanger, L. R. 5 Ch. Div. 73; Bagnall v. Carlton, L. R. 6 Ch. Div. 371; Davies v. London etc. Co., L. R. 8 Ch. Div. 469; Lovesy v. Smith, L. R. 15 Ch. Div. 655; Young v. Hughes, 32 N. J. Eq. 372.

(b) Quoted in Keen v. James, 39 N. J. Eq. 257, 51 Am. Rep. 29.

(c) St. Louis & S. F. R'y Co. v. Johnston, 133 U. S. 566, 10 Sup. Ct. 390; Keith v. Kellam, 35 Fed. 243; Keen v. James, 39 N. J. Eq. 257, 51 Am. Rep. 29.

(d) Potter's Appeal, 56 Conn. 1, 12 Atl. 513, 7 Am. St. Rep. 272; Hegenmyer v. Marks, 37 Minn. 6, 32 N. W. 785, 5 Am. St. Rep. 808; Whitman v. Bowden, 27 S. C. 53, 2 S. E. 630; Noyes v. Landon, 59 Vt. 569, 10 Atl. 342.

Concealment by Promoters of Corporations, and their duty to the corporation when acting in relation to it as vendors. See the very important recent English cases, Lagunas Nitrate Co. v. Lagunas Syndicate, [1899] 2 Ch. 392; In re Leeds and Hanley Theatres of Varieties, Lim.,

there is no existing fiduciary relation between the parties, and no *special* confidence reposed is expressed by their words or implied from their acts, but the very contract or other transaction itself, in its essential nature, is intrinsically fiduciary, and necessarily calls for perfect good faith and full disclosure, without regard to any particular intention of the parties. The contract of insurance is a familiar example. It will be found, I think, that all cases of fraudulent concealment may be referred to one or the other of these classes.

§ 903. Concealments by a Vendee.[a]—As instances of concealment are most frequent in contracts of sale, it will be proper to apply the foregoing general doctrine to the vendee and the vendor. The decisions recognize a marked difference between the two, with reference to their duty to disclose. The contract of sale is not intrinsically fiduciary, and does not fall within the third of the foregoing classes. The conclusion is clearly established, that under ordinary circumstances, there being no previously existing fiduciary relation between the parties, and no confidence being expressly reposed by the vendor in the very contract, no duty rests upon the vendee to disclose facts which he may happen to know advantageous to the vendor, —facts concerning the thing to be sold which would enhance its value, or tend to cause the vendor to demand a higher price, and the like; so that a failure to disclose will not be a fraudulent concealment.[1 b] The reason is evident.

[1] In the leading case of Fox v. Mackreth, 2 Cox, 320, 2 Brown Ch. 400, 420, Lord Thurlow thus stated this doctrine: "Suppose A, knowing of a mine on the estate of B, and knowing at the same time that B was ignorant of it, should treat and contract with B for the purchase of that estate at only half its real value, by reason of not disclosing to B the fact of the existence

[1902] 2 Ch. 809; also, Erlanger v. New Sombrero Phosphate Co., L. R. 3 App. Cas. 1218.

(a) This section is cited in Oliver v. Oliver, (Ga.) 45 S. E. 232.

(b) Pratt Land & Imp. Co. v. McClain, 135 Ala. 452, 33 South. 185, 93 Am. St. Rep. 35.

The law assumes that the owner has better opportunities than any one else to know all the material facts concerning his own property, and is thus able under all ordinary circumstances to protect his own interests. The duty to disclose can rest upon the vendee only when the case belongs either to the first or the second of the above-mentioned classes. If, therefore, there is a confidence reposed by the vendor in the vendee, by reason of some prior existing fiduciary relation between them, the vendee's failure to disclose a material fact would undoubtedly be a fraudulent concealment. Also, if, during the negotiation and conclusion of the sale, confidence is expressly reposed in the vendee, or if from the circumstances of the contract and the acts of the parties such confidence is necessarily implied, the vendee's silence might be a fraudulent concealment. In instances of the latter kind, a much stronger and clearer case of confidence and consequent duty to dis-

of the mine; can a court of equity set aside this bargain? No. But why is it impossible? Not because the one party is not aware of the unreasonable advantage taken by the other of this knowledge; but because there is no contract existing between them by which one party is bound to disclose to the other the circumstances which have come within his knowledge; for if it were otherwise, such a principle must extend to every case in which the buyer of an estate happened to have a clearer discernment of its real value than the seller. It is therefore not only necessary that great advantage should be taken in such a contract, and that such an advantage should arise from superiority of skill or information, but it is also necessary to show *some obligation binding the party to make such a disclosure.*" To the same general effect, see Dolman v. Nokes, 22 Beav. 402; Dicconson v. Talbot, L. R. 6 Ch. 32.

Livingston v. Peru Iron Co., 2 Paige, 390; Harris v. Tyson, 24 Pa. St. 347; 64 Am. Dec. 661; Drake v. Collins, 5 How. (Miss.) 253; Williams v. Spurr, 24 Mich. 335; Law v. Grant, 37 Wis. 548; see, however, *per contra*, Bowman v. Bates, 2 Bibb, 47; 4 Am. Dec. 677; Williams v. Beazley, 3 J. J. Marsh. 578. In Bowman v. Bates, 2 Bibb, 47, 4 Am. Dec. 677, a person discovered a valuable salt spring on another's land, and bought the tract from him at an ordinary price, without disclosing his discovery. The sale was, for that reason, set aside. One cannot help admiring the stern morality of this decision, even if it be not sustained by the current of authority. See also, as illustrating the general rule, Laidlaw v. Organ, 2 Wheat. 178, 195; Goninan v. Stephenson, 24 Wis. 75; Cleland v. Fish, 43 Ill. 282; Wright v. Brown, 67 N. Y. 1; Anonymous, 67 N. Y. 598.

close is necessary against the vendee than would be required under analogous circumstances against the vendor.[2]

§ 904. Concealments by a Vendor.— A broader duty certainly rests upon the vendor; a duty rests on him to disclose material facts under far more circumstances than is true of the purchaser. This duty, however, is not universal. In ordinary contracts of sale, where no previous fiduciary relation exists, and where no confidence, expressed or implied, growing out of or connected with the very transaction itself, is reposed on the vendor, and the parties are dealing with each other at arms-length, and the purchaser is presumed to have as many reasonable opportunities for ascertaining all the facts as any other person in his place would have had, then the general doctrine already stated applies: no duty to disclose material facts known to himself rests upon the vendor; his failure to disclose is not a fraudulent concealment.[1 a] Of course, any *affirmative* act

[2] Tate v. Williamson, L. R. 2 Ch. 55, 1 Eq. 528, is a very instructive case of fraudulent concealment by a vendee by reason of an existing fiduciary relation. While a vendee's silence, in the absence of any existing fiduciary relations, will not ordinarily be a fraudulent concealment unless the fact of confidence reposed by the vendor is clearly made out, yet such confidence may be more easily inferred, and the duty to disclose may more readily arise, when the material facts concealed are wrongful acts with respect to the subject-matter, knowingly done by the vendee himself. Phillips v. Homfray, L. R. 6 Ch. 770, is an illustration. The owner of a colliery contracted to purchase an adjoining mine from the proprietor thereof. The vendee concealed the fact that he had already got out a considerable quantity of coal from the vendor's mine without the latter's knowledge. This concealment was held to be fraudulent and to defeat the contract, although it did not appear there had been any under-valuation of the mine on account of the coal taken. See also Emmons v. Moore, 85 Ill. 304; Cleland v. Fish, 43 Ill. 282; Young v. Hughes, 32 N. J. Eq. 372; Connelly v. Fisher, 3 Tenn. Ch. 382; Dameron v. Jamison, 4 Mo. App. 299.

[1] Haywood v. Cope, 25 Beav. 140; Wilde v. Gibson, 1 H. L. Cas. 605; Gibson v. D'Este, 2 Younge & C. Ch. 542; People's Bank v. Bogart, 81 N. Y. 101; 37 Am. Dec. 481; Smith v. Countryman, 30 N. Y. 655; Hanson v. Edgerly, 29 N. H. 343; Fisher v. Budlong, 10 R. I. 525; Kintzing v. McElrath, 5 Pa. St. 467; Hadley v. Clinton etc. Co., 13 Ohio St. 502; Frenzel v. Miller, 37 Ind. 1; Williams v. Spurr, 24 Mich. 335; Mitchell v. McDougall,

(a) Marriner v. Dennison, 78 Cal. 202, 20 Pac. 386; People's Bank's Appeal, 93 Pa. St. 107, 39 Am. Rep. 728.

or language tending to conceal or withdraw the buyer's attention from the real facts will turn the scale and render the vendor's conduct fraudulent, as has already been shown. If, on the other hand, the case belongs to the first class mentioned in a former paragraph, the duty of disclosure becomes manifest and stringent. Whenever the vendor occupies an established fiduciary relation towards the buyer, independent of the contract, a full disclosure is demanded; any suppression or silence as to material facts, which would in any degree tend to prevent the sale, is clearly a fraudulent concealment; the utmost good faith and openness is required of vendors occupying such relations.[2] Equity and the law go farther than this. Not only where the vendor thus occupies a fiduciary position towards the purchaser, independently of the sale, but also when, in the very contract of sale itself, or in the negotiations preliminary to it, the purchaser *expressly* reposes a trust and confidence in the vendor, and when, from circumstances of that very transaction, or from the acts or relations of the parties in connection with it, such a trust and confidence reposed by the purchaser is necessarily *implied* in the contract of sale, it is the duty of the vendor to make a like

62 Ill. 498; Law v. Grant, 37 Wis. 548; Laidlaw v. Organ, 2 Wheat. 178; Hastings v. O'Donnell, 40 Cal. 148.

In Haywood v. Cope, 25 Beav. 140, it was held that the vendor's mere failure to disclose acts as having been done by himself, when the buyer must necessarily have known that they were done by somebody, is not only not a fraudulent concealment, but is even not a sufficient ground for defeating a suit for a specific performance brought by the vendor. Plaintiff had worked coal under his land, and had abandoned it as unprofitable. Twenty years after, defendant cleaned out the pit, examined the coal in the shaft with other persons, and then entered into a contract for a lease. The mine turned out to be worthless. Sir John Romilly, M. R., held that defendant had no ground of defense because plaintiff did not communicate the fact that *he* had worked and abandoned the mine, since the defendant, from his own personal examination, must have known that it had been worked and abandoned by some one.

2 These cases of dealings between agent and principal, attorney and client, trustee and beneficiary, and the like, are discussed in subsequent sections; cases illustrating the rule alluded to in the text will be found in that connection. See also cases cited *ante*, under § 902, on fiduciary relations.

disclosure, and his failure to do so is a fraudulent concealment.[3 b]

§ 905. Non-disclosure of Facts a Defense to the Specific Enforcement of Contracts in Equity.—Although the discussion relates to fraudulent concealments, such as necessarily imply knowledge and an intent not to communicate the fact, it is proper to notice one other rule affecting the relations between the vendor and purchaser in equity. A fraudu-

[3] It is impossible to formulate a rule applicable to the situation intended to be described more definite than this. When it appears that the purchaser has in express terms reposed a confidence in the vendor, there can be no doubt or difficulty. The difficulty arises where such confidence must be implied or inferred. With respect to *this* situation of the parties, the decisions, it must be confessed, are not harmonious; many of them seem to be separated by a very shadowy line. The truth probably is, that the apparent conflict among the decisions is due more to a difference in the effect of evidence, and in the conclusions of fact, than to any difference in the rules of law recognized and acted upon by the courts. Where the confidence reposed must be implied or inferred from the circumstances of the transaction, each case must turn upon its own particular facts: Gibson v. D'Este, 2 Younge & C. Ch. 542; Wilde v. Gibson, 1 H. L. Cas. 605; Edwards v. McLeay, 2 Swanst. 287; Coop. 308; Dolman v. Nokes, 22 Beav. 402; Haywood v. Cope, 25 Beav. 140; Brown v. Montgomery, 20 N. Y. 287; People's Bank v. Bogart, 81 N. Y. 101; 37 Am. Rep. 481; Rawdon v. Blatchford, 1 Sand. Ch. 344; Paddock v. Strobridge, 29 Vt. 470, 477; Holmes's Appeal, 77 Pa. St. 50; Snelson v. Franklin, 6 Munf. 210; McNeil v. Baird, 6 Munf. 316; Halls v. Thompson, 1 Smedes & M. 443; Roseman v. Canovan, 43 Cal. 110; Schiffer v. Dietz, 83 N. Y. 300; Howell v. Biddlecom, 62 Barb. 131; Clark v. Bamer, 2 Lans. 67; Bank of Republic v. Baxter, 31 Vt. 101; Howard v. Gould, 28 Vt. 523; 67 Am. Dec. 728; Fitzsimmons v. Joslin, 21 Vt. 129; 52 Am. Dec. 46; Hanson v. Edgerly, 29 N. H. 343.

Brown v. Montgomery, 20 N. Y. 287, is a very illustrative case of confidence implied from the circumstances of the particular sale. It doubtless stands on the border-line, but has not been overruled, nor even questioned so as to shake its authority. The vendor sold a check of a third party. At the time of the sale he knew that other checks of the same maker had been dishonored on that very day and the day before, but did not communicate this fact to the buyer. The check turned out worthless, as the maker had become insolvent. Held to be fraudulent concealment. The able opinion of Denio, J., holds that, under the circumstances, from the nature of the transfer and of the check itself, a confidence reposed by the buyer in the vendor was implied; the character of a check as a mercantile instrument, representing, as it does, that so much money *then* lies on deposit awaiting presentation, created a fiduciary duty on the vendor's part; the vendor was therefore bound to disclose.

(b) Thomas v. Murphy, 87 Minn. 358, 91 N. W. 1097.

lent concealment, defeating a contract of sale at law, and furnishing ground for its cancellation in equity, is, of course, a complete defense to its specific performance. In addition to these concealments properly so called, the suppression of a material fact, or the failure to communicate a material fact by the vendor, without any purpose of deceiving or misleading the other party, and even without having himself any knowledge of the fact, while not affecting the validity of the agreement at law, and not being sufficient ground for its cancellation in equity, because not fraudulent, may still render the agreement so unfair, unequal, or hard, that a court of equity, in accordance with its settled principles in administering the remedy of specific performance, will refuse to enforce the contract against the party who was misled.[a] The two contracting parties do not stand upon an equality; either one had a knowledge of important facts of which the other was ignorant, or else there was a mistake by one or perhaps by both. Such misdescription, consisting of omitting material particulars, however free of wrongful intent they may be, have often been held a sufficient defense to suits for specific enforcement.[1 b]

§ 906. **Concealments by Buyers on Credit.**[a]—The particular case of the buyer on credit who conceals his bad financial condition requires a brief additional mention, because it is the most common species of fraud, and because it involves one or two special rules. As to what constitutes

[1] Shirley v. Stratton, 1 Brown Ch. 440; Deane v. Rastron, 1 Anstr. 64; Ellard v. Lord Llandaff, 1 Ball & B. 241; Hesse v. Briant, 6 De Gex, M. & G. 623; Maddeford v. Austwick, 1 Sim. 89; Bonnett v. Sadler, 14 Ves. 526; Drysdale v. Mace, 5 De Gex, M. & G. 103; Baskcomb v. Beckwith, L. R. 8 Eq. 100; Lucas v. James, 7 Hare, 410; Denny v. Hancock, L. R. 6 Ch. 1.

§ 905, (a) Quoted in Byars v. Stubbs, 85 Ala. 256, 4 South. 755.

§ 905, (b) Byars v. Stubbs, 85 Ala. 256, 4 South. 755 (concealment by vendee).

§ 906, (a) This section is cited in Newell v. Randall, 32 Minn. 171, 19 N. W. 972, 50 Am. Rep. 562.

a false representation by such a buyer, nothing need be added, except that, in this instance especially, the statement of the buyer must be something more than the mere expression of an opinion as to his pecuniary ability. As to what constitutes a fraudulent concealment under these circumstances, there has been some uncertainty and even conflict of decision in determining what matters such buyer is bound to disclose, so that his failure to do so would be a fraud. The following rules may be regarded as settled by the decided weight of authority; they are certainly sustained by courts of the greatest ability and influence: 1. The purchaser when buying on credit is not bound to disclose the facts of his financial condition. If he makes no actual misrepresentation, if he is not asked any questions, and does not give thereto any untrue, evasive, or partial answers, his mere silence as to his general bad pecuniary condition, his indebtedness, or even his insolvency, will not constitute a fraudulent concealment. 2. If, however, the former *good* financial condition of the buyer has been known to the vendor through prior dealings or otherwise, and any sudden or complete change has happened to the buyer, such as his sudden loss of property by fire or other accident, or his sudden insolvency or embarrassment by the failure of others, or a general assignment which he has made of all his property, and the like, he is bound to disclose such facts to the vendor previously to the completion of the sale; his *mere* silence with respect to such changes in his condition, even when no questions are asked of him, is a fraudulent concealment. 3. Finally, if at the time he purchases the goods on credit, and fails to disclose his general insolvency, embarrassed condition, or indebtedness, the buyer forms or has in his mind the intention or design of not paying for them, this is a fraud on his part. In other words, a purchase on credit with a preconceived design on the buyer's part, formed at or be-

fore the purchase, not to pay for the thing bought constitutes a species of fraudulent concealment.[1] [b]

§ 907. Contracts and Transactions Essentially Fiduciary.—Wherever a contract is in its essential nature intrinsically fiduciary, the utmost good faith and the fullest disclosure of material facts are required from the parties, without any reference to their prior or collateral relations, or to the circumstances surrounding the particular transaction. Any concealment of a material fact known to a party would necessarily be fraudulent. The most familiar and illustrative example of such contracts is that of insurance.[1] The contract of suretyship, in the relations between the surety and the other parties, and especially the creditor, is also fiduciary, although not in the same degree as that of insurance. It demands good faith towards the surety, and while the creditor is not absolutely bound voluntarily to disclose every fact which might affect the contract, very slight incidents and collateral circumstances will render his concealment of material facts fraudulent.[2]

§ 906, [1] Cary v. Hotailing, 1 Hill, 311; 37 Am. Dec. 323; Bigelow v. Heaton, 6 Hill, 43; Mitchell v. Worden, 20 Barb. 253; Nichols v. Pinner, 18 N. Y. 295; 23 N. Y. 264 (in this case the subject was fully examined, and the three rules given in the text were laid down); Hennequin v. Naylor, 24 N. Y. 139; King v. Phillips, 8 Bosw. 603; Bell v. Ellis, 33 Cal. 620, 626, expressly overruling and repudiating the contrary view maintained in Seligman v. Kalkman, 8 Cal. 207. Hathorne v. Hodges, 28 N. Y. 486, illustrates the kind of indirect evidence admissible to show the buyer's fraudulent design.

§ 907, [1] The subject of insurance is so broad, the questions arising under the general duty of the assured to make disclosure are so numerous, that I can only refer to the treatises upon the law of insurance in which they are discussed. See also 1 Smith Lead. Cas. 843, notes to Carter v. Boehm; and 2 Am. Lead. Cas. 926, notes to Locke v. Am. Ins. Co.

[2] There are some *dicta* and even decisions that the contract of suretyship is in all respects identical with that of insurance in relation to the obligation

(b) Quoted in Brower v. Goodyer, 88 Ind. 572. See, also, Jaffrey v. Brown, 29 Fed. 476; Taylor v. Mississippi Mills, 47 Ark. 247, 1 S. W. 283; Kitson v. Farwell, 132 Ill. 327, 23 N. E. 1024; Oswego Starch Factory v. Lendrum, 57 Iowa, 573, 10 N. W. 900, 42 Am. Rep. 53 (intention not to pay); Houghtaling v. Hills, 59 Iowa, 289, 13 N. W. 305; Hotchkin v. Third Nat. Bank, 127 N. Y. 329, 27 N. E. 1050.

§ 908. **Liability of Principals for the Frauds of their Agents.**[a] — The general question as to the authority, express or implied, of agents to bind their principals, and to render those principals liable for any kind of remedy, legal or equitable, by means of fraudulent representations or concealments, and the more special questions as to the implied authority held by directors, trustees, managers, officers, employees, and the like, inherent in their official or representative position, to bind their corporations, stockholders, beneficiaries, co-directors, associates, or employers by their fraudulent representations or concealments, and to render the latter classes of persons liable, on account of the fraud, for any species of remedy, equitable or legal, do not come within the scope of this book; they belong to the law of agency. I shall attempt no discussion of them, and for their treatment the reader is referred to works professedly on the law of agency. It is proper to say, however, that there seems to be a marked difference between the conclusions upon these latter questions reached by the more recent English decisions and those maintained by the American cases. The tendency of the English courts has been very strong to take a very strict and narrow view of the powers and liabilities of directors, officers, trustees, and the corporations, stock-

of full disclosure. These *dicta* and decisions have been overruled, and the doctrine as now settled in England and the United States regards the contract of suretyship as partially fiduciary. The whole subject is fully examined in the following cases: Wythes v. Labouchere, 3 De Gex & J. 593; Owen v. Homan, 4 H. L. Cas. 997; 3 Macn. & G. 378; Hamilton v. Watson, 12 Clark & F. 109; Pidcock v. Bishop, 3 Barn. & C. 605; North Br. Ins. Co. v. Lloyd, 10 Ex. 523; Stone v. Compton, 5 Bing. N. C. 142; 6 Scott, 846; Maitland v. Irving, 15 Sim. 437; Squire v. Whitton, 1 H. L. Cas. 333; Railton v. Mathews, 10 Clark & F. 934; Carew's Case, 7 De Gex, M. & G. 43; Etting v. Bank of U. S., 11 Wheat. 59; Howe Machine Co. v. Farrington, 82 N. Y. 121; Sooy v State, 39 N. J. L. 135; Atlas Bank v. Brownell, 9 R. I. 168; 11 Am. Rep. 231; Franklin Bank v. Cooper, 36 Me. 179, 195; Evans v. Keeland, 9 Ala. 42.

(a) This and the following sections are cited in Keen v. James, 39 N. J. Eq. 257, 51 Am. Rep. 29. This section is cited in Gottschalk v. Kircher, 109 Mo. 170, 17 S. W. 905.

holders, co-directors, and other beneficiaries whom they represent. On the other hand, the general tendency of the American decisions is to enlarge the implied authority of such officials, and to extend the liability created by their frauds and resting upon corporations, stockholders, and co-directors. The question as to the extent of liability incurred by corporations, stockholders, co-directors, co-trustees, and the like, for the frauds and breaches of duty of officers, directors, and trustees, will be treated of in a subsequent section which deals with the particular subject of fiduciary relations. At present I shall simply state the general rules which define the liability of principals for the fraudulent representations and concealments of their agents, when such fraudulent acts are within the scope of the authority, express or implied, possessed by the agent, without any attempt to discuss the nature, extent, and limits of the authority itself.

§ 909. The Same.[a]— In the first place, it is very clear that when an agent, in doing the business of his principal, and acting within the scope of the authority conferred upon him, makes fraudulent representations or concealments with the knowledge or consent of his principal, expressed or implied, so that the act of the agent is virtually that of his principal, then the principal is liable in the same manner, to the same extent, and for the same remedies as though the fraud were committed by himself personally; he may even be liable in an action at law for deceit. The doctrine is carried much farther. When the agent acts beyond and even in direct opposition to his express authority, but within the scope of his implied authority,— that is, within the *apparent* authority contained in and conferred by the terms of his commission, or the nature of his official functions or of his employment, or appearing from a prior course of dealing with or on behalf of his principal, or

(a) This section is cited in Gottschalk v. Kircher, 109 Mo. 170, 17 S. W. 905; Alger v. Keith, 105 Fed. 105, 44 C. C. A. 371.

from any other mode of his being held out to the world as appearing to possess the authority, and the principal is personally innocent of any fraud,— the principal cannot acquire and retain any benefit obtained under such circumstances from the fraud, representations, or concealments. If the principal, upon learning of his agent's fraud, should expressly ratify and adopt the transaction, he would make the fraud his own. An express ratification, however, is not necessary. If the principal receives and retains the proceeds of the agent's fraud,— the property, money, and the like obtained through an executed transaction,— or claims the benefit of or attempts to enforce an executory obligation thus procured, he renders himself liable for the fraudulent acts of his agent.[b] The defrauded party is entitled to such remedies, legal or equitable, as are appropriate to the nature of the transaction. The only mode in which the principal, under these circumstances, can escape liability, is by repudiating the acts of his agent, and refusing to accept or retain any benefit of the transaction, immediately upon his discovery of the fraud. Many American decisions go much farther than this. They hold that where an agent has thus committed a fraud within the scope of his *apparent* authority, though in direct opposition to his express instructions, the principal is bound by the act, even though he is personally innocent, and has derived no benefit whatever from the fraudulent transaction of his agent.[1 c]

[1] The following cases furnish illustrations of the conclusions stated in the text, and also of the differences between the tendencies of English and American decisions: Gibson v. D'Este, 2 Younge & C. 542; 1 H. L. Cas. 605; Conybeare v. New Brunswick etc. Co., 1 De Gex, F. & J. 578; 9 H. L. Cas. 711, 726, per Lord Westbury; 730, per Lord Cranworth; Bristow v. Whitmore, 9 H. L. Cas. 418; Gibson's Case, 2 De Gex & J. 275; Nicol's Case, 3 De Gex & J. 387,

(b) Quoted in Trumbull v. Hewitt, 65 Conn. 60, 31 Atl. 492.

(c) Mullens v. Miller, 22 Ch. Div. 194; Clark v. Reeder, 40 Fed. 513; Riser v. Walton, 78 Cal. 490, 21 Pac. 362; Lindmeier v. Monahan, 64 Iowa, 24, 19 N. W. 839; Fairchild v. McMahon, 139 N. Y. 290, 34 N. E. 779, 36 Am. St. Rep. 701, affirming 65 Hun, 621, 20 N. Y. Suppl. 31.

§ 910. Jurisdiction of Equity in Cases of Fraud.[a]—It is impossible, especially in the United States, to formulate any *universal* rules concerning the extent or the exercise of the equitable jurisdiction in matters of fraud, since the decisions of different courts and in different states are

437; Udell v. Atherton, 7 Hurl. & N. 172; Fuller v. Wilson, 3 Q. B. 58; Cornfoot v. Fowke, 6 Mees. & W. 358; Moens v. Heyworth, 10 Mees. & W. 147; Bondfoot v. Montefiore, L. R. 2 Q. B. 511; Mackay v. Commercial Bank, L. R. 5 P. C. 394; Burnes v. Pennell, 2 H. L. Cas. 497; Ranger v. Great Western R'y, 5 H. L. Cas. 72; National Exch. Co. v. Drew, 2 Macq. 103, 125; Meux's Ex'rs' Case, 2 De Gex, M. & G. 522; Oakes v. Turquand, L. R. 2 H. L. 325; Sutton v. Wilders, L. R. 12 Eq. 373; Earl of Dundonald v. Masterman, L. R. 7 Eq. 504; Scholefield v. Templar, Johns. 155; Hartopp v. Hartopp, 21 Beav. 259; Western Bank v. Addie, L. R. 1 H. L. S. 145; Veazie v. Williams, 8 How. 134; Mason v. Crosby, 1 Wood. & M. 342; Fitzsimmons v. Joslin, 21 Vt. 129; 52 Am. Dec. 46; Concord Bank v. Gregg, 14 N. H. 331; Coddington v. Goddard, 16 Gray, 436; Litchfield Bank v. Peck, 29 Conn. 384; Van Wyck v. Watters, 81 N. Y. 352; Fishkill Savings Inst. v. National Bank of Fishkill, 80 N. Y. 162; 36 Am. Rep. 595; Bennett v. Judson, 21 N. Y. 238; Elwell v. Chamberlain, 31 N. Y. 611; Condit v. Baldwin, 21 N. Y. 219; 78 Am. Dec. 137; Bell v. Day, 32 N. Y. 165; Smith v. Tracy, 36 N. Y. 79; Estevez v. Purdy, 66 N. Y. 446; Durst v. Burton, 47 N. Y. 167; 7 Am. Rep. 428; Allerton v. Allerton, 50 N. Y. 670; Titus v. Great West T. Co., 61 N. Y. 237; Davis v. Bemis, 40 N. Y. 453, note; Indianapolis etc. R. R. v. Tyng, 63 N. Y. 653; Hathaway v. Johnson, 55 N. Y. 93; 14 Am. Rep. 186; Durst v. Burton, 2 Lans. 137; Graves v. Spier, 58 Barb. 349; Young v. Hughes, 32 N. J. Eq. 372; Mundorff v. Wickersham, 63 Pa. St. 87; 3 Am. Rep. 531; Custar v. Titusville etc. Co., 63 Pa. St. 381; Crossman v. Penrose Bdg. Co., 26 Pa. St. 69; Crump v. United States Mining Co., 7 Gratt. 352; 56 Am. Dec. 116; River v. Plankroad Co., 30 Ala. 92; Bowers v. Johnson, 10 Smedes & M. 169; Lawrence v. Hand, 23 Miss. 103; Hester v. Memphis etc. R. R., 32 Miss. 378; Mitchell v. Mims, 8 Tex. 6; Henderson v. Railroad Co., 17 Tex. 560; Morton v. Scull, 23 Ark. 289; East Tenn. R. R. v. Gammon, 5 Sneed, 567; Negley v. Lindsay, 67 Pa. St. 217; 5 Am. Rep. 427; Mendenhall v. Treadway, 44 Ind. 131; Boland v. Whitman, 33 Ind. 64; Shawmut etc. Co. v. Stevens, 9 Allen, 332; Fogg v. Griffin, 2 Allen, 1. For instances in which the fraud of persons not in a relation of agency is not ground for relief, see Root v. Bancroft, 8 Gray, 619; Lepper v. Nuttman, 35 Ind. 384; Wright v. Flinn, 33 Iowa, 159; Cummings v. Thompson, 18 Minn. 246; Fisher v. Boody, 1 Curt. 206. In the following series of remarkable cases, principals were held liable for fraud of their agents, done simply within the *apparent* scope of their authority, although the principal had received no benefit whatever from the transaction, and in many of the cases the principal was a corporation, and its agent an

(a) This section is cited in Seeley v. Reed, 25 Fed. 361; Smith v. Brittenham, 109 Ill. 540; Trenton Pass. Ry. Co. v. Wilson, (N. J. Eq.) 40 Atl. 597, reversing 55 N. J. Eq. 273, 37 Atl. 476.

directly at variance with respect to its existence and extent, and since its exercise must depend, to a great extent, upon the circumstances of particular cases, and even upon the temperaments and opinions of individual judges.[b] The jurisdiction, when it exists, may be exercised by granting reliefs which are peculiarly equitable, or reliefs which are wholly pecuniary, and therefore legal. In conferring these reliefs which are purely equitable, and therefore exclusive, the power of equity knows no limit. The court can always shape its remedy so as to meet the demands of justice in every case, however peculiar.[c] The most important of these equitable final reliefs, to one or the other of which all special instances and forms may be reduced, are these: Rescission or cancellation, as applied to contracts, conveyances, judgments, and all fraudulent transactions, with one marked exception; reformation of written instruments improperly drawn through fraud; and specific enforcement by which the fraudulent party is compelled to perform the very specific obligation which rests upon him, and the defrauded party obtains the enjoyment of the very right of which he was deprived through the fraud. This latter class of remedies may assume an unlimited variety of forms, as the circumstances may require. It includes, among others, the compelling the fraudulent party to make good his representations; the treating him as a trustee with respect to the property which he has acquired by his fraud;

officer thereof: North River Bank v. Aymar, 3 Hill, 262; Farmers' and Mechanics' Bank v. Butchers' etc. Bank, 16 N. Y. 125; 69 Am. Dec. 678; 14 N. Y. 623; Griswold v. Haven, 25 N. Y. 595; 82 Am. Dec. 380; Exchange Bank v. Monteath, 26 N. Y. 505; N. Y. & N. H. R. R. v. Schuyler, 34 N. Y. 30; Cutting v. Marlor, 78 N. Y. 454; Armour v. Michigan Central R. R., 65 N. Y. 111, 121–124; 22 Am. Rep. 603; but see, *per contra*, Mechanics' Bank v. N. Y. & N. H. R. R., 13 N. Y. 599, which must be regarded as entirely overruled by the subsequent cases.

(b) Quoted in County of Ada v. Bullen Bridge Co., 5 Idaho, 188, 47 Pac. 818, 95 Am. St. Rep. 180, 36 L. R. A. 367.

(c) Quoted in Vaught v. Meador, 99 Va. 569, 39 S. E. 225, 86 Am. St. Rep. 908.

the enforcing the performance of their specific duties by trustees, directors, and officers of corporations, and all others who stand in a position of trust; the compelling a written security to stand good for what is actually due upon it, and the like. These final remedies may be accompanied and aided by auxiliary reliefs, such as injunction or a receiver. The purely pecuniary relief which courts of equity may administer, as well as courts of law, in matters of fraud, are an accounting in all its various forms and conditions, and simple recoveries, without an accounting, of specific amounts of money which have been fraudulently obtained, or which are equitably and perhaps legally due on account of fraud. In administering all these remedies, pecuniary as well as equitable, the fundamental theory upon which equity acts is that of restoration,— of restoring the defrauded party primarily, and the fraudulent party as a necessary incident, to the positions which they occupied before the fraud was committed. Assuming that the transaction ought not to have taken place, the court proceeds as though it had not taken place, and returns the parties to that situation. Even in such cases, the court applies the maxim, He who seeks equity must do equity, and will thus secure to the wrong-doer, in awarding its relief, whatever is justly and equitably his due.[1] [d] All these

[1] The remedies of cancellation, reformation, and enforcing fiduciary duties are so familiar that they require no citation of examples. For examples of compelling the fraudulent party to make good his representations, see cases cited *ante*, under § 899. Examples of treating a fraudulent party as a trustee: Gresley v. Mousley, 4 De Gex & J. 78; Stump v. Gaby, 2 De Gex, M. & G. 623; and see *post*, section on constructive trusts. Example of ordering a security to stand for what was really due on it: Neilson v. McDonald, 6 Johns. Ch. 201. The equitable theory of restoring the parties to their original position: [e] Savery v. King, 5 H. L. Cas. 627; Bel-

(d) Quoted in Brown v. Norman, 65 Miss. 369, 4 South. 293, 7 Am. St. Rep. 663 (a most instructive case).

(e) See, also, Smith v. Brittenham. 109 Ill. 540; Lee v. V. O. Co., 126 N. Y. 579, 27 N. E. 1018; Potter v. Taggart, 59 Wis. 1, 16 N. W. 553, 632; and Pom. Eq. Rem., Chapter on Cancellation.

forms of exclusively equitable relief, and the remedy of accounting, will be examined in subsequent chapters. At present I purpose to state, as far as is possible, the general rules concerning the existence, extent, and exercise of the jurisdiction, and to add some examples illustrating the instances in which the jurisdiction is and is not exercised.

§ 911. **Fundamental Principles of the Jurisdiction.**[a]— It may be an aid in the present inquiry to recall the three fundamental principles concerning the equitable jurisdiction which were laid down and explained in the former volume: 1. Where the primary right or interest of the plaintiff is equitable only, the jurisdiction is necessarily exclusive, and will always be exercised without regard to the nature of the relief; otherwise the party would be without remedy, since courts of law could not take cognizance of the case. 2. Where the primary right is legal, and the remedy sought is purely equitable, the jurisdiction is also exclusive, and always exists, but will not generally be exercised if the legal remedy which the party might obtain is adequate, complete, and certain. 3. Where the primary right is legal, and the remedy is also legal, a recovery of money simply, or of the possession of chattels, the jurisdiction is concurrent, and only exists when the remedy which the party might obtain at law is not adequate.[b] The great majority of cases arising from fraud undoubtedly fall under the second or third of these principles. It should be observed that in the original condition of the jurisdiction, and in those courts of this country which preserve the original methods of equity, the jurisdiction might be extended over

lamy v. Sabine, 2 Phill. Ch. 425; Neblett v. Macfarland, 92 U. S. 101; Grymes v. Sanders, 93 U. S. 55; Johnson v. Jones, 13 Smedes & M. 580; Gatling v. Newell, 9 Ind. 572.

(a) This section is cited in Louisville, N. A. & C. R. Co. v. Ohio Val. I. & C. Co., 57 Fed. 42; Benson v. Keller, 37 Or. 120, 60 Pac. 918.

(b) See *ante*, § 178.

many instances otherwise belonging to the third class, by reason of the auxiliary relief of a discovery.[c]

§ 912. **The English Doctrine.**— The doctrine is fully settled by an unbroken line of decisions extending to the present day, that, with one remarkable exception, the jurisdiction of equity exists in and may be extended over *every* case of fraud, whether the primary rights of the parties are legal or equitable, and whether the remedies sought are equitable or simple pecuniary recoveries, and even though courts of law have a concurrent jurisdiction of the case and can administer the same kind of relief. The English judges have virtually said that in every case of fraud the remedy at law, either from the nature of the legal relief itself or from the methods of legal procedure, is inadequate. The only question, therefore, presented to an English court is, not whether the equitable jurisdiction *exists*, but whether it should be exercised.[1][a] As the ablest judges

[1] It will be proper to present the views of the English courts on this question, for the long line of chancellors and other equity judges may be supposed to know, at least, the jurisdiction of their own tribunal. I select recent cases, and those in which the recovery was pecuniary, and in which there was confessedly a concurrent jurisdiction at law. Hill v. Lane, L. R. 11 Eq. 215, was a suit brought simply to recover back the money which plaintiff had paid for certain shares of stock purchased from defendants in reliance upon their false and fraudulent representations. The bill was demurred to. Vice-Chancellor Stuart said (p. 220): "In support of the demurrer it was argued that the proper remedy for the plaintiff, if he had any, was to proceed by action at law. It has often been decided that this court will grant relief in such cases. . . . . It is so well settled that this court will entertain jurisdiction in such cases, that it would be a misfortune, indeed, to the public if there were any sufficient ground for considering that the jurisdiction is doubtful." He cites the opinions of Lord Eldon. Sir William Grant, Sir John Leach, and other eminent judges, and adds: "So long ago as the case of Colt v. Woollaston, 2 P. Wms. 154, 156, the master of rolls said: 'It is no objection that the parties have their remedy at law, and may bring an action for moneys had and received for the plaintiff's own use, for in cases of fraud the court of equity has concurrent jurisdiction with the common law, matter of fraud being the great subject of re-

(c) See *ante*, §§ 224–226, 234.

(a) This portion of the text is quoted in Anderson v. Eggers, (N. J. Eq.) 49 Atl. 578, reversing 61 N. J. Eq. 85, 47 Atl. 727. After stating that the American courts have not

have often said, one of the occasions for the existence of a separate court of chancery was its power to deal with all cases of fraud; its original grant of jurisdiction covered fraud in all its forms and phases. The law courts, on the other hand, originally had very little, if any, jurisdiction

lief here.'" The vice-chancellor also held that the decision in Ogilvie v. Currie, 37 L. J. Ch. 541, per Lord Cairns, was not in opposition to his own conclusion, and if a *dictum* in that case appeared to be opposed, it was in direct conflict with an unbroken current of authority. In Ramshire v. Bolton, L. R. 8 Eq. 294, the bill alleged that at the defendant's request he advanced to a third person, who was the drawer, one half of the amount of a bill of exchange drawn for five hundred pounds; that the advance was made upon defendant's promise to advance the other half, and his representations that the drawer and acceptor were both men of large property; that defendant's representations were intentionally false and fraudulent; that he knew the parties to the bill were utterly insolvent, and that it was worthless; that he made no advance himself; but the whole was a scheme to obtain money for himself. The relief demanded was repayment of the money from the defendant personally. The bill was demurred to on the ground that the remedy was wholly at law. Vice-Chancellor Malins said (p. 299): "No one can say that the bill does not allege a case entitling the plaintiff to recover the money at law; but the question is, whether the remedy is not in this court as well as at law." The vice-chancellor, having said that the facts brought the case within the principle of Pasley v. Freeman, 3 Term Rep. 51, and having cited instances in which equity had taken jurisdiction of similar cases, he proceeded: "Lord Eldon, in Evans v. Bicknell, 6 Ves. 174, 182, declared that the case of Pasley v. Freeman, 3 Term Rep. 51, and all others of that class, were more fit for a court of equity than a court of law, and was clearly of opinion that at least there is concurrent jurisdiction, and he says: 'It has occurred to me that that case, upon the principles of many decisions of this court, might have been maintained here; for it is a very old head of equity that if a representation is made to another person going to deal in a matter of interest upon the faith of that representation, the former shall make that representation good if he knows it to be false.' Can anything be more conclusive?" In St. Aubyn v. Smart, L. R. 5 Eq. 183, the defendant and one Buller had been partners as attorneys at law. Plaintiff employed the firm to obtain a sum of money due to him, being part of a fund in charge of a court. Buller attended to the business, obtained the money in his own name, and absconded with it. The suit is brought to make the defendant liable for this fraud of his copartner. The bill did not pray for an accounting, but simply to recover the sum of money. Demurrer on ground of want

generally upheld so broad a jurisdiction, Dixon, J., says: "But New Jersey is distinguished from her sister states by her adherence to the standards of the mother country respecting both rights and remedies in

in such matters. In the early forms of action to enforce covenants, debts, and other obligations *ex contractu,* fraud was not admitted as a defense, and there was no form of action appropriate for the recovery of damages on account of fraud. The jurisdiction of the law courts in such cases

of jurisdiction. The vice-chancellor said (p. 188): "Upon a careful consideration of the authorities, I am perfectly satisfied that even if there be a remedy at law, there is also one in equity. The jurisdiction was clearly stated by Sir James Wigram in Blair v. Bromley, 5 Hare, 556, 2 Phill. Ch. 361, confirmed by Lord Lyndhurst on appeal, who, in the course of his judgment, said that in all the cases to which he had referred the effect of a misrepresentation raised an equity to restore the parties as nearly as possible to the same situation in which they would have stood but for the misrepresentation, and for which damages in an action at law might be a very inadequate remedy; and that the fact that an action at law would lie was no objection to such equity." This decision was affirmed by the court of appeal, consisting of Page Wood (Lord Hatherley) and Selwyn, LL. JJ., on the ground of the general jurisdiction of equity in matters of fraud: St. Aubyn v. Smart, L. R. 3 Ch. 646, 650. The celebrated case of Slim v. Croucher, 1 De Gex, F. & J. 518, is a most instructive and convincing authority. Plaintiff was applied to for a loan upon the security of a lease, and was told by the borrower that he was entitled to a renewal of the lease for ninety-eight years from his lessor. Plaintiff required a written statement from the lessor of that fact. The lessor furnished such a statement, and on the faith of it plaintiff made the loan. It turned out that the lessor had already executed the renewal lease to the borrower, who had assigned it to a third person for value; at the time he made his statement the lessor had forgotten the fact. Plaintiff sues the lessor to recover the sum advanced, with interest. The court of appeal (Lord Chancellor Campbell and Lords Justices Turner and Knight Bruce) held that the defendant's misrepresentation was fraud in equity, though not an intentional moral wrong, that he was liable; and that equity had jurisdiction. Lord Campbell said (p. 523): "The defense set up in the suit is, that there was a remedy at law, and that that is the only remedy competent to the plaintiff. Now, that there was a remedy at law I think is quite clear; there is no doubt in my mind that an action

equity, and I know of no constitutional or statutory provision or judicial decision in this state which can be regarded as withholding or withdrawing from our court of chancery any jurisdiction possessed by its English prototypes. True, the jurisdiction of equity in cases of fraud remediable at law has not been much invoked, but that may be accounted for in large degree by the less expensive, equally efficient, and in former times more speedy, remedy secured in the courts of law. When resorted to, however, the jurisdiction of equity has not been doubted." This section is cited in Mack v. Village of Frankfort, 123 Mich. 421, 82 N. W. 209.

was of later origin, and was of gradual growth. It was not until the invention of the actions of assumpsit, case, and trover, in which equitable principles could be largely admitted, that the jurisdiction at law in matters of fraud

would lie, and that it would be for a jury to assess the damages. I am of opinion, however, that this belongs to a class of cases over which courts of law and courts of equity have a common jurisdiction, and in which the procedure of both jurisdictions is adapted for doing justice. I do not regret that there is such a class of cases, nor should I be sorry to see it extended. But being of opinion that this is a case in which a court of equity has jurisdiction as well as a court of law, I think that it is a much better case for a court of equity than for a court of law, because a court of law could only have left it to a jury to assess the damages; whereas here, by the superior powers of the court of equity, justice can be done between the parties in the most minute detail." Knight Bruce, L. J., said (p. 527): "On the merits of this case there can be no possibility of question.[b] The only point reasonably arguable was, in which of the courts redress should be sought, and it has been said that redress should be sought in a court of law. It is true that according to modern practice a court of law would afford redress in the case by means of an action, with the assistance of a jury; but the courts of law in this country exercise jurisdiction in these cases by means of a gradual extension of their powers, and we know that that does not deprive the courts of equity of their ancient and undoubted jurisdiction which they exercised before courts of law enlarged their limits. The observation is familiar — and some of us have heard it used by Lord Eldon — that the jurisdiction not only belongs to this court, but belonged to it originally. . . . . I do not mean to say that in all cases the court will exercise the jurisdiction. It is in the power of the court to say that it will not do so in particular cases, but I am perfectly satisfied that this is a case in which the jurisdiction ought to be exercised." These observations are very weighty, and correctly state the relative position of the two jurisdictions in equity and at law over matters of fraud. Some of the American decisions *seem* to speak as though the jurisdiction at law in cases of fraud had existed from the beginning, full and complete; while that in equity was a subsequent creation, including only those matters which, it was found, could not be easily determined at law. Turner, L. J., said (p. 528): "If we were to grant any relief upon this appeal, we should be very much narrowing an old jurisdiction of this court, by confining it to cases in which the jurisdiction has been exercised. We should, I think, be taking *the cases as the measure of the jurisdiction, instead of as the examples of that jurisdiction.*" These words contain the very essence of the true theory concerning the function of decided cases to operate as *examples* of all legal principles and doctrines, rather than as being their *sources* or fountains. They deserve to be

(b) Slim v. Croucher has been overruled on the merits by Derry v. Peek, 14 App. Cas. (H. L.) 337, but its authority on the question of jurisdiction is left untouched: Low v. Bouverie, [1891] 3 Ch. 82.

became fully developed. The full jurisdiction of equity having thus been established from the earliest time, it should not, in accordance with familiar principles, be at all affected by a subsequent growth of a similar common-law jurisdiction. To say that the full jurisdiction of equity has been any way abridged, impaired, or altered, because the law courts have gradually assumed and finally acquired a like jurisdiction, even though competent in many cases to administer adequate relief, is to violate one of the most fundamental principles regulating the general equitable jurisdiction. The sum of the English doctrine, therefore, is, that, although the jurisdiction always *exists,* whether it will be exercised depends upon the circumstances of individual cases.[2]

emblazoned on the walls of every court-room in the country, so that they might be under the constant observation of all judges who are applying precedents in the work of constructing and developing the law. See also Colt v. Woollaston, 2 P. Wms. 154; Evans v. Bicknell, 6 Ves. 174; Burrowes v. Lock, 10 Ves. 470; Green v. Barrett, 1 Sim. 45; Blair v. Bromley, 5 Hare, 542, 556; 2 Phill. Ch. 354, 361; Ingram v. Thorp, 7 Hare, 67; Cridland v. Lord De Mauley, 1 De Gex & S. 459; Atkinson v. Mackreth, L. R. 2 Eq. 570.

2 I add several cases, most of them recent, merely as examples of the exercise of the jurisdiction when some remedy might also have been obtained at law. The discussion of the peculiarly equitable remedies, such as cancellation, specific enforcement, reformation, injunction, etc., is postponed. *Pecuniary recoveries; jurisdiction not exercised:* Newham v. May, 13 Price, 749, 751 (suit on a fraudulent warranty); Leather v. Simpson, L. R. 11 Eq. 398 (to recover back money paid for a forged bill); Ship v. Crosskill, L. R. 10 Eq. 73 (to recover back money paid for shares); Ochsenbein v. Papelier, L. R. 8 Ch. 695 (court refused to enjoin an action at law on an insurance policy on the ground that the question of fraud involved could be better tried at law). *Pecuniary recoveries; jurisdiction exercised:* See cases in the last note, and also Wilson v. Short, 6 Hare, 366 (suit by a principal against his agent); Barker v. Birch, 1 De Gex & S. 376; Coomer v. Bromley, 5 De Gex & S. 532; McIntosh v. Great West. R'y, 2 Macn. & G. 74 (discovery and relief on a contract, although there was a remedy at law). *Cancellation or rescission of contracts, sales, etc.:* Jennings v. Broughton, 5 De Gex, M. & G. 126 (cancellation of a contract of purchase); Reynell v. Sprye, 1 De Gex, M. & G. 660 (setting aside an agreement); Rawlins v. Wickham, 3 De Gex & J. 304 (setting aside a contract of partnership and indemnifying plaintiff against the debts of the firm); Bartlett v. Salmon, 6 De Gex, M. & G. 33 (setting aside a contract); Walsham v. Stainton, 1 De Gex, J. & S.

§ 913. Exception — Fraudulent Wills.— The marked exception to the jurisdiction referred to in the foregoing paragraph is that of canceling wills obtained by means of fraud. In a few very early decisions, the court of chancery seems to have asserted such a jurisdiction. For more than a century, however, and through a long series of cases, the judges have either refused to exercise the jurisdiction, or denied its existence; and it has finally been settled by the tribunal of last resort, that, under their general jurisdiction, courts of equity have no power to entertain suits for the purpose of setting aside or canceling a will on the ground that it was procured by fraud. The same rule has been generally adopted in the United States. Under the common system, the validity of wills of real estate could only be tested in an action at law; that of wills of personal estate was established by the decree of the ecclesiastical

678 (setting aside a sale and recovering the value); Traill v. Baring, 4 De Gex, J. & S. 318 (canceling a policy of insurance, notwithstanding the remedy at law); Skilbeck v. Hilton, L. R. 2 Eq. 587 (setting aside a release); Hoare v. Bremridge, L. R. 14 Eq. 522; 8 Ch. 22 (cancellation of an insurance policy; the jurisdiction certain, although the remedy at law might be better); London etc. Co. v. Seymour, L. R. 17 Eq. 85 (ditto); Flower v. Lloyd, L. R. 10 Ch. Div. 327 (setting aside a judgment); Lemprière v. Lange, L. R. 12 Ch. Div. 675 (setting aside a fraudulent lease against an infant lessee guilty of the fraud). *Recovering real estate to which the plaintiff was entitled, and which he had been prevented by fraud from possessing and enjoying:* Vane v. Vane, L. R. 8 Ch. 383 (lapse of time no bar where fraud was concealed from the plaintiff,— a remarkable case); Chetham v. Hoare, L. R. 9 Eq. 571 (lapse of time no bar where the fraud has been concealed); Howard v. Earl of Shrewsbury, L. R. 2 Ch. 760. *Specific enforcement of false representations; compelling the defendant to make them good:* Hutton v. Rossiter, 7 De Gex, M. & G. 9, 18, 19 (against an executor who had represented that the assets of the estate were sufficient, and that a certain claim would be paid). *Enforcing a constructive trust against a party who has fraudulently obtained the title to land:* Rolfe v. Gregory, 4 De Gex, J. & S. 576 (delay excused by concealed fraud). See also, on the subject of jurisdiction in general, Garth v. Cotton, 3 Atk. 751; Man v. Ward, 2 Atk. 228; Trenchard v. Wanley, 2 P. Wms. 167, Huguenin v. Baseley, 14 Ves. 273; Browne v. Savage, 4 Drew. 635; Stent v. Bailis, 2 P. Wms. 220; Chesterfield v. Janssen, 2 Ves. Sr. 125; Barker v. Ray, 2 Russ. 63; Taff Vale etc. R'y v. Nixon, 1 H. L. Cas. 109, 221.

court in the proceedings for probate. Under the statutory system generally prevailing in this country, both wills of real estate and wills of personal estate are admitted to probate; in some of the states the decree of the probate court is conclusive with respect to both kinds; in other states it is conclusive only with respect to those of personal property.[1] [a]

[1] The early cases which admit the jurisdiction are: Herbert v. Lowns, 1 Ch. Rep. 12; Maundy v. Maundy, 1 Ch. Rep. 66; Welby v. Thornagh, Prec. Ch. 123; Goss v. Tracey, 1 P. Wms. 287; Lucas v. Burgess, Reg. Lib. 1573, A, fol. 7; Corp'n of Feversham v. Parr, Reg. Lib. 1573, A, fol. 208; and see Monro's Acta Cancellariæ, 398. The following cases directly or impliedly deny the jurisdiction: Allen v. McPherson, 1 H. L. Cas. 191; 1 Phill. Ch. 133; 5 Beav. 469; Jones v. Gregory, 2 De Gex, J. & S. 83, Wright v. Wilkin, 4 De Gex & J. 141; Andrews v. Powys, 2 Brown Parl. C. 504; Kerrick v. Bransby, 7 Brown Parl. C. 437; Bennet v. Vade, 2 Atk. 324; Webb v. Claverden, 2 Atk. 424; Jones v. Jones, 3 Mer. 161; Armitage v. Wadsworth, 1 Madd. 189; Roberts v. Wynn, 1 Ch. Rep. 125; Archer v. Mosse, 2 Vern. 8; Thynn v. Thynn, 1 Vern. 286; Nelson v. Oldfield, 2 Vern. 76; Plume v. Beale, 1 P. Wms. 388; Barnesly v. Powel, 1 Ves. Sr. 284, 287; Sheffield v. Duchess of Buckingham, 1 Atk. 628; Ex parte Fearon, 5 Ves. 633, 647; Price v. Dewhurst, 4 Mylne & C. 76, 80; Gingell v. Horne, 9 Sim. 539, 548; In re Broderick's Will, 21 Wall. 503; Jones v. Bolles, 9 Wall. 364; Gaines v. Chew, 2 How. 619, 645; Tarver v. Tarver, 9 Pet. 174; Gould v. Gould, 3 Story, 516, 537; Adams v. Adams, 22 Vt. 50; Waters v. Stickney, 12 Allen, 1; 90 Am. Dec. 122; Colton v. Ross, 2 Paige, 396; 22 Am. Dec. 648; Trexler v. Miller, 6 Ired. Eq. 248; Blue v. Patterson, 1 Dev. & B. Eq. 457; McDowall v. Peyton, 2 Desaus. Eq. 313; Watson v. Bothwell, 11 Ala. 650; Hamberlin v. Terry, 7 How. (Miss.) 143; Cowden v. Cowden, 2 How. (Miss.) 806; Ewell v. Tidwell, 20 Ark. 136; Archer v. Meadows, 33 Wis. 166; California v. McGlynn, 20 Cal. 233, 266; Booth v. Kitchen, 7 Hun, 255; Van Alst v. Hunter, 5 Johns. Ch. 148; Muir v. Trustees, 3 Barb. Ch. 477. Hunter's Will, 6 Ohio, 499, Hunt v. Hamilton, 9 Dana, 90; Burrow v. Ragland, 6 Humph. 481. While it plainly appears from these cases that there is no jurisdiction to set aside a probate on the ground of fraud in obtaining the will, there would not seem to be any such objection, on principle, to the granting of appropriate relief against the probate itself on account of fraud in the proceedings independently of the will. Such relief would seem to be exactly analogous to that granted against any fraudulent decree or judgment. With respect to jurisdiction of a court of probate, see the two following remarkable cases: Roderigas v. East Riv. Sav. Inst., 63 N. Y. 460; 20 Am. Rep. 555; Roderigas v. East Riv. Sav. Inst., 76 N. Y. 316; 32 Am. St. Rep. 309.

(a) This section is cited in Domestic & F. Missionary Soc. of the P. E. Church v. Eells, 68 Vt. 497, 35 Atl. 463, 54 Am. St. Rep. 888.

§ 914. **The American Doctrine.**[a]— In a few of the earlier decisions the English rule was adopted to its full extent.[1] This cannot, however, be regarded as the present American doctrine. As was shown in the former volume, in several of the states only a partial and very narrow equitable jurisdiction was for a long time conferred, and this was strictly limited by the courts to the very matters specified by the statutes. In other states, the equitable jurisdiction was defined by statute as embracing only those cases for which there was no adequate remedy at law. Influenced partly by the tendency of this legislation, and partly by the supposed constitutional guaranties of the jury trial, which were construed to forbid the interposition of equity in controversies which *could* be determined by law, the equity courts of the United States and of the several states have practically abandoned a large part of the jurisdiction in matters of fraud which is confessedly held by the English court of chancery. The doctrine is settled that the exclusive jurisdiction to grant purely equitable remedies, such as cancellation, will not be exercised, and the concurrent jurisdiction to grant pecuniary recoveries does not exist, in any case where the legal remedy, either affirmative or defensive, which the defrauded party might ob-

As to jurisdiction in case of a lost or destroyed will,[b] see Gaines v. Chew, 2 How. 619, 645; Bailey v. Stiles, 2 N. J. Eq. 220; Allison v. Allison, 7 Dana, 90; Buchanan v. Matlock, 8 Humph. 390; 47 Am. Dec. 622; Morningstar v. Selby, 15 Ohio, 345; 45 Am. Dec. 579; Slade v. Street, 27 Ga. 17.

[1] For example, by Chancellor Kent in Bacon v. Bronson, 7 Johns. Ch. 201; 11 Am. Dec. 449.[b]

§ 913, [b] Dower v. Seeds, 28 W. Va. 113, 57 Am. Rep. 646 (the jurisdiction asserted, after an extended review of the cases); Jones v. Casler, 139 Ind. 382, 47 Am. St. Rep. 274, 38 N. E. 812. See *post*, note to § 1154.

§ 914, (a) This section is cited in Fitzmaurice v. Mosier, 116 Ind. 365, 16 N. E. 175, 9 Am. St. Rep. 854; Thackrah v. Haas, 119 U. S. 501, 7 Sup. Ct. 311; Krueger v. Armitage, 58 N. J. Eq. 357, 44 Atl. 167; Rogers v. Rogers, 17 R. I. 623, 24 Atl. 46; Domestic & F. Missionary Soc. of the P. E. Ch. v. Eells, 68 Vt. 497, 35 Atl. 463, 54 Am. St. Rep. 888; Druon v. Sullivan, 66 Vt. 609, 30 Atl. 98; Farmington Corp. v. Bank, 85 Me. 46, 26 Atl. 965.

§ 914, [b] See, also, *ante*, § 912, (a).

tain, would be adequate, certain, and complete.[2][c] The language on this subject often used by judges represents nearly the entire jurisdiction of equity in matters of fraud, whatever be the remedies granted, as concurrent with that at the law, and as not *existing* where adequate legal relief

2 I have already discussed this general doctrine in the former volume. See, with respect to the jurisdiction of the United States courts, *ante*, §§ 295, 296, 297, and cases cited; with respect to the jurisdiction in New Hampshire, § 303; in Massachusetts, §§ 313, 318; in Maine, §§ 323, 327. See also Earl of Oxford's Case, 2 Lead. Cas. Eq. 1550–1553, note by American editor. The following are a few of the vast number of cases in which the jurisdiction in matter of fraud is discussed, and its limitations and exceptions are stated:[d] Grand Chute v. Winegar, 15 Wall. 373; Insurance Co. v. Bailey, 13 Wall. 616; Jones v. Bolles, 9 Wall. 364; Bank of Bellows Falls v. Rutland etc. R. R., 28 Vt. 470; Crane v. Bunnell, 10 Paige, 333; Russell v. Clark's Ex'rs, 7 Cranch, 69, 89; Hardwick v. Forbes's Adm'r, 1 Bibb, 212; Waters v. Mattingly, 1 Bibb, 244; 4 Am. Dec. 631; Blackwell v. Oldham, 4 Dana, 195; Warner v. Daniels, 1 Wood. & M. 90, 112; Ferson v. Sanger, Daveis, 252, 259; Bassett v. Brown, 100 Mass. 355; Suter v. Matthews, 115 Mass. 253; Hubbell v. Currier, 10 Allen, 333; Miller v. Scammon, 52 N. H. 609; Woodman v. Freeman, 25 Me. 531; Piscataqua Ins. Co. v. Hill, 60 Me. 178, 183; Clark v. Robinson, 58 Me. 133, 137; Williams v. Mitchell, 30 Ala. 299; Learned v. Holmes, 49 Miss. 290; Boardman v. Jackson, 119 Mass. 161. In the two following recent cases the doctrine was clearly stated in both of its aspects: Girard Ins. Co. v. Guerard, 3 Woods, 427. Held, that a suit in equity to recover on a bond which had been delivered up and canceled through the fraud of a person not a party to the suit, but which was still in force, will not be sustained, where no discovery is sought, and where a substantial copy is furnished. Woods, J., said (p. 431): "It is not *mere* fraud which confers jurisdiction on a court of equity. A party may be guilty of a fraud in the warranty of personal property sold, but nevertheless the remedy is at law on the warranty. So if the maker of a bond, by fraudulent artifice, or even theft, gets possession of the bond from the obligee, still if the obligee has a duplicate of the bond, he cannot proceed in equity to recover upon the bond. A court of equity has jurisdiction to relieve from the consequences of fraud, as where a bond or note is procured, or deed of conveyance obtained, on false and fraudulent pretenses. So where a bond or deed is delivered up on fraudulent representations and is canceled or

(c) Quoted in County of Ada v. Bullen, 5 Idaho, 188, 47 Pac. 818, 95 Am. St. Rep. 180, 36 L. R. A. 367.

(d) Buzard v. Houston, 119 U. S. 347, 7 Sup. Ct. 249; Paton v. Majors, 46 Fed. 210; Tillison v. Ewing, 87 Ala. 350, 6 South. 276; Fitzmaurice v. Mozier, 116 Ind. 365, 16 N. E. 175, 19 N. E. 180, 9 Am. St. Rep. 854, and note; Taylor v. Taylor, 74 Me. 582; Merrill v. McLaughlin, 75 Me. 64; Farmington Corp. v. Bank, 85 Me. 46, 26 Atl. 965; Krueger v. Armitage, 58 N. J. Eq. 357, 44 Atl. 167; Rogers v. Rogers, 17 R. I. 623, 24 Atl. 246; Green v. Spaulding, 76 Va. 411.

can be given. The inaccuracy of this mode of expression has been shown in the former volume.[e] The true doctrine is, that where the estate or interest is equitable, the jurisdiction exists and will always be exercised; where the estate, interest, or right is legal, and the remedies are equitable, the jurisdiction always exists, but will not always be exercised; where the right is legal, and the remedy is pecuniary and legal, the jurisdiction is concurrent and only exists where the remedy at law is inadequate.[f] I have placed in the foot-note a number of recent decisions, arranged in groups according to the nature of their reliefs, merely as examples and illustrations of the doctrine

destroyed." I would remark that if this reasoning is correct, it seems to strike at the root of the jurisdiction to entertain suits on lost instruments of indebtedness. Wampler v. Wampler, 30 Gratt. 454: Held, that a deed of conveyance obtained by fraud may be set aside. Christian, J., said (p. 459): "Courts of equity have an original, independent, and inherent jurisdiction to relieve against every species of fraud. Every transfer or conveyance of property, by what means soever it may be done, is in equity vitiated by fraud. Deeds, obligations, contracts, awards, judgments, or decrees may be the instruments to which parties resort to cover fraud, and through which they may obtain the most unrighteous advantages, but none of such devices or instruments will be permitted by a court of equity to obstruct the requirements of justice. If a case of fraud be established, a court of equity will set aside all transactions founded upon it, by whatever machinery they may have been effected, and notwithstanding any contrivance by which it may have been attempted to protect them. These principles have now become axioms of equity jurisprudence." I am convinced that the practical surrender by the equity courts of this country of so large a portion of their original and most certain jurisdiction was both unfortunate and unnecessary. There are multitudes of cases, even for the recovery of money alone, in which justice could be administered and the rights of both litigants protected far better by a trained judge than by leaving everything to the rough-and-ready justice of an ordinary jury. The English courts have perceived and admitted this truth. Doubtless the influence of able courts, like those of Massachusetts, Maine, and Pennsylvania, has been very powerful in shaping the decisions of other state tribunals, the narrow and purely statutory jurisdiction of the former states not, perhaps, having been sufficiently observed.

(e) See §§ 138, 140, note, 175, note, 188.

(f) Quoted in Buck v. Ward, 97 Va. 209, 33 S. E. 513. See § 178.

adopted by the American courts.[3] The question whether equity has jurisdiction of suits merely for the recovery of money, or whether the action should be at law, has, however, ceased to be of any practical importance in those

[3] *Cancellation of conveyances, contracts, and other private instruments. The jurisdiction exercised:*[g] Derrick v. Lamar Ins. Co., 74 Ill. 404 (an assignment of a policy fraudulently procured from the assured by an officer of the insurance company set aside); Remington etc. Co. v. O'Dougherty, 81 N. Y. 474 (a forged deed); Hammond v. Pennock, 61 N. Y. 145; Fisher v. Hersey, 78 N. Y. 387 (a sale of land in pursuance of a decree, but fraudulently made; sale set aside, and a resale ordered); Hackley v. Draper, 60 N. Y. 88 (sale of a debt in pursuance of an order of court obtained by fraud); Bruce v. Kelly, 5 Hun, 229, 232 (conveyance); Vandercook v. Cohoes Sav. Inst., 5 Hun, 641 (fraudulent sale under a decree of foreclosure); Smith v. Griswold, 6 Or. 440 (a court of equity will cancel a bill of sale of personal property executed through fraud); Globe Life Ins. Co. v. Reals, 50 How. Pr. 237 (a life policy); Glastenbury v. McDonald, 44 Vt. 450 (a contract); Willemin v. Dunn, 93 Ill. 511 (voluntary conveyance on account of mental weakness and undue influence); Fuller v. Percival, 126 Mass. 381 (cancellation of a firm note fraudulently given by a partner of the plaintiff to a holder with notice of the fraud); Emigrant Co. v. County of Wright, 97 U. S. 339 (contract for conveyance of land procured in fraud of public rights and for grossly inadequate consideration); Wampler v. Wampler, 30 Gratt. 454 (conveyance of land); Hosleton v. Dickinson, 51 Iowa, 244 (equitable defense; in an action on a promissory note given for the price of land, defendant may have

(g) Thackrah v. Haas, 119 U. S. 501, 7 Sup. Ct. 311; U. S. Life Ins. Co. v. Cable, 98 Fed. 761, 39 C. C. A. 756; Mutual Life Ins. Co. v. Pearson, 114 Fed. 395; Union Life Ins. Co. v. Riggs, 123 Fed. 312; Calmon v. Sarraille, 142 Cal. 638, 76 Pac. 486; Harris v. Dumont, 207 Ill. 583, 69 N. E. 811; Stebbins v. Petty, (Ill.) 70 N. E. 673; Clay v. Hammond, 199 Ill. 370, 65 N. E. 352, 93 Am. St. Rep. 146; Felt v. Bell, (Ill.) 68 N. E. 794; Fitzmaurice v. Mozier, 116 Ind. 365, 16 N. E. 175, 19 N. E. 180, 9 Am. St. Rep. 854, and note (promissory note); Matlack v. Shaffer, 51 Kan. 208, 32 Pac. 890, 37 Am. St. Rep. 270; Westlake v. Dunn, (Mass.) 68 N. E. 212; Jones v. Somerville, 78 Miss. 269, 28 South. 940, 84 Am. St. Rep. 627; Dashner v. Buffington, 170 Mo. 260, 70 S. W. 699; McGhee v. Bell, 170 Mo. 121, 70 S. W. 493, 59 L. R. A. 761; McCue v. Stumpf, (Mo.) 79 S. W. 661; Marden v. Dorthy, 160 N. Y. 39, 54 N. E. 726, 46 L. R. A. 694 (cancellation of mortgage for fraud in procuring signature); Mack v. Latta, (N. Y.) 71 N. E. 97; Hearn v. Hearn, 24 R. I. 328, 53 Atl. 95; Byrd v. Byrd, 95 Tenn. 364, 32 S. W. 198, 49 Am. St. Rep. 932; Cooper v. Maggard, (Tex. Civ. App.) 79 S. W. 607; Hollis v. Finks, (Tex. Civ. App.) 78 S. W. 555; American Cotton Co. v. Collier, 30 Tex. Civ. App. 105, 69 S. W. 1021; Morrison v. Snow, 26 Utah, 247, 72 Pac. 924; Druon v. Sullivan, 66 Vt. 609, 30 Atl. 98.

states which have adopted the reformed procedure. The codes provide that all actions, simply for the recovery of money, without making any exceptions, must be tried by a jury, and the same general rules of pleading are prescribed

the note canceled to the extent of the damage sustained by him from false representations in the sale); Field v. Herrick, 5 Ill. App. 54 (a lease obtained by fraud upon the lessee); Tracy v. Colby, 55 Cal. 67 (sale of land made in pursuance of a judicial order); Moore v. Moore, 56 Cal. 89 (conveyance procured by undue influence); United States Ins. Co. v. Central Nat. Bank, 7 Ill. App. 426 (bill supplementary to execution setting aside conveyance fraudulent against a creditor); Noble v. Hines, 72 Ind. 12; Bruker v. Kelsey, 72 Ind. 51; Pfeifer v. Snyder, 72 Ind. 78 (to set aside a conveyance of land fraudulent against the plaintiff as a judgment creditor, the complaint must aver that there is not other sufficient property subject to execution to satisfy the demand); Thompson v. Heywood, 129 Mass. 401 (where land was fraudulently sold and conveyed to the owner of the equity of redemption under a power of sale contained in a prior mortgage, a subsequent mortgagee is entitled to have such sale and conveyance canceled); and see Huxley v. King, 40 Mich. 73 (setting aside title fraudulently acquired under a foreclosure and redemption); Somerville v. Donaldson, 26 Minn. 75 (conveyance of land); Poston v. Balch, 69 Mo. 115 (a sale of personal property set aside at suit of the defrauded vendor, and real estate into which the property had been converted by the fraudulent vendee subjected to a lien for its value); Free v. Buckingham, 57 N. H. 95 (fraudulent conveyance of land); Ladd v. Rice, 57 N. H. 374 (fraudulent conveyance set aside and reconveyance ordered); Willis v. Sweet, 49 Wis. 505; 5 N. W. 895 (a deed of land delivered as an escrow, and fraudulently recorded, set aside).

The same. Jurisdiction, when not exercised:[h] The rule is generally adopted that a suit will not be sustained to cancel an executory, non-negotiable, personal contract,— e. g., a policy of insurance,— when the fraud might be set up as a defense to an action on the contract, and there are no special circumstances which would prevent the defense from being available, adequate, and complete: Globe etc. Ins. Co. v. Reals, 79 N. Y. 202 (where the jurisdiction of equity will not be exercised to cancel a policy of insurance or other written executory contract; it is not sufficient that a defense exists and the evidence might be lost; there must be circumstances showing injury which a court of equity alone can prevent); Huff v. Ripley, 58 Ga. 11 (will not set aside fraudulent sale of personal property when remedy at law is adequate); Ins. Co. v. Bailey, 13 Wall. 616, 621, 623 (policy of insurance will not be canceled when the facts constitute a complete defense at law); Rawson v. Harger, 48 Iowa, 269 (contract for sale of an invention, if neither party knew of its

(h) Buzard v. Houston, 119 U. S. 347, 7 Sup. Ct. 249; Cable v. United States Life Ins. Co., 191 U. S. 288, 24 Sup. Ct. 74; Such v. Bank of State of New York, 127 Fed. 450; Riggs v. Union Life Ins. Co., (C. C. A.) 129 Fed. 207; Vannatta v. Lindley, 198 Ill. 40, 92 Am. St. Rep. 270, 64 N. E. 735; Des Moines Life Ins. Co. v. Seifert, (Ill.) 71 N. E. 349.

for all kinds of suits. It follows, therefore, that there would be no real distinction in the form, pleadings, procedure, mode of trial, judgment, and execution, in those states, whether the action is regarded as equitable or legal.

want of novelty, and both had the same means of information and acted in good faith, the contract will not be canceled); Moore v. Holt, 3 Tenn. Ch. 248 (a contract for the purchase of real property will not be canceled at the suit of one contractor on account of the fraud of his co-contractor, when the other parties were innocent of the wrong); Tuttle v. Tuttle, 41 Mich. 211; 2 N. W. 21 (a mortgage on land, conveyed on consideration of supporting the grantor, will not be canceled as fraudulent against such grantor, when he again becomes owner of the land); Johnson v. Murphy, 60 Ala. 288 (the breach of an agreement to make future advances if a mortgage is executed for past advances is not sufficient to have the mortgage canceled on the ground of fraud; the remedy is at law); Noel v. Horton, 50 Iowa, 687 (deed of land will not be canceled on the ground of false representations concerning mere collateral matters not affecting the substance of the contract); Dunaway v. Robertson, 95 Ill. 419 (a person who executes deeds with intent to defraud creditors and puts them on record, but does not deliver them, can have no relief against them in equity); Compton v. Bunker Hill Bank, 96 Ill. 301; 36 Am. Rep. 147 (a deed will not be canceled when made through the fraud of a third person not authorized to act for the grantee, the fraud being unknown to the latter when the deed was received); Briggs v. Johnson, 71 Me. 235 (a deed invalid on its face will not be canceled as a cloud on title); Lavassar v. Washburne, 50 Wis. 200; 6 N. W. 516 (a deed of land will not be canceled unless the proof of fraud is clear and convincing).

Cancellation of judgments and other judicial proceedings, and suits to restrain actions and judgments at law. The jurisdiction exercised:[1] Dederer v. Voorhies, 81 N. Y. 153 (to set aside fraudulent proceedings of commissioners in making an assessment for a road); Hunt v. Hunt, 72 N. Y. 217; 28 Am. Rep. 129 (what necessary in order to set aside a judgment for fraud); Jordan v. Volkenning, 72 N. Y. 300 (ditto); Ross v. Wood, 70 N. Y. 8 (ditto); Harbaugh v. Hohn, 52 Ind. 243 (judgment fraudulently taken for a larger sum than was due); Harris v. Cornell, 80 Ill. 54 (a fraudulent decree for the sale of land); Doughty v. Doughty, 27 N. J. Eq. 315 (a judgment recovered in another state); Craft v. Thompson, 51 N. H. 536 (an award obtained by fraud); Holland v. Trotter, 22 Gratt. 136 (where party was prevented by fraud from setting up a good defense in the action at law); Babcock v. McCamant, 53 Ill. 214 (collection of a fraudulent judgment restrained; equity jurisdiction in fraud not lost because a statute has given a similar jurisdiction at law); Graham v. Roberts, 1 Head, 56, 59 (a judgment by default fraudulently obtained without service of process); Sayles v. Mann, 4 Ill. App.

(1) Robb v. Vos, 155 U. S. 13, 15 Sup. Ct. 4 (judgment obtained by fraudulent appearance of attorney); Bosher v. Richmond, etc., Land Co., 89 Va. 455, 16 S. E. 360, 37 Am. St. Rep. 879 (injunction against action on stock subscription obtained by fraud).

§ 915. Incidents of the Jurisdiction and Relief.[a]— There are certain incidents which are requisite to the exercise of the jurisdiction, and to the granting of any relief, and which

516 (a judgment fraudulently obtained against a married woman); District etc. of Algona v. District etc. of Lott's Creek, 54 Iowa, 286 (a fraudulent award); Huxley v. King, 40 Mich. 73 (a fraudulent foreclosure and redemption thereunder).

The same. Jurisdiction, when not exercised: United States v. Throckmorton, 98 U. S. 61 (a judgment or decree — e. g., confirming a claim under a Mexican grant — will not be set aside by an equity suit brought for that purpose, on the ground that it was obtained by fraudulent and forged documents and fraudulent and perjured testimony, when the self-same questions and the issues thereon were presented, considered, and determined by the court in the judgment itself which is assailed); Kelly v. Christal, 81 N. Y. 619 (equity will not set aside, or restrain, or relieve against a judgment at law on the ground of fraud, when all the facts could have been set up and would have been a complete defense to the action at law. The following cases also are to the same effect: Cairo etc. R. R. v. Titus, 27 N. J. Eq. 102; Barker v. Rukeyser, 39 Wis. 590; Thomason v. Fannin, 54 Ga. 361; Grubb v. Kolb, 55 Ga. 630; Cairo etc. R. R. v. Holbrook, 92 Ill. 297; Stilwell v. Carpenter, 2 Abb. N. C. 238); Shepard v. Akers, 3 Tenn. Ch. 215 (equity will not relieve against a judgment at law on the ground merely of irregularities at the trial, laches of the party himself, or negligence, or even fraud of the party's own counsel); Robinson v. Wheeler, 51 N. H. 384 (equity will not relieve against a judgment at law merely on the ground of a defense insufficient at law, where no discovery is sought).

Pecuniary recoveries. Concurrent jurisdiction, when exercised:[j] Getty v. Devlin, 70 N. Y. 504 (against fraudulent promotors of a fraudulent corporation; accounting and recovery of money invested in the stock of the company); Erie R. R. v. Vanderbilt, 5 Hun, 123 (suit by corporation against trustees for a fraudulent disposition of corporate property); Marlow v. Marlow, 77 Ill. 633 (payment decreed of promissory notes fraudulently obtained by the maker from the holder); Scott v. Scott, 33 Ga. 102, 104; Harper v. Whitehead, 33 Ga. 138 (general rule, inadequate remedy at law is a sufficient ground for a suit in equity); Ellis v. Kelly, 8 Bush, 621, 631 (money compelled to be paid by a fraudulent judgment recovered back after a discovery of the fraud).

The same. Concurrent jurisdiction for recovery of money, when not exer-

(j) Tyler v. Savage, 143 U. S. 79, 12 Sup. Ct. 340 (president of insolvent corporation represented that it was flourishing, and thus induced plaintiff to buy stock. Held, that plaintiff had a right to the appointment of a receiver and to have the assets applied to the debts); Bosher v. Richmond, etc., Land Co., 89 Va. 455, 16 S. E. 360, 37 Am. St. Rep. 879 (recovery of money paid on stock subscription); Wilson v. Carpenter, 91 Va. 183, 21 S. E. 243, 50 Am. St. Rep. 824.

(a) This section is cited in Keen v. James, 39 N. J. Eq. 257, 51 Am. Rep. 29.

result partly from the equitable conception of fraud itself in its effects upon the rights and liabilities of the two parties, and partly from the theory concerning remedies and their administration. These incidental requisites are referable, therefore, to the two following general prin-

ciscd:[k] Stephens v. Board of Education, 79 N. Y. 183; 35 Am. Rep. 511 (where trust moneys have been fraudulently disposed of, but have been paid to a *bona fide* holder); Bay City Bridge Co. v. Van Etten, 36 Mich. 210 (against officers of a corporation, who have ceased to be such, for money fraudulently appropriated to their own use, when no discovery is sought); Youngblood v. Youngblood, 54 Ala. 486 (money overpaid through fraudulent representations); Huff v. Ripley, 58 Ga. 11 (fraudulent sale of personal property where the remedy at law is complete); Frue v. Loring, 120 Mass. 507 (money overpaid by fraud, or fraudulent conversion of chattels); Ferson v. Sanger, Daveis, 252, 259, 261 (to recover damages arising from fraud); Woodman v. Saltonstall, 7 Cush. 181 (where there is an adequate remedy at law in insolvency proceedings, equity will not interfere, in Massachusetts, even though a discovery is sought); Bassett v. Brown, 100 Mass. 355 (no equity jurisdiction in Massachusetts of a suit for repayment of money or reconveyance of land on the ground of fraud; the remedy is at law); Suter v. Matthews, 115 Mass. 253 (fraud not sufficient to give equity jurisdiction in Massachusetts when the law provides an adequate remedy); Girard Ins. Co. v. Guerard, 3 Woods, 427 (suit on a bond which has been delivered up and canceled through fraud of a third person); Jewett v. Bowman, 29 N. J. Eq. 174 (a bill alleging fraud cannot be turned into an action for an accounting, on failure to prove the fraud).

Jurisdiction in matters relating to or connected with administrations:[l] Fulton v. Whitney, 5 Hun, 16 (the final accounting by executors or trustees before a surrogate is no bar to a suit in equity to enforce a trust); Richardson v. Brooks, 52 Miss. 118 (there is no jurisdiction in equity to correct probate proceedings; but the jurisdiction of equity over the acts of trustees will not be affected by the proceedings in a court of probate); Freeman v. Reagan, 26 Ark. 373, 378 (equity has jurisdiction over an administration when there has been fraud or waste); Kellogg v. Aldrich, 39 Mich. 576 (no jurisdiction in equity of a suit for the distribution of an intestate's personal estate on the ground of fraud; proceedings must be in a probate court); Cota v. Jones, 8 Pac. L. J. 1044, Sup. Ct. Cal. (A and B were two of the heirs and next of kin of a deceased intestate, whose estate was in the course of administration, and each was entitled to an undivided share of such estate. By false and fraudulent representations that the estate was virtually in-

(k) Buzard v. Houston, 119 U. S. 347, 7 Sup. Ct. 249; Paton v. Majors, 46 Fed. 210.

(l) See, also, § 1154. This paragraph of the text and this note are cited in French v. Woodruff, 25 Colo. 339, 54 Pac. 1015 (suit to set aside fraudulent sale by executor to himself, brought after his final accounting and discharge).

ciples: 1. Fraud does not render contracts and other transactions absolutely void, but merely voidable, so that they may be either confirmed or repudiated by the party who

solvent, and that A's share was valueless, the defendant, B, procured the plaintiff, A, to give the defendant an absolute conveyance and assignment of all A's share in the estate for a nominal consideration. When the estate was subsequently settled and distributed, B, as the assignee of A, received A's share by the decree of distribution, which share consisted of lands and personal property, and was from eight thousand to ten thousand dollars in value. A did not discover the fraud until several years after, and upon such discovery immediately brought this suit. Held, that the court had jurisdiction in equity to give A complete relief by declaring B to be a trustee of the property thus fraudulently acquired, and by compelling a conveyance to A; that the decree of distribution did not affect A's rights or prevent the relief; and that the fraud, not having been discovered, the action was not barred by the statute of limitations or by the lapse of time).

Jurisdiction exercised by impressing a trust on property acquired by fraud: Cota v. Jones, 8 Pac. L. J. 1044, Sup. Ct. Cal.; Bennett v. Austin, 81 N. Y. 308 (fiduciary person buying in property and held to be a trustee); Stephens v. Board of Education, 79 N. Y. 183; 35 Am. Rep. 511 (trust moneys fraudulently transferred cannot be reached in the hands of a *bona fide* holder); People v. Houghtaling, 7 Cal. 348, 351 (a fraudulent grantee held to be a trustee); Watson v. Erb, 33 Ohio St. 35 (the breach of a verbal agreement to buy land and convey it to the plaintiff is not a fraud which authorizes a court of equity to declare a trust and compel a conveyance); McVey v. McQuality, 97 Ill. 93 (a fraudulent grantee treated as a trustee for the equitable owner).

Miscellaneous cases of fraud: Durant v. Davis, 10 Heisk. 522 (borrowing money to pay for land purchased with the promise to give the lender a mortgage on the land, which promise is violated, is not a fraud giving rise to a trust, nor does the lender become subrogated to the vendor's lien on the land); Struve v. Childs, 63 Ala. 473 (an injunction granted to restrain the sale of land under a power in a mortgage, when the mortgagee colludes with third persons to obtain a wrongful lien on the land under the sale); Leupold v. Krause, 95 Ill. 440 (homestead; neither fraud nor even the commission of a crime will work a forfeiture of homestead rights); Dickenson v. Seaver, 44 Mich. 624 (a right to complain of fraud and to sue for relief is not assignable); Grubb's Appeal, 90 Pa. St. 228 (the proper construction of a deed is not a ground for equity jurisdiction; that is, a suit for the construction of a deed cannot be maintained; a deed will not be reformed when there is no allegation of fraud, mistake, or accident); Williamson v. Carskadden, 36 Ohio St. 664 (in an action on a mortgage regular in form, it may be shown in defense that the delivery, as to several of the persons who signed it, was unauthorized and fraudulent). The foregoing examples which are purposely selected from the most recent decisions will be sufficient, it is hoped, to put the reader on the track of the authorities which deal with the subject of equitable jurisdiction over matters of fraud.

had suffered the wrong.[1][b] 2. If he elects to repudiate, and to seek for a remedy, then equity proceeds upon the theory that the fraudulent transaction is a nullity; and it administers relief by putting the parties back into their original position, as though the transaction had not taken place, and by doing equity to the defendant as well as to the plaintiff. The consequences of these two principles, which have been alluded to, and which remain to be considered, are as follows:—

§ 916. **The Same. Plaintiff Particeps Doli — Ratification.**[a]— If the plaintiff is himself a party to the fraud, *particeps doli,* to such an extent that he is *in pari delicto* with the defendant, he can obtain no relief; equity does not, in general, relieve a person from the consequences of his own

[1] Oakes v. Turquand, L. R. 2 H. L. 325, 346; Lindsley v. Ferguson, 49 N. Y. 623, 625; Negley v. Lindsay, 67 Pa. St. 217, 228; 5 Am. Rep. 427; Pearsoll v. Chapin, 44 Pa. St. 9; Wood v. Goff, 7 Bush, 59, 63. Some of these cases draw an important distinction between fraudulent instruments which a party intends to execute in the form and character which they purport to have, — that is, he intends to execute a deed as a deed, an assignment as an assignment, — but this his intention is procured by fraud, and those instruments which he does not intend to execute in the form and character which they purport to have, but he executes them under the fraudulent representation, and conviction produced thereby, that their character is different from what it really is; for example, a person executes a deed under the fraudulent representation and conviction that he is executing a receipt; he intends to execute a receipt, but really executes a deed. In the latter class of cases, the instrument is so far *void*, it is said, that even a *bona fide* purchaser can acquire no rights under it; and the remedial rights of the defrauded party are not prejudiced by his delay in enforcing them: [c] Tayler v. Great Indian etc. R'y, 4 De Gex & J. 559, 573, 574; Donaldson v. Gillot, L. R. 3 Eq. 274; Ogilvie v. Jeaffreson, 2 Giff. 353; Livingston v. Hubbs, 2 Johns. Ch. 512; County of Schuylkill v. Copley, 67 Pa. St. 386; 5 Am. Rep. 441; McHugh v. County of Schuylkill, 67 Pa. St. 391, 396; 5 Am. Rep. 445. See also a series of cases on fraudulent promissory notes involving this distinction.

(b) Howard v. Turner, 155 Pa. St. 349, 26 Atl. 723, 35 Am. St. Rep. 883.

(c) See § 918.

(a) This classification is quoted in Farnsworth v. Duffner, 142 U. S. 43, 12 Sup. Ct. 164; Crocker v. Manley, 164 Ill. 282, 45 N. E. 577, 56 Am. St. Rep. 196; Rauh v. Waterman, 29 Ind. App. 344, 61 N. E. 743, 63 N. E. 42 (dissenting opinion). This section is cited in Snipes v. Kelleher, 31 Wash. 286, 72 Pac. 67, 61 L. R. A. 506.

actual fraud.[1] The mere fact, however, that the plaintiff was a party to the wrong in any degree, and is not therefore completely innocent, will not necessarily deprive him of relief, defensive or even affirmative. If he is not *in pari delicto*, and is comparatively the more innocent of the two, he may obtain relief by doing full equity to those parties, if any, who have sustained injury by his partial wrong.[2] While the party entitled to relief may either avoid the transaction or confirm it, he cannot do both; if he adopts a part, he adopts all; he must reject it entirely if he desires to obtain relief.[3] [b] Any material act done by him, with knowledge of the facts constituting the fraud, or under such circumstances that knowledge must be imputed, which assumes that the transaction is valid, will be a ratification.[4] [c]

§ 917. Promptness — Delay through Ignorance of the Fraud. — The most important practical consequence of the two principles above mentioned is the requisite of promptness.

[1] See *ante*, vol. 1, § 401, and cases cited; Dunaway v. Robertson, 95 Ill. 419; Roman v. Mali, 42 Md. 513.

[2] See *ante*, vol. 1, § 403, and cases cited; Solinger v. Earle, 82 N. Y. 393; Erie R. R. v. Vanderbilt, 5 Hun, 123; Poston v. Baleh, 69 Mo. 115. A person who comes within this rule must restore those who have sustained injury by him, as a condition to his obtaining any relief: See Kisterbock's Appeal, 51 Pa. St. 483; and see Briggs v. Rice, 130 Mass. 50.

[3] Great Luxembourg R'y v. Magnay, 25 Beav. 586, 594; Potter v. Titcomb, 22 Me. 300; Farmers' Bank v. Groves, 12 How. 51. To entitle a party to rescind an agreement for the exchange of land for goods, he must be able to put the other party in as good a condition as before the exchange: Smith v. Brittenham, 98 Ill. 188.

[4] See *ante*, § 897. In the same suit a party cannot claim under and against the fraudulent transaction. If his suit is brought to enforce rights arising from the transaction as standing, he cannot ask to have it rescinded, and the like: [d] See Coleman v. Columbia Oil Co., 51 Pa. St. 74, 77. If, however, the injured party has obtained the relief in an equity suit that a fraudulent conveyance be canceled, and the property reconveyed, this is not, it seems, any bar to an action at law for damages: Bruce v. Kelly, 5 Hun, 229, 232.

(b) Dennis v. Jones, 44 N. J. Eq. 513, 14 Atl. 913, 6 Am. St. Rep. 899.

(c) See *post*, § 964. Shappirio v. Goldberg, 192 U. S. 232, 24 Sup. Ct. 259.

(d) Merrill v. Wilson, 66 Mich. 232, 33 N. W. 716; Acer v. Hotchkiss, 97 N. Y. 395.

The injured party must assert his remedial rights with diligence and without delay, upon becoming aware of the fraud. After he has obtained knowledge of the fraud, or has been informed of facts and circumstances from which such knowledge would be imputed to him, a delay in instituting judicial proceedings for relief, although for a less period than that prescribed by the statute of limitations, may be, and generally will be, regarded as an acquiescence, and this may be, and generally will be, a bar to any equitable remedy.[1] [a] To this rule there is one limitation: it applies only when the fraud is known or ought to have been known. No lapse of time, no delay in bringing a suit, however long, will defeat the remedy, provided the injured party was, during all this interval, ignorant of the fraud. The duty

[1] See *ante*, §§ 817, 819, 820; Briggs v. Rice, 130 Mass. 50; Hathaway v. Noble, 55 N. H. 508; Lyme v. Allen, 51 N. H. 242; Willoughby v. Moulton, 47 N. H. 205, 208; Weeks v. Robie, 42 N. H. 316; Badger v. Badger, 2 Wall. 87, 94; Allore v. Jewell, 94 U. S. 506, 512; Sullivan v. Portland R. R., 94 U. S. 806, 811; Maxwell v. Kennedy, 8 How. 210; Campau v. Van Dyke, 15 Mich. 371; Wilbur v. Flood, 16 Mich. 40; Weaver v. Carpenter, 42 Iowa, 343; Akerly v. Vilas, 21 Wis. 88; Jones v. Smith, 33 Miss. 215; Shaver v. Radley, 4 Johns. Ch. 310; Philips v. Belden, 2 Edw. Ch. 1; Ward v. Van Bokkelen, 1 Paige, 100; Bank of U. S. v. Biddle, 2 Pars. Cas. 31; McDowell v. Goldsmith, 2 Md. Ch. 370; Anderson v. Burwell, 6 Gratt. 405; Field v. Wilson, 6 B. Mon. 479. Courts of equity have also been in the habit of applying the statute of limitations as a bar, by analogy, in all ordinary cases, even though equitable suits were not expressly included within the statutory provisions: See Kane v. Bloodgood, 7 Johns. Ch. 90; 11 Am. Dec. 417; Lansing v. Starr, 2 Johns. Ch. 150.

(a) This section is cited in Hanner v. Moulton, 138 U. S. 486, 11 Sup. Ct. 408; National Mut. B. & L. Ass'n v. Blair, 98 Va. 490, 36 S. E. 513; Romanoff Land & Min. Co. v. Cameron, 137 Ala. 214, 33 South. 864; Frost v. Walls, 93 Me. 405, 45 Atl. 287; Melms v. Pabst Brewing Co., 93 Wis. 153, 66 N. W. 518, 57 Am. St. Rep. 899. See, also, Coddington v. R. R. Co., 103 U. S. 409; Norris v. Haggin, 136 U. S. 386, 10 Sup. Ct. 942; Cummins v. Lods, 2 Fed. 661; Terbell v. Lee, 40 Fed. 40; Brewer v. Keeler, 42 Ark. 289; Burkle v. Levy, 70 Cal. 250, 11 Pac. 643; Bailey v. Fox, 78 Cal. 389, 20 Pac. 868 (four months); Allen v. Allen, 47 Mich. 74, 10 N. W. 113; Haldane v. Sweet, 55 Mich. 196, 20 N. W. 902; Burdett v. May, 100 Mo. 18, 12 S. W. 1056; Dierks v. Martin, 16 Neb. 120, 19 N. W. 598; Strong v. Strong, 102 N. Y. 73, 5 N. E. 799; Calhoun v. Millard, 121 N. Y. 77, 24 N. E. 27, 8 L. R. A. 248; and § 897, *ante*.

to commence proceedings can arise only upon his discovery of the fraud; and the possible effect of his laches will begin to operate only from that time.[2 b]

[2] Modern statutes of limitation usually provide that the statutory period shall begin to run only from the discovery of the fraud by the injured party; but even in the absence of such an express provision the courts have put this construction upon the statute: Vane v. Vane, L. R. 8 Ch. 383, 398; Rolfe v. Gregory, 4 De Gex, J. & S. 576, 579; Chetham v. Hoare, L. R. 9 Eq. 571; Allfrey v. Allfrey, 1 Macn. & G. 87, 99; Charter v. Trevelyan, 11 Clark & F. 714; Blair v. Bromley, 5 Hare, 542, 559; Sherwood v. Sutton, 5 Mason, 143; Fed. Cas. No. 12,872; Doggett v. Emerson, 3 Story, 700; Fed. Cas. No. 3,960; Michoud v. Girod, 4 How. 503, 561; Cota v. Jones, 8 Pac. L. J. 1044; Dodge v. Essex Ins. Co., 12 Gray, 65; Phalen v. Clark, 19 Conn. 421; 50 Am. Dec. 253; Stocks v. Van Leonard, 8 Ga. 511; Martin v. Martin, 35 Ala. 560; Smith v. Fly, 24 Tex. 345; 76 Am. Dec. 109; Gibson v. Fifer, 21 Tex. 260; Relf v. Eberly, 23 Iowa, 467; Cock v. Van Etten, 12 Minn. 522. It has sometimes been said that *actual concealment* is necessary, and that the mere fact of non-discovery is not enough. This cannot mean that the defrauded party must *necessarily* have used some affirmative means to discover the fraud, for he might not have the slightest suspicion of its existence; nor that the fraudulent party must *necessarily* have used some affirmative means to cover up his acts; nor that any *special* duty, such as a trust or fiduciary relation, must rest upon the fraudulent party, different from that which rests upon all such wrong-doers to speak the truth. It can only mean that the defrauded party's ignorance must not be negligent; that he remains ignorant without any fault of his own; that he has not discovered the fraud, and could not by reasonable diligence discover it. If the statement means anything more than this, it is in direct conflict with the ablest authorities, and with the very principle upon which the rule itself is based. In Rolfe v. Gregory, 4 De Gex, J. & S. 576, Lord Westbury said: "As the remedy is given on the ground of fraud, it is governed by this important principle, that the right of the party defrauded is not affected by the lapse of time, or, generally speaking, by anything done or omitted to be done, *so long as he remains, without any fault of his own, in ignorance of the fraud that has been committed.*" In Vane v. Vane, L. R. 8 Ch. 383, James, L. J., said that the statute will not begin to run "until the fraud is first discovered, or might with reasonable diligence have been discovered." See also Meader v. Norton, 11 Wall. 442; Township of Boomer v. French, 40 Iowa, 601; Humphreys v. Mattoon, 43 Iowa, 556; Reed v. Minell, 30 Ala. 61; Wilson v. Ivy, 32 Miss. 233; Buckner v. Calcote, 28 Miss. 432; Hudson v. Wheeler, 34 Tex. 356; Munson v. Hallowell, 26 Tex. 475; 84 Am. Dec. 582; Peck v. Bullard, 2 Humph. 41.

(b) The text is cited to this effect in Melms v. Pabst Brewing Co., 93 Wis. 153, 66 N. W. 518, 57 Am. St. Rep. 899; Crawford's Adm'r v. Smith's Ex'r, 93 Va. 623, 23 S. E. 235 (same rule applies in case of blameless mistake). See, also, Kirby v. L. S., etc., R. R. Co.,

§ 918. **Persons against Whom Relief is Granted.**[a]— The remedy which equity gives to the defrauded person is most extensive. It reaches all those who were actually concerned in the fraud, all who directly and knowingly participated in its fruits, and all those who derive title from them voluntarily or with notice. "A court of equity will wrest property fraudulently acquired, not only from the perpetrator of the fraud, but, to use Lord Cottenham's language, from his children and his children's children, or, as elsewhere said, from any persons amongst whom he may have parceled out the fruits of his fraud."[1b] There is one limitation: if the property which was acquired by the fraud has come by transfer into the hands of a *bona fide* purchaser for a valuable consideration and without notice, even though his immediate grantor or assignor was the fraudulent party himself, the hands of the court are stayed, and the remedy of the defrauded party, with respect to the property itself, is gone; his only relief must be personal against those who committed the fraud.[2c] To this limitation there is, however, an exception, where the general rule giving relief applies even as against a *bona fide* purchaser. Where an owner has been apparently deprived

1 Vane v. Vane, L. R. 8 Ch. 383, 397, per James, L. J.; Huguenin v. Baseley, 14 Ves. 273; Bridgeman v. Green, Wilm. 58.

2 See *ante*, § 777; Stephens v. Board of Education, 79 N. Y. 183; 35 Am. Rep. 511 (trust money fraudulently obtained, and then paid to a *bona fide* holder, cannot be reached by the equitable owner. A distinction exists between money and other property. The money was here paid to the holder in satisfaction of an antecedent debt. If other kinds of property had thus been transferred, the transferee would not have been a purchaser for a valuable consideration, according to the rule as settled in New York); Dunklin v. Wilson, 64 Ala. 162 (land sold under a fraudulent decree).

120 U. S. 137, 7 Sup. Ct. 430; Kilbourn v. Sunderland, 130 U. S. 519, 9 Sup. Ct. 594; Jones v. Van Doren, 130 U. S. 684, 9 Sup. Ct. 685; Brown v. Norman, 65 Miss. 369, 4 South. 293, 7 Am. St. Rep. 663; Brown v. Brown, 61 Tex. 45; also §§ 965, 881, 897, 418, 419.

(a) This section is cited in Sutherland v. Reeve, 151 Ill. 384, 38 N. E. 130.

(b) See *ante*, § 899.

(c) Quoted in Martin v. Robinson, 67 Tex. 368, 3 S. W. 550.

of his title by a fraudulent conveyance or assignment which is void, as where he was procured to execute it by the fraudulent representation and under the conviction that it was an entirely different instrument, or where it was fraudulently executed in his name without any authority express or implied, or where, after being executed by him for one purpose, it was fraudulently altered without his knowledge or authority, so as to include the property, or where it was a forgery, and he has done no collateral act with reference to it which might amount to an equitable estoppel by conduct, and the property, by means of such transfer, comes into the hands of a purchaser for value and without notice, the original defrauded owner is not barred of his remedy.[3] Equity will relieve by canceling the fraudu-

[3] Tayler v. Great Indian etc. R'y, 4 De Gex & J. 559, 574; Donaldson v. Gillot, L. R. 3 Eq. 274; Bank of Ireland v. Evans's Charities, 5 H. L. Cas. 389; Vorley v. Cooke, 1 Giff. 230; Ogilvie v. Jeaffreson, 2 Giff. 353; Swan v. North British etc. Co., 7 Hurl. & N. 603. See also, for limitations, Case v. James, 3 De Gex, F. & J. 256, 264; Hunter v. Walters, L. R. 11 Eq. 292; In re Barned's Banking Co., L. R. 3 Ch. 105; Hawkins v. Maltby, L. R. 3 Ch. 188; 4 Eq. 572; Cottam v. Eastern Cos. R'y, 1 Johns. & H. 243; Spaight v. Cowne, 1 Hem. & M. 359; Dowle v. Saunders, 2 Hem. & M. 242, 250; Livingston v. Hubbs, 2 Johns. Ch. 512; County of Schuylkill v. Copley, 67 Pa. St. 386; 5 Am. Rep. 441; McHugh v. County of Schuylkill, 67 Pa. St. 391, 396; 5 Am. Rep. 445. The doctrine of the text, and the cases which support it, are undoubtedly in conflict with some of the American decisions concerning transfers of stock and other things in action cited in the previous section on *priorities;* but they accord completely with the author's views as expressed in that section and in the one on *bona fide purchase.* The conclusions in the text above are intentionally stated with caution and careful limitations, and they cannot be extended beyond the limits thus laid down. If the person who fraudulently executes the transfer has any implied authority, even though he acts in direct opposition to his private instructions, or if the original and defrauded owner has done any acts which will operate as an equitable estoppel, then the conclusions of the text cannot apply; the equity of the purchaser in good faith will be superior. Some of the cases cited above hold that when the owner has executed and delivered an assignment in blank, and the person to whom it is delivered fraudulently fills up the blanks, and thus conveys the property to a *bona fide* purchaser, such person acts with implied authority, and the owner's rights as against the purchaser are cut off. But when the facts detailed in the text exist, when there is no authority express or implied, and no conduct working an estoppel, there is no ground of principle for preferring the equity of a subsequent claimant, however innocent, over that of the original owner, who is equally innocent, and whose title is prior in time.

lent apparent transfer, and by compelling a reconveyance or reassignment, even as against the holder who is innocent of wrong; the doctrines of equitable estoppel and of *bona fide* purchase do not apply under these circumstances. Such is the doctrine announced by decisions of the highest authority.

§ 919. **Particular Instances of Jurisdiction.**—I shall conclude this discussion of actual fraud by enumerating some well-settled instances of the jurisdiction which deserve a special mention. In several of them the fraud affects third persons rather than the immediate party to the transaction; but in all a fraudulent intention, or what equity regards as tantamount to such an intention, is a necessary element, and they may all, therefore, be properly grouped under the head of actual fraud.[a] *Judgments:* When a judgment or decree of any court, whether inferior or superior, has been obtained by fraud, the fraud is regarded as perpetrated upon the court as well as upon the injured party. The judgment is a mere nullity, and it may be attacked and defeated on account of the fraud, in any collateral proceeding brought upon it or to enforce it, at least in the same court in which it was rendered.[1][b] When a judgment fraudulently recovered in one court is sued upon

[1] Kerr on Fraud, Am. ed., 293; Duchess of Kingston's Case, 2 Smith's Lead. Cas., 7th Am. ed., 609; Lord Bandon v. Becher, 3 Clark & F. 479, 510; Shedden v. Patrick, 1 Macq. 535; The Queen v. Saddlers' Co., 10 H. L. Cas. 431; Brownsword v. Edwards, 2 Ves. Sr. 243, 246; Harrison v. Mayor etc., 4 De Gex, M. & G. 137; Perry v. Meadowcroft, 10 Beav. 122; Webster v. Reid, 11 How. 437; Clark v. Douglass, 62 Pa. St. 408; Campbell v. Sloan, 62 Pa. St. 481; Wilson v. Watts, 9 Md. 356; Hall v. Hall, 1 Gill, 383, 391; Carpentier v. Hart, 5 Cal. 406.

(a) This section is cited in Hogg v. Link, 90 Ind. 346; Anthony v. Masters, 28 Ind. App. 239, 62 N. E. 505; Georgia Pac. Ry. Co. v. Brooke, 66 Miss. 583, 6 South. 467. For further instances, see *post*, § 1377.

(b) Anthony v. Masters, 28 Ind. App. 239, 62 N. E. 505 (judgment obtained by false return of service of process). The text is cited in Elting v. First Nat. Bank, 173 Ill. 368, 50 N. E. 1095. See further, as to relief against judgments obtained by fraud, etc., Pomeroy Equitable Remedies.

in another court, whether the fraud can *there* be set up to defeat its enforcement has been questioned.[2] There can be no doubt, however, that under these circumstances, wherever the reformed procedure prevails, the fraud may be set up by way of *equitable* defense, especially if the affirmative relief of cancellation is sought.[3] Although the fraud may thus be set up by way of defense, the equitable jurisdiction to cancel and set aside or to restrain judgments and decrees of any court which have been obtained by a fraud practiced upon the court and the losing party, is well settled and familiar.[4] *Awards:* The jurisdiction to set aside and cancel awards was settled at a very early day, and it still exists, except so far as it has been regulated or taken away by statute.[5] [d] *Fraudulent bequests:*

[2] Kerr on Fraud, 284.

[3] Dobson v. Pearce, 12 N. Y. 156, 166, 168; and see *post*, section on equitable defenses.

[4] A judgment will not, however, be set aside on the ground of fraud, when the very same fraud alleged, and the same questions concerning it, were presented by the issues, litigated, and decided by the courts in the judgment which is attacked:[e] United States v. Throckmorton, 98 U. S. 61. On the general subject, see Dederer v. Voorhies, 81 N. Y. 153; Hunt v. Hunt, 72 N. Y. 217; 28 Am. Rep. 129; Jordan v. Volkenning, 72 N. Y. 300; Ross v. Wood, 70 N. Y. 8; Harbaugh v. Hohn, 52 Ind. 243; Harris v. Cornell, 80 Ill. 54; Doughty v. Doughty, 27 N. J. Eq. 315; Holland v. Trotter, 22 Gratt. 136; Babcock v. McCamant, 53 Ill. 214; Graham v. Roberts, 1 Head, 56, 59; Sayles v. Mann, 4 Ill. App. 516; Huxley v. Rice, 40 Mich. 73; Griffin v. Sketoe, 30 Ga. 300; Byers v. Surget, 19 How. 303. Conversely, equity has jurisdiction to aid, by whatever relief may be appropriate, in the enforcement of a valid judgment of another court, when its enforcement is hindered or prevented by fraud; as, for example, where the judgment debtor, pending the suit, transfers or withdraws his property with the intent of rendering the expected judgment nugatory: Blenkinsopp v. Blenkinsopp, 1 De Gex, M. & G. 495, 500; 12 Beav. 568, 586.

[5] Kerr on Fraud, 288; Brown v. Brown, 1 Vern. 156; Earl v. Stocker, 2 Vern. 251; Burton v. Knight, 2 Vern. 514; Smith v. Whitmore, 2 De Gex, J. & S. 297; Haigh v. Haigh, 3 De Gex, F. & J. 157; Craft v. Thompson, 51

(c) Hogg v. Link, 90 Ind. 346. See, also, §§ 914, note, 1364, 221.

(d) This section is cited to this effect in Hartford Fire Ins. Co. v. Bonner Mercantile Co., 44 Fed. 151, 11 L. R. A. 623. It is competent for the parties to agree that fraud on the part of the arbitrator shall not vitiate the award: Tullis v. Jacson, [1892] 3 Ch. 441.

Although an entire will cannot be set aside on account of fraud,[f] yet a particular devise or bequest may be impressed with a trust in favor of a third person for whom the testator's beneficial intentions have been fraudulently intercepted and prevented by the actual devisee or legatee; and in the same manner the land descending to the heir may be impressed with a trust, where he has prevented the testator from making an intended devise by fraudulently representing to the testator that his intention will be carried into effect towards the beneficiary as fully as though the devise were made.[6][g] Where a *probate* is obtained by

N. H. 536; District of Algona v. District etc., 54 Iowa, 286; 6 N. W. 295; Emerson v. Udall, 13 Vt. 477; 37 Am. Dec. 604. As to what acts or omissions will constitute fraud in an award:[e] Lord Lonsdale v. Littledale, 2 Ves. 451, 453; Calcraft v. Roebuck, 1 Ves. 221, 226; Lingood v. Croucher, 2 Atk. 395; Ives v. Metcalfe, 1 Atk. 63, 64; Burton v. Knight, 2 Vern. 514; Haigh v. Haigh, 3 De Gex, F. & J. 157; Blennerhasset v. Day, 2 Ball & B. 104, 116; Gartside v. Gartside, 3 Anstr. 735; Spettigue v. Carpenter, 3 P. Wms. 361; Harding v. Wickham, 2 Johns. & H. 676; Harvey v. Shelton, 7 Beav. 455; Kemp v. Rose, 1 Giff. 258; Van Cortlandt v. Underhill, 2 Johns. Ch. 339; 17 Johns. 405; Knowlton v. Mickles, 29 Barb. 465; Rand v. Redington, 13 N. H. 72; Lee v. Patillo, 4 Leigh, 436; Emery v. Owings, 7 Gill, 488; 48 Am. Dec. 580; Jordan v. Hyatt, 3 Barb. 275; Peters v. Newkirk, 6 Cow. 103; Lutz v. Linthicum, 8 Pet. 165, 178. The whole subject of arbitration and awards, and of the procedure thereon, is very generally a matter of statutory regulation in this country.

[6] McCormick v. Grogan, L. R. 4 H. L. 82, 91, 97, per Lord Westbury; Dutton v. Pool, 1 Vent. 318; Thynn v. Thynn, 1 Vern. 296; Oldham v. Litchfield, 2 Vern. 506; Freem. Ch. 284; Devenish v. Baines, Prec. Ch. 3; Chamberlaine v. Chamberlaine, Freem. Ch. 34; Reech v. Kennigate, Amb. 67; Barrow v. Greenough, 3 Ves. 152; Mestaer v. Gillespie, 11 Ves. 621, 638; Chamberlain v. Agar, 2 Ves. & B. 259, 262; Chester v. Urwick, 23 Beav. 407; Dimes v. Steinberg, 2 Smale & G. 75; Morgan v. Annis, 3 De Gex & S. 461; Hindson v. Wetherill, 1 Smale & G. 604; 5 De Gex, M. & G. 301; Podmore v. Gunning, 7 Sim. 644, 660; Russell v. Jackson, 10 Hare, 204, 213; Hoge v. Hoge, 1 Watts, 163, 213; Jones v. McKee, 3 Pa. St. 496; 6 Pa. St. 425, 428; Irwin v. Irwin, 34 Pa. St. 525; Church v. Ruland, 64 Pa. St. 432, 442; Gaither v. Gaither, 3 Md. Ch. 158; Howell v. Baker, 4 Johns.

(e) Brush v. Fisher, 70 Mich. 469, 38 N. W. 446, 14 Am. St. Rep. 510; Pt. Huron, etc., Ry. v. Callanan, 61 Mich. 22, 34 N. W. 678; Georgia Pac. Ry. Co. v. Brooke, 66 Miss. 583, 6 South. 467; Hartupee v. Pittsburgh, 131 Pa. St. 535, 19 Atl. 507.

(f) See § 913.

(g) See further, § 1054, and note.

fraud, equity may declare the executor or the other person deriving title under it a trustee for the party defrauded.[7] *Preventing acts for the benefit of another:* The jurisdiction in the case of intended testamentary gifts fraudulently prevented extends to other analogous cases. Where one person has been prevented by fraud from doing an intended act for the benefit of another, equity may relieve the disappointed party by establishing his rights as though the act had been done, and by confirming the title which he would thereby have acquired.[8] *Suppressing instruments:* Conversely, when instruments have been fraudulently suppressed or destroyed for the purpose of hindering or defeating the rights of others, equity has jurisdiction to give appropriate relief by establishing the estate or rights of the defrauded party.[9]

Ch. 118; Jenkins v. Eldridge, 3 Story, 181. If a testator devises an estate to a son, who promises his father, in consideration of such devise, to pay a certain sum to another son, equity will enforce the promise: Strickland v. Aldridge, 9 Ves. 516, 519; and such an engagement may be made by a silent assent to a proposal by the testator: Byrn v. Godfrey, 4 Ves. 6, 10; Paine v. Hall, 18 Ves. 475.

7 Barnesly v. Powel, 1 Ves. Sr. 284, 287; McCormick v. Grogan, L. R. 4 H. L. 82; Allen v. Macpherson, 1 Phill. Ch. 133, 145; 1 H. L. Cas. 191, 213, 214; Kennell v. Abbott, 4 Ves. 802; Charlton v. Coombes, 4 Giff. 382, 385; Wilkinson v. Joughin, L. R. 2 Eq. 319; Podmore v. Gunning, 7 Sim. 644, 660.

8 Kerr on Fraud, 273; Middleton v. Middleton, 1 Jacob & W. 94, 96 (execution of an instrument prevented by duress and undue influence); Luttrell v. Olmius, cited 11 Ves. 638; 14 Ves. 290; 1 Jacob & W. 96 (an intended recovery prevented, and the estate held as though the recovery had been suffered) as to preventing the execution of deeds, see Buckell v. Blenkhorn, 5 Hare, 131; Vane v. Fletcher, 1 P. Wms. 352; Nanney v. Williams, 22 Beav. 452; Bulkley v. Wilford, 2 Clark & F. 102; West v. Ray, Kay, 385.

9 Kerr on Fraud, 275. For example, if an heir should suppress a deed or will, equity would confirm the title of the grantee or devisee. Of course the proof must be perfectly clear and convincing: Hunt v. Matthews, 1 Vern. 408; Wardour v. Berisford, 1 Vern. 452; cited 2 P. Wms. 748, 749; Finch v. Newnham, 2 Vern. 216; Dalston v. Coatsworth, 1 P. Wms. 731; Cowper v. Cowper, 2 P. Wms. 720; Tucker v. Phipps, 3 Atk. 359; Saltern v. Melhuish, Amb. 247; Hornby v. Matcham, 16 Sim. 325. When an instrument has been intentionally destroyed or suppressed, everything will be presumed against the party by whom the destruction or suppression has been done: Bowles v. Stewart, 1 Schoales & L. 209, 222; Eyton v. Eyton, 4 Brown Parl. C. 149, 153; Hampden v. Hampden, 3 Brown Parl. C. 550.

If a person obtains a conveyance or other instrument for one particular

§ 920. The Same. Appointments under Powers.— The jurisdiction of equity in this class of cases is based upon the principle that, in making an appointment under a power, the intention of the donor should be carried out as far as it has been expressed,— at least, that his intention should not be directly violated. All mere powers, from their very nature, give more or less discretion to the donee. When he refuses to exercise that discretion by failing to make any appointment at all, equity does not, as has been shown, interfere to supply the omission. When the donee is clothed with an *absolute* discretion with respect to the persons whom he may or may not make beneficiaries by appointment to or among them, with respect to the shares, the manner, and the like, equity will rarely, if ever, interfere with any appointment which is actually made, since the court cannot say that it violates the donor's intention. When, as is generally the case, the donee, although clothed with a discretion as to whether he will appoint at all, is restricted by the terms of the instrument with respect to the persons to or among whom he may make an appointment, or in respect to other material matters, an appointment made with the intention of violating, and so made that it does violate, this restriction, is regarded by equity as a fraud upon the donor, and upon the persons who would and will be set aside as nugatory. There are two important modes in which an appointment may be thus fraudulent: 1. Where the donee is restricted to a certain class of beneficiaries, not including himself, and he intentionally makes an appointment for the purpose of his own benefit, and in such a manner as directly or indirectly to secure his own

avowed purpose, and then retains it and uses it for an entirely different purpose, equity, regarding the conduct as fraud, may give such relief as is appropriate:[h] Young v. Peachy, 2 Atk. 254, 256; Wilkinson v. Brayfield, 2 Vern. 307; Goodrick v. Brown, Freem. Ch. 180; Evans v. Bicknell, 6 Ves. 174, 191; Pickett v. Loggon, 14 Ves. 215, 234.

(h) See numerous cases cited under § 1055.

benefit. An appointment to a person of the prescribed class, with an agreement on his part that, in consideration of the appointment being made to him, he will give or secure to the donee some part of the property or some benefit arising from it, would be an illustration; but the forms of such fraudulent appointment are various. In this species the donee is clearly guilty of actual fraud,— a moral wrong. 2. Where the donee is restricted to a certain class of individuals, and he intentionally makes an appointment for the purpose of benefiting, and in such a manner as directly or indirectly to secure the benefit of a third person not belonging to the class specified by the donor. An appointment to one of the prescribed class, with an accompanying agreement on his part to share the property with such a third person, would be an illustration. Such a violation of the donor's intention is treated by equity as a fraud upon the power, although it may not involve any moral wrong in the donee. It is held that, in determining whether any particular appointment is a fraud upon the power, the *motive* with which the power was exercised and the appointment made cannot be regarded, but the *purpose* may; in fact, the purpose is the important element. Where the donee holds a *mere* power and makes a fraudulent appointment, the persons who would be entitled to the property upon default of any appointment at all are the parties to whom equity gives relief, since the appointment is regarded as a nullity and is set aside. Where the power is *in trust,* the beneficiaries under it, who are entitled to have it executed in their favor, are plainly the parties to whom equity gives relief in case of a complete failure to appoint, or of an imperfect or fraudulent appointment.[1] [a] *Marital rights:*

[1] Kerr on Fraud, 267; Aleyn v. Belchier, 1 Eden, 132; 1 Lead. Cas. Eq. 573, 578, 598, and notes. Although this subject is one of great importance in England, it has little more than a theoretical existence in the law

(a) See, also, In re Perkins, [1893] 1 Ch. 283; Alexander v. Alexander, 2 Ves. Sr. 640; Sadler v. Pratt, 5 Sim. 632; Watt v. Creyke, 3 Sm. & Giff. 362; In re Somes, [1896] 1 Ch. 250 (doctrines applicable to the fraudu-

The rule was well settled in England that if a negotiation for a marriage had begun, the woman should, while it was pending, without the knowledge of or notice to the intended husband, make a voluntary conveyance or settlement of her own property, and the marriage should be completed by him in ignorance of the transfer, such conveyance or settlement would be a fraud upon the husband's marital rights of property, and would be set aside by a court of equity. The same general doctrine has also been adopted by several early decisions in this country.[2 b] This doctrine must necessarily be abrogated by the modern legislation in most of the states, which destroys all right and interest of the husband in the property of his wife. *Trusts:* One of the most important effects of fraud, and most striking illus-

of most of our states. It does not seem necessary, therefore, to enter upon any discussion of the special rules which have been settled, or of the cases which have arisen. The following are some of the recent decisions, and for further exposition the reader is referred to treatises upon powers: Topham v. Duke of Portland, 1 De Gex, J. & S. 517; 11 H. L. Cas. 32; Pryor v. Pryor, 2 De Gex, J. & S. 205; Cooper v. Cooper, L. R. 8 Eq. 312; 5 Ch. 203; In re Huish's Charity, L. R. 10 Eq. 5; Arnold v. Woodhams, L. R. 16 Eq. 29; Topham v. Duke of Portland, L. R. 5 Ch. 40; Roach v. Trood, L. R. 3 Ch. Div. 429; Palmer v. Locke, L. R. 15 Ch. Div. 294; Lane v. Page, Amb. 233; Lord Hinchinbroke v. Seymour, 1 Brown Ch. 395; Jackson v. Jackson, 7 Clark & F. 977; Palmer v. Wheeler, 2 Ball & B. 18, 31; Farmer v. Martin, 2 Sim. 502, 511; Arnold v. Hardwick, 7 Sim. 343; Reid v. Reid, 25 Beav. 469, 478; Wellesley v. Mornington, 2 Kay & J. 143; In re Marsden's Trust, 4 Drew. 594, 601; Routledge v. Dorril, 2 Ves. 357; Birley v. Birley, 25 Beav. 299. The American cases are comparatively very few. The following recognize the general doctrine that equity will not control the exercise of a real discretion given to the donee, but will set aside a fraudulent appointment made under color of such discretion: Lippincott v. Ridgway, 10 N. J. Eq. 164; Budington v. Munson, 33 Conn. 481; Williams's Appeal, 73 Pa. St. 249; Graeff v. De Turk, 44 Pa. St. 527; Cloud v. Martin, 2 Dev. & B. 274; Haynesworth v. Cox, Harp. Eq. 117, 119; Fronty v. Fronty, 1 Bail. Eq. 517, 529; Melvin v. Melvin, 6 Md. 541; Jackson v. Veeder, 11 Johns. 169, 171.

[2] Countess of Strathmore v. Bowes, 1 Ves. 22; 1 Lead. Cas. Eq. 405, 611, 618, and cases in notes by the English and American editors.

lent exercise of a power of appointment do not apply to the release of a power not coupled with a duty):

Wainwright v. Miller, [1897] 2 Ch. 255.

(b) See further, § 1113.

trations of the equity jurisdiction, is found in the theory of trusts arising by operation of law. When property subject to a trust is fraudulently transferred, or when one person, in fraudulent violation of his fiduciary duty, acquires property which equitably belongs to another, or when one person by his actual fraud obtains the title to property in which another is beneficially interested, equity may work out and protect the rights of the beneficial owner by regarding the property as though it were actually impressed with a trust in the hands of the one who holds the legal title, by treating such person as though he were an actual trustee, and by enforcing such trust by means of a conveyance, accounting, payment, injunction, and other appropriate remedies. There is no other effect of fraud more remarkable, and none which exhibits more clearly the power of courts of equity to deal with the substantial realities under the appearance of external forms.[2]

§ 921. The Statute of Frauds not an Instrument of Fraud.—It is a most important principle, thoroughly established in equity, and applying in every transaction where the statute is invoked, that the statute of frauds, having been enacted for the purpose of preventing fraud, shall not be made the instrument of shielding, protecting, or aiding the party who relies upon it in the perpetration of a fraud, or in the consummation of a fraudulent scheme.[1] [a] This most righteous principle lies at the basis of many forms of equitable relief, among which are the specific enforcement of verbal agreements for the sale of land which have been

[3] See *post*, the sections on constructive trusts.

[1] Mestaer v. Gillespie, 11 Ves. 621, 627, 628, per Lord Eldon; Haigh v. Kaye, L. R. 7 Ch. 469; Jervis v. Berridge, L. R. 8 Ch. 351; Lincoln v. Wright, 4 De Gex & J. 16; Wood v. Midgley, 5 De Gex, M. & G. 41; Willink v. Vanderveer, 1 Barb. 599; Miller v. Cotten, 5 Ga. 341, 346; Shields v. Trammell, 19 Ark. 51; Trapnall v. Brown, 19 Ark. 39.

(a) This section is cited in Woodbury v. Gardner, 77 Me. 68. See, also, Wood v. Rabe, 96 N. Y. 414, 48 Am. Rep. 640.

partly performed, the reformation and enforcement of agreements and conveyances imperfect through fraud or mistake, the cancellation of fraudulent agreements and conveyances, and the like. One particular instance of relief will be mentioned as an illustration. Where an agreement has been verbally made which the statute requires to be in writing, and through the actual fraud of one party the execution of the written instrument is prevented, and the other party is induced to accept and rely upon the verbal agreement as valid and binding, a court of equity will not permit the fraudulent party to set up the statute of frauds as a defense, but will enforce the agreement against him, although it is merely verbal. Of course, there must be actual fraud as the distinguishing feature of the transaction,— something more than the mere omission to put the contract into writing. The plaintiff must be induced through the deceit, false statements, or concealments of the other party to waive a written instrument, and to rely upon the parol undertaking. The same relief, it seems, will be given when the execution of a written contract, otherwise fully agreed upon, is prevented by an inevitable accident, as by the death of a party.[2]

[2] Mestaer v. Gillespie, 11 Ves. 621, 627, 628; Montacute v. Maxwell, 1 P. Wms. 618; 1 Strange, 236; 1 Eq. Cas. Abr. 19; Attorney-General v. Sitwell, 1 Younge & C. 557, 583; Walker v. Walker, 2 Atk. 98; Joynes v. Statham, 3 Atk. 388; Whitchurch v. Bevis, 2 Brown Ch. 559, 565; Lincoln v. Wright, 4 De Gex & J. 16, 22; Wood v. Midgley, 5 De Gex, M. & G. 41; Cookes v. Mascall, 2 Vern. 200; Taylor v. Luther, 2 Sum. 228; Jenkins v. Eldridge, 3 Story, 181, 290–293; Phyfe v. Wardell, 2 Edw. Ch. 47; Whitridge v. Parkhurst, 20 Md. 62; Wesley v. Thomas, 6 Har. & J. 24; Walkins v. Stockett, 6 Har. & J. 435; Schmidt v. Gatewood, 2 Rich. Eq. 162; Kinard v. Hiers, 3 Rich. Eq. 423; 55 Am. Dec. 643; Chetwood v. Brittan, 2 N. J. Eq. 438; Kennedy v. Kennedy, 2 Ala. 571; Collins v. Tillou, 26 Conn. 368; 68 Am. Dec. 398; Brown v. Lynch, 1 Paige, 147; Sweet v. Jacocks, 6 Paige, 355; 31 Am. Dec. 252; Wolford v. Herrington, 74 Pa. St. 311; 15 Am. Rep. 548; Murphy v. Hubert, 16 Pa. St. 50; 7 Pa. St. 420; Bernard v. Flinn, 8 Ind. 204; Finucane v. Kearney, 1 Freem. (Miss.) 65, 69; Trapnall v. Brown, 19 Ark. 39, 49; Shields v. Trammell, 19 Ark. 51; Childers v. Childers, 1 De Gex & J. 482; Davies v. Otty, 35 Beav. 208; Colyer v. Clay, 7 Beav. 188; Symes v. Hughes,

SECTION IV.

CONSTRUCTIVE FRAUD.

ANALYSIS.

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L. R. 9 Eq. 475; Clarke v. Grant, 14 Ves. 519, 525; compare Blodgett v. Hildreth, 103 Mass. 484; Glass v. Hulbert, 102 Mass. 24; 3 Am. Rep. 418; Walker v. Locke, 5 Cush. 90. In Taylor v. Luther, 2 Sum. 228; Fed. Cas. No. 13,796, Judge Story lays down the doctrine very broadly, more so perhaps than is warranted by the principle or sustained by the authorities. The doctrine of the text and the foregoing cases should be considered in connection with the discussion concerning parol evidence in cases of fraud and mistake, near the end of the section on mistake. They lie at the foundation of the conclusions there reached, and fully support them.

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§ 974. Conveyances in fraud of subsequent purchasers.

§ 922. Definition — Essential Elements.— The term "constructive fraud" is not a very appropriate one, but has been used so long that any attempt to substitute another

in its place would be useless. It is important, however, to form an accurate notion of the meaning given to it in equity, and of the peculiar element or criterion which distinguishes the various classes of cases belonging to it. The distinguishing element of actual fraud, as has been shown, is always *untruth* between the two parties to the transaction, so that actual fraud may be reduced to misrepresentations and concealments. This untruth at law must be virtually intentional,— a falsehood; in equity the intention is not so essential. Untruth is not the distinguishing element of constructive fraud; it is never essential that there should be untruth between the immediate parties to a transaction, in order that it may come within the denomination of constructive fraud; in a great many instances it would be impossible to predicate untruth of the wrong-doer's conduct.[1] Constructive fraud is simply a term applied to a great variety of transactions, having little resemblance either in form or in nature, which equity regards as wrongful, to which it attributes the same or similar effects as those which follow from actual fraud, and for which it gives the same or similar relief as that granted in cases of real fraud. It covers different grades of wrong. It embraces contracts illegal, and therefore void at law as well as in equity; transactions voidable in equity because contrary to public policy; and transactions which merely raise a presumption of wrong, and throw upon the

1 It should be carefully observed, however, that in certain instances of constructive fraud, although there is no element of untruth whatever between the two immediate parties to the transaction, — the grantor and grantee, donor and donee, promisor and promisee, — there is such an element, and even perhaps an intention to deceive, towards a third person, not a party to the transaction, who is the one defrauded, and who obtains relief; e. g., a conveyance by A to B with intent to defraud A's creditors. This particular species has, therefore, a strong analogy to actual fraud, and the cases belonging to it are governed, to a great extent, by the rules of actual fraud.

party benefited the burden of proving his innocence and the absence of fault.[2] [a]

§ 923. **Three Principal Classes.**— In the great case of Chesterfield v. Janssen, quoted in the preceding section,[a] Lord Hardwicke, after mentioning actual fraud, added the three other following classes: 1. That apparent from the intrinsic nature and subject of the bargain itself; 2. That presumed from the circumstances and condition of the immediate parties to the transaction; 3. That which is an imposition on third persons not parties to the transaction. As these three groups constitute the constructive fraud of equity, the classification of the great chancellor will be adopted in the discussions of the present section.[1]

§ 924. **First. Constructive Fraud Apparent from the Intrinsic Nature and Subject of the Transaction Itself.**— This class includes three principal subjects: 1. Inadequacy of consideration; 2. Contracts illegal because opposed to statute, or to public policy, or to good morals; and 3. Certain trans-

2 The term "presumptive fraud" is sometimes used as a substitute for "constructive fraud," but improperly. In a great number of instances there is no presumption of fraud, in the true sense of that word; and no such presumption could possibly arise.

1 Before entering upon the subject, two explanatory statements should be made: 1. Although the divisions are in the main sharply distinguished, yet there are a few particular instances which cannot with certainty be allotted to their single appropriate place, since they possess features which are common to two, or even to all, of the classes. Without attempting to be strictly logical, I have pursued an arrangement which is natural and practical. In this matter of order there is great difference among text-writers. 2. A large number of instances belonging to constructive fraud are simply cases of illegal contracts and of personal incapacity,— insanity, infancy, etc., — the rules concerning which are the same at law and in equity, and are found in every treatise upon contracts. Since the main object of the present work is to ascertain when these matters give occasion for the equitable jurisdiction, and to determine the extent of its exercise, it does not seem necessary to enter upon any examination of subjects which properly belong to the general law of contracts. A mere enumeration of those cases of illegality and incapacity which come within the cognizance of equity is all that is needed.

§ 922, (a) The text is cited in Tribou v. Tribou, 96 Me. 305, 52 Atl. 795.

§ 923, (a) § 874, and note.

actions which, in analogy with contracts, equity regards as contrary to public policy, and therefore illegal. I shall specify these various instances with as much explanation as may be needed to exhibit the doctrines peculiar to equity, and shall then describe the equitable jurisdiction which they occasion, and the reliefs, defensive or affirmative, which may be obtained by its means.

§ 925. **I. Inadequacy of Consideration.**— Inadequacy of consideration must ordinarily occur either in conveyances, executed or executory contracts of sale, or in agreements analogous to sale where there is a subject-matter transferred or dealt with, and a price paid or to be paid. It may exist in the price or in the subject-matter, the latter case being the same as exorbitancy of price. It necessarily implies that the price is either too small or too great. The former is the condition ordinarily meant by inadequacy, and is plainly more susceptible of judicial investigation than the other. In both these forms inadequacy of consideration will be considered: 1. By itself free from any other fact; 2. As connected with other inequitable facts and circumstances.[a]

§ 926. **Inadequacy Pure and Simple.**— The rule is well settled that where the parties were both in a situation to form an independent judgment concerning the transaction, and acted knowingly and intentionally, mere inadequacy in the price or in the subject-matter, unaccompanied by other inequitable incidents, is never of itself a sufficient ground for canceling an executed or executory contract. If the parties, being in the situation and having the ability to do so, have exercised their own independent judgment as to the value of the subject-matter, courts of equity should not and will not interfere with such valuation.[1 a] In some of the earlier

[1] Harrison v. Guest, 6 De Gex, M. & G. 424; 8 H. L. Cas. 481; Curson v. Belworthy, 3 H. L. Cas. 742; Merediths v. Saunders, 2 Dow, 514; Gart-

§ 925, (a) This section is cited in Phillips v. Pullen, 45 N. J. Eq. 5, 16 Atl. 9.

§ 926, (a) This portion of the text is quoted in Clark's Appeal, 57 Conn. 565, 19 Atl. 332; and cited in Dick-

decisions, mere inadequacy, either in the price or in the value of the subject-matter, was held to be a sufficient hardship which might defeat the specific performance of an executory contract when set up as a defense.[2] The doctrine, however, is now settled, that *mere* inadequacy — that is, in-

side v. Isherwood, 1 Brown Ch. 559; Griffith v. Spratley, 1 Cox, 383, 388; Collier v. Brown, 1 Cox, 428; Fox v. Mackreth, 2 Cox, 322; 2 Dick. 689; Copis v. Middleton, 2 Madd. 409; Wood v. Abrey, 3 Madd. 417; Murray v. Palmer, 2 Schoales & L. 474, 488; Erwin v. Parham, 12 How. 197; Eyre v. Potter, 15 How. 42; Barribeau v. Brant, 17 How. 43; Slater v. Maxwell, 6 Wall. 268, 273; Warner v. Daniels, 1 Wood. & M. 90, 110; Howard v. Edgell, 17 Vt. 9; Kidder v. Chamberlin, 41 Vt. 62; Bedel v. Loomis, 11 N. H. 74; Lee v. Kirby, 104 Mass. 420, 428; Park v. Johnson, 4 Allen, 259; Osgood v. Franklin, 2 Johns. Ch. 1, 23; 7 Am. Dec. 513; Seymour v. Delancey, 3 Cow. 445; 15 Am. Dec. 270; Worth v. Case, 42 N. Y. 362; Shaddle v. Disborough, 30 N. J. Eq. 370; Ready v. Noakes, 29 N. J. Eq. 497; Wintermute v. Snyder, 3 N. J. Eq. 489; Weber v. Weitling, 18 N. J. Eq. 441; Harris v. Tyson, 24 Pa. St. 347, 360; 64 Am. Dec. 661; Davidson v. Little, 22 Pa. St. 245, 247; 60 Am. Dec. 81; Cummings's Appeal, 67 Pa. St. 404; Shepherd v. Bevin, 9 Gill, 32; Mayo v. Carrington, 19 Gratt. 74; Cribbins v. Markwood, 13 Gratt. 495; 67 Am. Dec. 775; Butler v. Haskell, 4 Desaus. Eq. 651; Juzan v. Toulmin, 9 Ala. 662; 44 Am. Dec. 448; Delafield v. Anderson, 7 Smedes & M. 630; Steele v. Worthington, 2 Ohio, 182; Weld v. Rees, 48 Ill. 428; Scovill v. Barney, 4 Or. 288.

[2] Tilly v. Peers, cited 10 Ves. 301, per Eyre, C. B.; Day v. Newman, 2 Cox, 77, and cited 10 Ves. 300, per Lord Alvanley; Savile v. Savile, 1 P. Wms. 745; 5 Vin. Abr. 516, pl. 25. In the celebrated case of Seymour v. Delancey, 6 Johns. Ch. 222, 224, 225, Chancellor Kent reached this conclusion after a most able and exhaustive review of all the then existing authorities. His decree was reversed by a bare majority of the court of errors, although all the supreme court judges sustained Chancellor Kent's views: Seymour v. Delaneey, 3 Cow. 445; 15 Am. Dec. 270. See also Clitherall v. Ogilvie, 1 Desaus. Eq. 257; Gasque v. Small, 2 Strob. Eq. 72; Clement v. Reid, 9 Smedes & M. 535.

son v. Kempinsky, 96 Mo. 252, 9 S. W. 618; Crum v. Sawyer, 132 Ill. 443, 24 N. E. 956. See, also, Hamblin v. Bishop, 41 Fed. 74; Lathrop v. Tracy, 24 Colo. 382, 51 Pac. 486, 65 Am. St. Rep. 229; Palmour v. Roper, (Ga.) 45 S. E. 790; Herron v. Herron, 71 Iowa, 428, 32 N. W. 407; Brockway v. Harrington, 82 Iowa, 23, 47 N. W. 1013; Griffith v. Milwaukee Harvester Co., 92 Iowa, 634, 61 N. W. 243, 54 Am. St. Rep. 573; Sohan v. Gibson, (Ky.) 80 S. W. 1173; Keagle v. Pessell, 91 Mich. 618, 52 N. W. 58; McDonnell v. De Soto Sav. & Bldg. Ass'n, 175 Mo. 250, 97 Am. St. Rep. 592, 75 S. W. 439; Mueller v. Reukes, (Mont.) 77 Pac. 512; Phillips v. Pullen, 45 N. J. Eq. 5, 16 Atl. 9; affirmed in 45 N. J. Eq. 830, 18 Atl. 849; Diffendarfer v. Dicks, 105 N. Y. 445, 11 N. E. 825; Tillery v. Wren, 86 N. C. 217; Berry v. Hall, 105 N. C. 154, 10 S. E. 903; Babcock v. Wells, (R. I.) 54 Atl. 599; Mathews v. Crockett's Adm'r, 82 Va. 394.

equality in value between the subject-matter and the price — is not a ground for refusing the remedy of specific performance; in order to be a defense, the inadequacy must either be accompanied by other inequitable incidents, or must be so gross as to show fraud. In short, inadequacy as a negative defense, and as an affirmative ground for a cancellation, is governed by one and the same rule.[3] [b] When a sale is made at public auction, conducted in a fair and open manner, with opportunity for real competition, the rule is even stronger, for fraud cannot then be inferred from any inadequacy in the price, without other circumstances showing bad faith.[4] [c] The particular case of selling an ex-

[3] This doctrine was first introduced by Lord Eldon and Sir William Grant, and has since prevailed unchallenged in England, and has generally been adopted in the United States, although not without strong dissent and protest from individual judges: Coles v. Trecothick, 9 Ves. 246; White v. Damon, 7 Ves. 30; Underhill v. Horwood, 10 Ves. 209; and Stilwell v. Wilkins, Jacob, 280, 282, per Lord Eldon; Burrowes v. Lock, 10 Ves. 470, per Sir William Grant; Lowther v. Lowther, 13 Ves. 95, 103, per Lord Erskine; Collier v. Brown, 1 Cox, 428; Griffith v. Spratley, 1 Cox, 383; cited 2 Brown Ch. 179; Bower v. Cooper, 2 Hare, 408; Borell v. Dann, 2 Hare, 440; Stephens v. Hotham, 1 Kay & J. 571; Callaghan v. Callaghan, 8 Clark & F. 374, 401; Abbott v. Sworder, 4 De Gex & S. 448; Seymour v. Delancey, 3 Cow. 445; 15 Am. Dec. 270; Hale v. Wilkinson, 21 Gratt. 75; Booten v. Scheffer, 21 Gratt. 474; Shaddle v. Disborough, 30 N. J. Eq. 370; Ready v. Noakes, 29 N. J. Eq. 497; Rodman v. Zilley, 1 N. J. Eq. 320; Lee v. Kirby, 104 Mass. 420; Western R. R. v. Babcock, 6 Met. 346; Westervelt v. Matheson, 1 Hoff. Ch. 37; Viele v. Troy & B. R. R., 21 Barb. 381; Black v. Cord, 2 Har. & G. 100; White v. Thompson, 1 Dev. & B. Eq. 493; Curlin v. Hendricks, 35 Tex. 225; Harrison v. Town, 17 Mo. 237; Cathcart v. Robinson, 5 Pet. 263; Scovill v. Barney, 4 Or. 288.

[4] White v. Damon, 7 Ves. 30, per Lord Eldon; Borell v. Dann, 2 Hare, 440, 450, per Wigram, V. C.; Ayers v. Baumgarten, 15 Ill. 444; Erwin v. Parham, 12 How. 197 (a debt of two hundred and sixty thousand dollars sold at sheriff's sale for six hundred dollars). An auction sale will be set aside, and *a fortiori* a specific performance will be refused, when there was actual fraud in conducting it, or the buyer controlled it: Byers v. Surget, 19 How. 303, 309.

(b) This portion of the text is quoted in Erwin v. Hedrick, 52 W. Va. 537, 44 S. E. 165; Pennybacker v. Laidley, 33 W. Va. 624, 11 S. E. 39. See, also, Hamilton v. Hamilton, (Ind.) 70 N. E. 535 (specific performance); Conaway v. Sweeney, 24 W. Va. 643 (not a defense to action for specific performance).

(c) See Warner v. Jacob, 20 Ch. Div. 220; Carden v. Lane, 48 Ark. 219, 2 S. W. 709, 3 Am. St. Rep. 228;

pectancy or reversion for an inadequate price, which is in some respects an exception to the foregoing general rule, is considered in the subsequent section.

§ 927. Gross Inadequacy Amounting to Fraud.— Although the actual cases in which a contract or conveyance has been canceled on account of gross inadequacy merely, without other inequitable incidents, are very few, yet the doctrine is settled, by a consensus of decisions and *dicta*, that even in the absence of all other circumstances, when the inadequacy of price is so gross that it shocks the conscience, and furnishes satisfactory and decisive evidence of fraud, it will be a sufficient ground for canceling a conveyance or contract, whether executed or executory. Even then fraud, and not inadequacy of price, is the true and only cause for the interposition of equity and the granting of relief.[1] [a]

[1] Gwynne v. Heaton, 1 Brown Ch. 1, 9, per Lord Thurlow: "An inequality so strong, gross, and manifest that it must be impossible to state it to a man of common sense without producing an exclamation at the inequality of it": Gartside v. Isherwood, 1 Brown Ch. 558, 560; Heathcote v. Paignon, 2 Brown Ch. 167, 173; Griffith v. Spratley, 1 Cox, 383, 388, 389; Fox v. Mackreth, 2 Dick. 689; Evans v. Llewellin, 1 Cox, 333; Stilwell v. Wilkins, Jacob, 280; Gibson v. Jeyes, 6 Ves. 266, 273; Underhill v. Horwood, 10 Ves. 209, 219; Coles v. Trecothick, 9 Ves. 234, 246; Morse v. Royal, 12 Ves. 355, 373; Peacock v. Evans, 16 Ves. 512; Wood v. Abrey, 3 Madd. 417; Borell v. Dann, 2 Hare, 440, 450; Rice v. Gordon, 11 Beav. 265; Cockell v. Taylor, 15 Beav. 103, 115; Summers v. Griffiths, 35 Beav. 27; Falcke v. Gray, 4 Drew. 651; James v. Morgan, 1 Lev. 111 (exorbitancy of price; the well-known horseshoe case, in which a party stipulated to pay a sum resulting from doubling the amount for every nail in the horse's shoes); Howard v. Edgell, 17 Vt. 9; Kidder v. Chamberlin, 41 Vt. 62; Osgood v. Franklin, 2 Johns. Ch. 1, 23; 7 Am. Dec. 513; 14 Johns. 527; Dunn v. Chambers, 4 Barb. 376; Worth v. Case, 42 N. Y. 362; Hodgson v. Farrell, 15 N. J. Eq. 88; Gifford v. Thorn, 9 N. J. Eq. 702; Cleaver v. Green, 107 Ill. 67; Griffith v. Milwaukee Harvester Co., 92 Iowa, 634, 61 N. W. 243, 54 Am. St. Rep. 573; Learned v. Geer, 139 Mass. 31, 29 N. E. 215; Allen v. Martin, 61 Miss. 78; Stroup v. Raymond, 183 Pa. St. 279, 38 Atl. 626, 63 Am. St. Rep. 758; Robinson v. Amateur Ass'n, 14 S. C. 148; Smith v. Perkins, 81 Tex. 152, 16 S. W. 805, 26 Am. St. Rep. 794 (execution sale); Lallance v. Fisher, 29 W. Va. 512, 2 S. E. 775.

(a) This section is quoted in Phillips v. Pullen, 45 N. J. Eq. 5, 16 Atl. 9; Cleere v. Cleere, 82 Ala. 581, 3 South. 107, 60 Am. Rep. 750; Stephens v. Ozbourne, 107 Tenn. 572, 64 S. W. 902, 89 Am. St. Rep. 957; and

§ 928. Inadequacy Coupled with Other Inequitable Incidents. — If there is nothing but mere inadequacy of price, the case must be extreme, in order to call for the interposition of equity. Where the inadequacy does not thus stand alone, but is accompanied by other inequitable incidents, the relief

Eq. 702; Davidson v. Little, 22 Pa. St. 245; 60 Am. Dec. 81; Hamet v. Dundass, 4 Pa. St. 178; Sime v. Norris, 8 Phila. 84; Green v. Thompson, 2 Ired. Eq. 365; Barnett v. Spratt, 4 Ired. Eq. 171; Butler v. Haskell, 4 Desaus. Eq. 651; Juzan v. Toulmin, 9 Ala. 662; 44 Am. Dec. 448; Judge v. Wilkins, 19 Ala. 765; Morriso v. Philliber, 30 Mo. 145; Mitchell v. Jones, 50 Mo. 438; Kelly v. McGuire, 15 Ark. 555; Deaderick v. Watkins, 8 Humph. 520; Coffee v. Ruffin, 4 Cold. 487; Tally v. Smith, 1 Cold. 290; McCormick v. Malin, 5 Blackf. 509; Knobb v. Lindsay, 5 Ohio, 468; Macoupin Co. v. People, 58 Ill. 191; Madison Co. v. People, 58 Ill. 456; Case v. Case, 26 Mich. 484; Byers v. Surget, 19 How. 303; Eyre v. Potter, 15 How. 42, 60; Veazie v. Williams, 8 How. 134.

If the inadequacy may be so excessive as to be ground for a cancellation, it may, of course, be sufficient to defeat the specific performance of an executory contract: Eastman v. Plumer, 46 N. H. 464; Graham v. Pancoast, 30 Pa. St. 89, 97; Powers v. Mayo, 97 Mass. 180; and see cases in preceding note.

The rule is ordinarily stated that the inadequacy must be so gross that it is *conclusive* evidence of fraud. It is so laid down by earlier judges, and by Mr. Kerr. The rule had its origin at a time when fraud was generally inferred by presumptions of law, and often by conclusive presumptions. In the present condition of the law on the subject of fraud, this mode of formulating the rule seems to be erroneous. The principle is now almost universally adopted, that fraud is a *fact*, inferred, like other conclusions of fact, from the evidence; no rule of law can therefore be laid down as to the amount of inadequacy necessary to produce the resulting fraud. Inadequacy of consideration may be evidence of fraud, slight or powerful, according to its amount, and other circumstances. When it is satisfactory and decisive evidence,— when from the proof of inadequacy the court or jury are convinced that fraud as a fact did exist,— then the relief is granted. Instead, therefore, of repeating the usual formula which has been handed down for generations, that the inadequacy must be conclusive evidence of fraud, I have said in the text that it must be satisfactory and decisive evidence; the former mode represented fraud as the result of a conclusive legal presumption; the latter treats it as a conclusion of fact drawn

cited in Davis v. Chicago Dock Co., 129 Ill. 180, 21 N. E. 830; Lundy v. Seymour, 55 N. J. Eq. 1, 35 Atl. 893. See, also, Berry v. Lovi, 107 Ill. 612 (two lots sold *en masse* on execution for $65, value $8,000); Adair v. Cummin, 48 Mich. 375, 12 N. W. 495; Johnson v. Avery, 60 Minn. 262, 62 N. W. 283, 51 Am. St. Rep. 529 (land worth $8,000 sold at partition sale for $1,500); Suffern v. Butler, 19 N. J. Eq. (4 C. E. Green) 202; Howells v. Pacific States Sav., etc., Co., 21 Utah, 45, 60 Pac. 1025, 81 Am. St. Rep. 659.

is much more readily granted. But even here the courts have established clearly marked limitations upon the exercise of their remedial functions, which should be carefully observed. The fact that a conveyance or other transaction was made without professional advice or consultation with

from the evidence, and is therefore in perfect harmony with the theory which now prevails in most, if not all, of the states. The following seems to be the true *rationale* of the doctrines concerning inadequacy of price. Whenever it appears that the parties have knowingly and deliberately fixed upon any price, however great or however small, there is no occasion nor reason for interference by courts, for owners have a right to sell property for what they please, and buyers have a right to pay what they please: See Harris v. Tyson, 24 Pa. St. 347, 360; 64 Am. Dec. 661; Davidson v. Little, 22 Pa. St. 245, 247; 60 Am. Dec. 81. But where there is no evidence of such knowledge, intention, or deliberation by the parties, the disproportion between the value of the subject-matter and the price may be so great as to warrant the court in inferring therefrom the *fact* of fraud. Such a gross inadequacy or disproportion will call for explanation, and will shift the burden of proof upon the party seeking to enforce the contract, and will require him to show affirmatively that the price was the result of a deliberate and intentional action by the parties; and if the facts do prove such action, the fact of fraud will be more readily and clearly inferred. I do not mean that judges and juries are no longer, under any circumstances, aided by legal presumptions in dealing with fraud. The number of instances, however, in which legal presumptions are invoked has been very much lessened; the issue of fraud or no fraud is generally decided in the same manner as any other issue of fact.

The Roman law adopted a fixed standard by which to determine all cases of inadequacy, which was one half of the real value of the subject-matter when that consisted of immovable property. If the price was less than one half of the real value, the seller could compel the buyer to elect either to rescind, restore the thing and take back the price, or to affirm and make up the deficiency: Code, lib. 14, tit. 44, sec. 2; and see Nott v. Hill, 2 Cas. Ch. 120, per Lord Nottingham; Burrowes v. Lock, 10 Ves. 470, 474, per Sir William Grant. A like method is found in the French law. Such arbitrary rules are entirely contrary to the spirit of our law, and our methods of administering justice. If the price was less than one half of the value of the subject-matter, and there were no circumstances showing an intention on the part of the vendor to confer a bounty or favor, the sale would doubtless be set aside. Where the circumstances show that a favor or bounty was intended, the inference of fraud is necessarily destroyed; even a pure gift would be sustained: Whalley v. Whalley, 1 Mer. 436. As to the time of the inadequacy, in order that it may ever be fatal, it must exist at the concluding of the contract. If there was no inadequacy at the making of the contract, none can arise from subsequent events or change of circumstances: Mortimer v. Capper, 1 Brown Ch. 156; Batty v. Lloyd, 1 Vern. 141; Hale v. Wilkinson, 21 Gratt. 75; Lee v. Kirby, 104 Mass. 420. The old

friends, and was improvident, even coupled with an inadequacy of price, is not of itself a sufficient ground for relief, provided the parties were both able to judge and act independently, and did act upon equal terms, and fully understood the nature of the transaction, and there was no undue influence or circumstance of oppression.[1] [a] When the accompanying incidents are inequitable and show bad faith, such as concealments, misrepresentations, undue advantage, oppression on the part of the one who obtains the benefit, or ignorance, weakness of mind, sickness, old age, incapacity,

case of Savile v. Savile, 1 P. Wms. 745, was decided otherwise, but has long been overruled on this point. See, however, the somewhat remarkable case of Willard v. Tayloe, 8 Wall. 557, which was really an instance of the price becoming inadequate by subsequent events. This rule is subject to a certain modification in suits for the specific performance of contracts. If a plaintiff, instead of obtaining his remedy promptly as soon as he was able, should unnecessarily delay, and should not bring a suit until, by his delay or change of circumstances, the price or subject-matter had become inadequate, a specific enforcement might and generally would be refused:[b] Booten v. Scheffer, 21 Gratt. 474; Whitaker v. Bond, 63 N. C. 290; Hudson v. King, 2 Heisk. 560; McCarty v. Kyle, 4 Cold. 348.

[1] Harrison v. Guest, 6 De Gex, M. & G. 424; 8 H. L. Cas. 481; Merediths v. Saunders, 2 Dow, 514; Blackie v. Clark, 15 Beav. 595; Denton v. Donner, 23 Beav. 285, 291; Toker v. Toker, 31 Beav. 629; Dunn v. Chambers, 4 Barb. 376; Green v. Thompson, 2 Ired. Eq. 365; Juzan v. Toulmin, 9 Ala. 662; 44 Am. Dec. 448; Scovill v. Barney, 4 Or. 288. Harrison v. Guest, 6 De Gex, M. & G. 424, 8 H. L. Cas. 481, is a very illustrative case. An old man of seventy-one, bedridden, illiterate, without any independent professional advice, and without consulting his friends or relatives, conveyed property worth four hundred pounds, for the consideration of being provided with board and lodging during the rest of his life. He lived only six weeks after the conveyance; his representatives sought to have the conveyance set aside. The evidence showed that he had refused to employ professional advice for himself, that he was able to understand the nature of the transaction, and that there were no circumstances of oppression; the court held that there was not sufficient ground to impeach the conveyance. In Scovill v. Barney, 4 Or. 288, the court said that inadequacy of consideration or mental weakness, standing alone, will not warrant the interposition of equity; but when both are combined, relief will be granted. It is, perhaps, not possible to reconcile this naked proposition with the authorities.

(b) Quoted in Henderson v. Beatty, (Iowa) 99 N. W. 716.

(a) The text is quoted in Pennybacker v. Laidley, 33 W. Va. 624, 11 S. E. 39.

pecuniary necessities, and the like, on the part of the other, these circumstances, combined with inadequacy of price, may easily induce a court to grant relief, defensive or affirmative. It would not be correct to say that such facts constitute an absolute and necessary ground for equitable interposition. They operate to throw the heavy burden of proof upon the party seeking to enforce the transaction or claiming the benefits of it, to show that the other acted voluntarily, knowingly, intentionally, and deliberately, with full knowledge of the nature and effects of his acts, and that his consent was not obtained by any oppression, undue influence, or undue advantage taken of his condition, situation, or necessities. If the party upon whom the burden rested should succeed in thus showing the perfect good faith of the transaction, it would be sustained; if he should fail, equity would grant such relief, affirmative or defensive, as might be appropriate.[2 b] There are cases, however, which

[2] Deane v. Rastron, 1 Anstr. 64; Lewis v. Lord Lechmere, 10 Mod. 503; Clarkson v. Hanway, 2 P. Wms. 203; Ardglasse v. Muschamp, 1 Vern. 236; Gartside v. Isherwood, 1 Brown Ch. 558; Evans v. Llewellin, 1 Cox, 333; Morse v. Royal, 12 Ves. 355, 373; Pickett v. Loggon, 14 Ves. 231; Murray v. Palmer, 2 Schoales & L. 474, 486; Falkner v. O'Brien, 2 Ball & B. 220; Griffiths v. Robins, 3 Madd. 191; Wood v. Abrey, 3 Madd. 417; Willan v. Willan, 2 Dow, 274; Collins v. Hare, 2 Bligh, N. S., 106; McDiarmid v. McDiarmid, 3 Bligh, N. S., 374; Smith v. Kay, 7 H. L. Cas. 750; Dent v. Bennett, 4 Mylne & C. 269, 273; Gibson v. Russell, 2 Younge & C. Ch. 104; Prideaux v. Lonsdale, 1 De Gex, J. & S. 433; Tate v. Williamson, L. R. 2 Ch. 65; 1 Eq. 528; Rhodes v. Bate, L. R. 1 Ch. 252; Sturge v. Sturge, 12 Beav. 229, 244; Cockell v. Taylor, 15 Beav. 103, 115; Cooke v. Lamotte, 15 Beav. 234; Grosvenor v. Sherratt, 28 Beav. 659; Summers v. Griffiths, 35 Beav. 27; Longmate v. Ledger, 2 Giff. 157; Powers v. Hale, 25 N. H. 145; Howard v. Edgell, 17 Vt. 9; Mann v. Betterly, 21 Vt. 326; Osgood v. Franklin, 2 Johns. Ch. 1, 24; 7 Am. Dec. 513; Hall v. Perkins, 3 Wend. 626; Kloepping v. Stellmacher, 21 N. J. Eq. 328 (mistake and inadequacy in a sheriff's sale); Graham v. Pancoast, 30 Pa. St. 89 (age of a party); Henderson v. Hays, 2 Watts, 148, 151 (intemperance and weakened mind); Campbell v. Spencer, 2 Binn. 133 (ditto); Todd v. Grove, 33 Md. 188; Brooke v. Berry,

(b) The text is quoted in Stephens v. Ozbourne, 107 Tenn. 572, 64 S. W. 902, 89 Am. St. Rep. 957; Stringfellow v. Hanson, 25 Utah, 480, 71 Pac. 1052; Flook v. Armentrout's Adm'r, 100 Va. 638, 42 S. E. 686; and cited in Cleere v. Cleere, 82 Ala. 581, 3 South. 107, 60 Am. Rep. 750;

theoretically call for the interposition of equity on account of such circumstances of bad faith, as well as other forms of fraud, but in which no relief can actually be given, because the contract — conveyance or settlement — being *executed,* the parties cannot be restored to their original

2 Gill, 83; McKinney v. Pinckard, 2 Leigh, 149; 21 Am. Dec. 601; Clitherall v. Ogilvie, 1 Desaus. Eq. 257 (one party young and inexperienced, the other mature and cunning); Neeley v. Anderson, 2 Strob. Eq. 262; Gasque v. Small, 2 Strob. Eq. 72; Bunch v. Hurst, 3 Desaus. Eq. 273; 5 Am. Dec. 551; Maddox v. Simmons, 31 Ga. 512; Wormack v. Rogers, 9 Ga. 60; Blackwilder v. Lovelass, 21 Ala. 371 (undue advantage of party's pecuniary necessities, — an instructive case); Harrison v. Town, 17 Mo. 237; Holmes v. Fresh, 9 Mo. 200; Cadwallader v. West, 48 Mo. 483 (physician and patient); Mitchell v. Jones, 50 Mo. 438 (mistake and inadequacy in a partition sale); Newland v. Gaines, 1 Heisk. 720; Benton v. Shreeve, 4 Ind. 66; Modisett v. Johnson, 2 Blackf. 431; McCormick v. Malin, 5 Blackf. 509; Fish v. Leser, 69 Ill. 394 (ignorance and fear of one party, concealment of value and undue advantage by the other, — a very instructive case); Cathcart v. Robinson, 5 Pet. 263; Byers v. Surget, 19 How. 303.

When the inadequacy appears in a contract between a parent and child, or between other near relatives, the circumstances may be such that all suspicion of fraud or hardship is removed by the fact of relationship. This would especially be so if the one obtaining the benefit, and from whom the inadequate consideration comes, is a person who would naturally be

Tribou v. Tribou, 96 Me. 305, 52 Atl. 795. See, also, Graffan v. Burgess, 117 U. S. 184, 6 Sup. Ct. 686, and cases cited (a good discussion); Fahrney v. Kelly, 102 Fed. 403; Parker v. Glenn, 72 Ga. 637; Walker v. Shepard, (Ill.) 71 N. E. 422; Hardy v. Dyas, 203 Ill. 211, 67 N. E. 852; Davis v. Chicago Dock Co., 129 Ill. 180, 21 N. E. 830 (gross inadequacy in judicial sale, with irregularities and trifling circumstances indicating unfairness); Smith v. Huntoon, 134 Ill. 24, 24 N. E. 971, 23 Am. St. Rep. 646 (same); Lurton v. Rodgers, 139 Ill. 214, 29 N. E. 866, 32 Am. St. Rep. 214 (execution sale); Sioux City, etc., Land Co. v. Walker, 78 Iowa, 476, 43 N. W. 294 (execution sale); Wilkie v. Sassen, (Iowa) 99 N. W. 124; Bean v. Haffendorfer, 84 Ky. 685, 2 S. W. 556, 3 S. W. 138; Ratterman v. Campbell, (Ky.) 80 S. W. 1155; Rogers & B. H. Co. v. Cleveland B. Co., 132 Mo. 442, 34 S. W. 57, 53 Am. St. Rep. 494, 31 L. R. A. 335; Cole Co. v. Madden, 91 Mo. 585, 4 S. W. 397 (execution sale); Dickson v. Kempinsky, 96 Mo. 252, 9 S. W. 618 (contract with person of weak mind); Holdsworth v. Shannon, 113 Mo. 508, 21 S. W. 85, 35 Am. St. Rep. 719 (sheriff's sale); Norris v. Clark, (N. H.) 57 Atl. 334; Stroup v. Raymond, 183 Pa. St. 279, 38 Atl. 626, 63 Am. St. Rep. 758; Haskins v. Wallet, 63 Tex. 213 (the price paid did not exceed one-twentieth of the value, and the court held that very slight circumstances in addition would be sufficient to avoid the sale).

position.[3] Some special rules as to the effect of a false statement of the consideration in a conveyance, and as to the evidence admissible to impeach or to sustain the consideration recited, are collected in the foot-note.[4]

a recipient of the other party's bounty:[c] Shepherd v. Bevin, 9 Gill, 32, 39, per Frick, J.; Hays v. Hollis, 8 Gill, 357; Haines v. Haines, 6 Md. 435; White v. Thompson, 1 Dev. & B. Eq. 493; Fripp v. Fripp, 1 Rice Eq. 84. On the other hand, in transactions between the same class of parties, the circumstances may be such as to raise a strong inference, if not even a presumption of bad faith. The fact of inadequacy in a contract between near relatives, and especially when the party obtaining the benefit is in a position of natural superiority and command over the other, — as a father and child, an elder brother and younger sister, — might raise a strong inference and even presumption of undue influence, and thus call for the interposition of a court: Whelan v. Whelan, 3 Cow 537; and see Callaghan v. Callaghan, 8 Clark & F. 374. The questions concerning inadequacy of price accompanied by other inequitable incidents cannot, in practice, be easily separated from the more comprehensive subjects of undue influence and fiduciary relations, and will be more fully illustrated in the subsequent paragraphs which treat of those topics.

3 The most striking illustration is that of marriage settlements, since the parties cannot be unmarried: North v. Ansell, 2 P. Wms. 619.

4 See Kerr on Fraud, 191. A false statement of the consideration does not necessarily vitiate a deed: Bowen v. Kirwan, Lloyd & G. 47. But it may, in some cases, invalidate the entire transaction: Bowen v. Kirwan, Lloyd & G. 47; Uppington v. Bullen, 2 Dru. & War. 184; Gibson v. Russell, 2 Younge & C. Ch. 104. In general, where no consideration at all is expressed in a deed, a party may prove the actual consideration to support it; and where a consideration is expressed, a party may prove any other actual consideration, if not wholly inconsistent with that stated: Hartopp v. Hartopp, 17 Ves. 184, 192; Clifford v. Turrell, 1 Younge & C. Ch. 138; on appeal, 14 L. J. Ch. 390; Nixon v. Hamilton, 2 Dru. & Walsh, 364, 387. To this general rule there is the limitation that, where the consideration expressed in a deed is impeached on account of fraud, the party claiming under the conveyance cannot sustain it by proving another consideration different from that stated: Clarkson v. Hanway, 2 P. Wms. 203; Bridgman v. Green, 2 Ves. Sr. 627; Watt v. Grove, 2 Schoales & L. 492, 501; Willan v. Willan, 2 Dow, 274. If a pecuniary consideration is stated in the deed, and is impeached, the party cannot show and rely on the consideration of blood, or love and affection: Clarkson v. Hanway, 2 P. Wms. 203; Willan v. Willan, 2 Dow, 274.[d] If the recitals state a pecuniary consideration, and the operative part mentions love and affection as being in part the consideration of the deed, this discrepancy is not sufficient to raise a presumption of fraud: Filmer v. Gott, 4 Brown Parl. C. 230; Whalley v. Whalley, 3 Bligh, 1, 13. If

(c) John's Appeal, 102 Pa. St. 59 (husband and wife). See, also, *post*, §§ 962, 963, and notes.

(d) See, however, Carty v. Connolly, 91 Cal. 15, 27 Pac. 599.

§ 929. II. Illegal Contracts and Transactions.—In this subdivision I shall merely enumerate the most important kinds of illegal contracts and transactions which *may* permit the interposition of equity, with such very brief description as shall seem necessary. The general subject of illegality in the terms or the consideration, with the special rules which define its extent, limitations, and exceptions, will be found in treatises upon contracts, to which the reader is referred. The equitable jurisdiction which may be exercised on the occasion of such transactions is described in the following subdivision. It is sufficient at present to say that a court of equity does not aid a party to *enforce* an illegal transaction which is still executory, in pursuance of the principle embodied in the maxim, *Ex turpi causa non oritur actio.* It may, however, grant the affirmative relief of cancellation or injunction in such a condition, when the defense would not be available at law. If the contract has been executed by the payment of the money, conveyance or delivery of the property, and the parties have equally participated in the wrong, and are equally in fault, the court, unless compelled to do so by statute, does not generally interpose its aid.

the transaction on which a deed is represented to be based, and the consideration for which it purports to be given, are stated untruly, and this untruth would operate fraudulently, the instrument may lose all of its validity in equity, even though it cannot be attacked at law: Watt v. Grove, 2 Schoales & L. 492, 504. A deed between parties, one of whom is subject to the influence of the other, should contain a fair and truthful statement of the transaction. If the statement of the consideration is untrue, the instrument cannot be upheld. The party seeking to uphold it cannot prove, in order to sustain it, that the actual consideration was partly that represented in the deed and partly something else, since this would be inconsistent with the consideration stated on the face of the instrument: Ahearne v. Hogan, Dru. 310; Uppington v. Bullen, 2 Dru. & War. 184; Clifford v. Turrell, 1 Younge & C. Ch. 138; Gibson v. Russell, 2 Younge & C. Ch. 104. A statement of a consideration where there was actually none, or a wrong statement of the consideration, or other suspicious circumstances, may shift the burden of proof from the party attacking a deed to the one sustaining it: Watt v. Grove, 2 Schoales & L. 492, 502; Griffiths v. Robins, 3 Madd. 191; Gibson v. Russell, 2 Younge & C. Ch. 104; Ahearne v. Hogan, Dru. 310; Harrison v. Guest, 6 De Gex, M. & G. 424; 8 H. L. Cas. 481.

The maxims, *In pari delicto, potior est conditio possidentis,* and *Potior est conditio defendentis,* are then controlling. Affirmative relief is sometimes prescribed by statute, as in usurious and gaming contracts. When the parties are not *in pari delicto,* equity may give affirmative relief to the one who is comparatively innocent.

§ 930. 1. Contracts Illegal because Contrary to Statute.— I place under this head those few instances in which the illegality is wholly or chiefly the result of statutory prohibition. Very many of the contracts illegal at the common law, because opposed to public policy or to good morals, have also been brought within the domain of positive legislation in the various states; and a very few which are illegal by the English common law are not generally made so by the law of this country. The important species which fall under the present head are usurious, gaming, and smuggling contracts.[a] The policy of prohibiting usury has been abandoned, and the statutes concerning it repealed, in England and in several of the American states. In some of the states which still adhere to the policy, the usurious contract itself, the instrument by which it is evidenced, and all its securities, are declared to be utterly void; in others, the stipulation for the usurious excess over the legal interest is alone made void; while in others a further penalty is added to this usurious excess.[1] Although at the common law certain kinds of contracts based upon wagers were not unlawful, while those made upon a gaming consideration were illegal, the modern legislation of England and of the United States declares all gaming and wagering agreements, and the instruments by which they are evidenced or secured, to be

[1] Waller v. Dalt, 1 Ch. Cas. 276; 1 Dick. 8; Barker v. Vansommer, 1 Brown Ch. 149; Scott v. Nesbit, 2 Brown Ch. 641; 2 Cox, 183; Bosanquett v. Dashwood, Cas. t. Talb. 38; Fanning v. Dunham, 5 Johns. Ch. 122, 142, 143; 9 Am. Dec. 283.

(a) See, also, § 402.

illegal, null, and void.[2][b] The subject of smuggling belongs to the exclusive province of the national legislature, and forms a part of the customs revenue system. All contracts entered into in the course of smuggling operations, or made

[2] Rawden v. Shadwell, Amb. 269; Woodroffe v. Farnham, 2 Vern. 291; Da Costa v. Jones, Cowp. 729; Robinson v. Bland, 2 Burr. 1077; Skipwith v. Strother, 3 Rand. 214; Dade v. Madison, 5 Leigh, 401; Wilkinson v. Tousley, 16 Minn. 299; 10 Am. Rep. 139. The ordinary so-called time contracts purporting to be for the purchase of stocks, but in reality wholly speculative, and without any intention to sell or buy specific stocks, but only to gain or lose the difference resulting from the rise or fall of the market price, are clearly within the definition "gaming contracts," and therefore void.[c] If they are made in good faith, with the intention of actually selling and buying certain specific stocks to be obtained by the vendor in the future, they have no element of invalidity:[d] See Story v. Salomon, 71 N. Y. 420; Brua's Appeal, 55 Pa. St. 294; Smith v. Bouvier, 70 Pa. St. 325; Kirkpatrick v. Bonsall, 72 Pa. St. 155; Maxton v. Gheen, 75 Pa. St. 166; Cole v. Milmine, 88 Ill. 349. An offer to pay a premium to the owner of a horse that shall "make the quickest time" at an agricultural fair, etc., is not opposed to public policy: Alvord v. Smith, 63 Ind. 58.[e] In Harris v. White, 81 N. Y. 532, and cases cited, the meaning of "bet," "wager," and "stakes" is determined.

(b) See, also, Kuhl v. Gally Universal Press Co., 123 Ala. 452, 26 South. 535, 82 Am. St. Rep. 135, citing many cases (contract of sale of a gambling device or machine); Beer v. Landman, 88 Tex. 450, 31 S. W. 805; and the interesting case of Barclay v. Pearson, [1893] 2 Ch. 154, holding that a "missing word competition" was a lottery, and that the court would not administer or distribute the fund contributed by the competitors.

(c) Embrey v. Jemison, 131 U. S. 336, 9 Sup. Ct. 776; Board of Trade v. O'Dell Commission Co., 115 Fed. 74 ("bucket shop"); Board of Trade v. Donovan Commission Co., 121 Fed. 1012 (no injunction against using board of trade quotations); Lane v. Logan Grain Co., (Mo. App.) 79 S. W. 722; Jamieson v. Wallace, 167 Ill. 388, 59 Am. St. Rep. 302, 47 N. E. 762; Baxter v. Deneen, (Md.) 57 Atl. 601 (bucket shop); Harvey v. Merrill, 150 Mass. 1, 22 N. E. 49, 15 Am. St. Rep. 159, 5 L. R. A. 200; Flagg v. Baldwin, 38 N. J. Eq. 219, 48 Am. Rep. 308; Garsed v. Sternberger, (N. C.) 47 S. E. 603; Stewart v. Parnell, 147 Pa. St. 523, 23 Atl. 838, 29 Wkly. Notes Cas. 537; McGrew v. City Produce Exchange, 85 Tenn. 572, 4 S. W. 38, 4 Am. St. Rep. 771.

(d) Irwin v. Williar, 110 U. S. 510, 4 Sup. Ct. 160; Lehman v. Feld, 37 Fed. 852; Boyd v. Hanson, 41 Fed. 174; Board of Trade v. Christie Grain & Stock Co., 116 Fed. 944; Clay v. Allen, 63 Miss. 426; Jamieson v. Wallace, 167 Ill. 388, 47 N. E. 762, 59 Am. St. Rep. 302.

(e) Business of training horses for racing purposes, legal, but betting on races illegal: Central Trust & S. D. Co., 112 Ky. 606, 66 S. W. 421, 99 Am. St. Rep. 317.

for the purpose of aiding, abetting, or procuring smuggling, are null and void.[3] [f]

§ 931. 2. Transactions Illegal because Opposed to Public Policy.— A. Contracts Interfering with the Freedom of Marriage.— The law of England and our own law regard the marriage relation as the very foundation of society. Since the true conception of marriage assumes and requires a perfectly *free* consent and union of the two spouses, equity has, from its earliest periods, treated all agreements, executory or executed, between the immediate parties or between third persons, which might directly or indirectly interfere in any degree with this absolute freedom, either by promoting or restraining marriage, as opposed to public policy and illegal, and has therefore declared them null and void. Although a court of equity will apply this principle in whatever kind of agreement the illegality may appear, yet there are certain well-defined forms of these contracts which have received judicial condemnation. The following are the most important: Marriage brokerage contracts, by which one party agrees, for a consideration, to negotiate or procure a marriage for the other. Courts of equity have condemned these agreements with an especial emphasis. They are absolutely void, without the slightest regard to the situation of the spouses or the fitness of the marriage between them in the particular case. They are so utterly null that they cannot be ratified and confirmed; and it has even been held that money paid in pursuance of them may be recovered back.[1] [a] Contracts in restraint of marriage: While mutual

[3] Adams's Equity, 360 (175).

[1] These contracts seem to have been quite frequent at an early day: Hall v. Potter, Show. Parl. C. 76; 3 Lev. 411 (cannot be confirmed); Roche v.

(f) A contract in violation of the statute of another state, and to be executed wholly within that state, will not be enforced, nor can a bill be sustained for accounting of the profits of such contract when executed: Chambers v. Church, 14 R. I. 398, 51 Am. Rep. 410.

(a) The text is cited to this effect in Duval v. Wellman, 124 N. Y. 158,

promises by a man and a woman to marry each other are, of course, valid, although they are thereby prevented from marrying others, agreements not to marry at all, or not to marry any one unless it be the promisee, without any corresponding stipulation by that party, as well as more general forms of contract restraining the freedom and power of marriage, are void.[2 b] Rewards for marriages: Agreements to pay a reward or compensation to a parent or guardian, for procuring or consenting to a marriage with his daughter or ward, are clearly void.[3] Secret contracts in fraud of marriage: Secret agreements of any kind or form, concealed from one or both of the spouses, the object of which is to promote a particular marriage, or to induce one or both the parties to enter into a marriage, are plainly opposed to public policy and void.[4] Secret agreements to

O'Brien, 1 Ball & B. 330, 358 (ditto); Smith v. Bruning, 2 Vern. 392 (money recovered back); Goldsmith v. Bruning, 1 Eq. Cas. Abr. 89 (ditto); Cole v. Gibson, 1 Ves. Sr. 503, 506, 507; Roberts v. Roberts, 3 P. Wms. 66, 74; Arundel v. Trevillian, 1 Ch. Rep. 87; Law v. Law, Cas. t. Talb. 140, 142; Drury v. Hooke, 1 Vern. 412; Vauxhall Bridge Co. v. Spencer, Jacob, 64, 67; Williamson v. Gihon, 2 Schoales & L. 357; Boynton v. Hubbard, 7 Mass. 112; and see 2 Lead. Cas. Eq., 4th Am. ed., 494–499, note to Scott v. Tyler.

2 Lowe v. Peers, 4 Burr. 2225; Baker v. White, 2 Vern. 215; Key v. Bradshaw, 2 Vern. 102; Woodhouse v. Shepley, 2 Atk. 535, 539, 540; Atkins v. Farr, 1 Atk. 287; Cock v. Richards, 10 Ves. 429; England v. Downs, 2 Beav. 522; Phillips v. Medbury, 7 Conn. 568; Conrad v. Williams, 6 Hill, 444; see 2 Lead. Cas. Eq. 494–499.

3 Keat v. Allen, 2 Vern. 588; Stribblehill v. Brett, 2 Vern. 445; Peyton v. Bladwell, 1 Vern. 240; Crawford v. Russell, 62 Barb. 92.

4 Such cases must depend largely upon their own special circumstances: Gale v. Lindo, 1 Vern. 475; Redman v. Redman, 1 Vern. 348; Neville v. Wilkinson, 1 Brown Ch. 543; Palmer v. Neave, 11 Ves. 165. In McClurg v. Terry, 21 N. J. Eq. 225, a marriage entered into in sport was declared void. Of the same general character with the contracts mentioned in the text are those contracts secretly made for the purpose of rendering nugatory

26 N. E. 343, where it was held that money so paid could be recovered. But see, as to recovery of money paid, White v. Equitable, etc., Union, 76 Ala. 251, 52 Am. Rep. 325. To the effect that such contracts are illegal, see Morrison v. Rogers, 115 Cal. 252, 46 Pac. 1072, 56 Am. St. Rep. 95.

(b) White v. Equitable Nuptial Benefit Union, 76 Ala. 251, 52 Am. Rep. 325.

marry between a man and woman, for the purpose of deceiving or misleading a parent or relative of one of the parties, have been declared void.[5] Analogous to marriage brokerage contracts, and depending upon the same reasons, are agreements to pay a compensation to a person for using his influence with a testator to procure a will, devise, or bequest to be made in favor of the promising party.[6]

§ 932. Agreements for a Separation.—Whatever may have been the opinion at an earlier day, it is now thoroughly settled that agreements for a separation between husband and wife, if valid in form, made upon a sufficient consideration, and executed by parties legally capable of contracting, are not illegal; they will even be specifically enforced in equity, by decreeing the execution of the proper deed, and by restraining either party from personally interfering with the other in violation of their covenants.[1 a] The agreement,

the stipulations of marriage agreements, or the acts agreed to be done in a negotiation for a marriage, or for the purpose of defrauding either or both the spouses or their relatives: See Peyton v. Bladwell, 1 Vern. 240; Turton v. Benson, 1 P. Wms. 496; Scott v. Scott, 1 Cox, 366; Dalbiac v. Dalbiac, 16 Ves. 116, 124; Morris v. Clarkson, 1 Jacob & W. 107; Lamlee v. Hanman, 2 Vern. 499; Barret v. Wells, Prec. Ch. 131; Jones v. Martin, 3 Anstr. 882; Randall v. Willis, 5 Ves. 261; McNeill v. Cahill, 2 Bligh, 228; Stocken v. Stocken, 4 Mylne & C. 95; Bell v. Clarke, 25 Beav. 437; Kerr on Fraud, 216, 217.

5 Woodhouse v. Shepley, 2 Atk. 536; Cock v. Richards, 10 Ves. 429.

6 Debenham v. Ox, 1 Ves. Sr. 276. While such contracts are clearly void, agreements between the heirs or near relatives of a testator, in anticipation of a will, stipulating to share equally the property which may be bequeathed to them, are valid, and are rather favored by courts of equity: Beckley v. Newland, 2 P. Wms. 182; Harwood v. Tooke, 2 Sim. 192; Wethered v. Wethered, 2 Sim. 183.

1 Wilson v. Wilson, 1 H. L. Cas. 538; 5 L. H. Cas. 40; 14 Sim. 405; Fletcher v. Fletcher, 2 Cox, 99; Sanders v. Rodway, 22 L. J. Ch., N. S., 230; Gibbs v. Harding, L. R. 5 Ch. 336; 8 Eq. 490; Besant v. Wood, L. R. 12 Ch. Div. 605; Hunt v. Hunt, 4 De Gex, F. & J. 221, 235; McCrocklin v.

(a) See Bailey v. Dillon, (Mass.) 71 N. E. 538. Clark v. Fosdick, 118 N. Y. 14, 22 N. E. 1111, 16 Am. St. Rep. 733. 6 L. R. A. 132; Com. v. Richards, 131 Pa. St. 209, 18 Atl. 1007; Buttlar v. Buttlar, 57 N. J. Eq. 645, 42 Atl. 755, 73 Am. St. Rep. 648 (agreement to pay money for wife's support will be enforced in equity); but see *contra*, Baum v.

however, must be made upon a valuable consideration accruing to the husband's benefit;[2] and under the strict common-law rules, a third person must be added as a trustee and contracting party on behalf of the wife, so that the stipulations on her side may be binding.[3]

§ 933. B. Conditions and Limitations in Restraint of Marriage. — Intimately connected with contracts in restraint of marriage, and depending upon the same principle, are conditions and limitations operating in like manner annexed to or forming part of testamentary dispositions, or of family settlements, or similar gifts. Although the subject, in some of its special applications and phases, is still more confused and uncertain than perhaps any other branch of equity jurisprudence, yet certain general rules have been established beyond all further controversy.[1] Two propositions lie at the foundation, and are recognized by all the authorities: 1. It is ordinarily said that all conditions annexed to gifts which prohibit marriage *generally* and absolutely are

McCrocklin, 2 B. Mon. 370. See, *per contra*, Aylett v. Ashton, 1 Mylne & C. 105; Duke of Bolton v. Williams, 2 Ves. 138.[b]

[2] Wilson v. Wilson, 1 H. L. Cas. 538; 5 H. L. Cas. 40; 14 Sim. 405; Wellesley v. Wellesley, 10 Sim. 256; Stephens v. Olive, 2 Brown Ch. 90; Earl of Westmeath v. Countess of Westmeath, Jacob, 126, 141; Elworthy v. Bird, 2 Sim. & St. 372; Hobbs v. Hull, 1 Cox, 445.

[3] Hope v. Hope, 26 L. J. Ch. 417; Wilkes v. Wilkes, 2 Dick. 791; Vansittart v. Vansittart, 4 Kay & J. 62. Such additional party would clearly be unnecessary in many states of this country.[c]

[1] The direct civil-law origin of these rules, and also the difference between certain dogmas of the civil law and the corresponding doctrines of English equity, are fully explained in Stackpole v. Beaumont, 3 Ves. 89, 96, per Lord Loughborough; and in Scott v. Tyler, 2 Brown Ch. 431; 2 Dick. 712, per Lord Thurlow.

Baum, 109 Wis. 47, 85 N. W. 122, 83 Am. St. Rep. 854, 53 L. R. A. 650. An agreement by a wife to relinquish all right of support in case a divorce is granted is illegal: Birch v. Anthony, 109 Ga. 349, 34 S. E. 561, 77 Am. St. Rep. 379. A contract to allow a wife to procure a divorce is illegal and void, and neither party can be relieved therefrom after a divorce is granted: Racey v. Racey, (Okl.) 73 Pac. 305. See, also, § 935, notes.

(b) See § 402, last note.

(c) Commonwealth v. Richards, 131 Pa. St. 209, 18 Atl. 1007.

void and inoperative. This, however, is a very inaccurate mode of statement, since a condition *precedent* annexed to a devise of land, even if in complete restraint, will, if broken, be operative and prevent the devise from taking effect. With this limitation all conditions in general restraint are void. Also, if a condition is not in absolute restraint, but is of such form that it will *probably* operate as a general prohibition, it is, under the same limitation, void.[2] 2. On the other hand, conditions annexed to testamentary or other gifts, in partial and reasonable restraint of marriage, are valid and operative; such, for example, as that a devisee or legatee should not marry under age, or should not marry without the consent of parents, guardians, or trustees, or should not marry a particular person, or a person belonging to a particular religious communion.[3] [b] In the application

[2] Scott v. Tyler, 2 Brown Ch. 431; 2 Dick. 712; 2 Lead. Cas. Eq.. 4th Am. ed., 429, 475; Keily v. Monck, 3 Ridg. App. 205, 244, 247, 261; Hervey v. Aston, 1 Atk. 361; Stackpole v. Beaumont, 3 Ves. 89, 95; Rishton v. Cobb, 9 Sim. 615, 619; Morley v. Rennoldson, 2 Hare, 570; Connelly v. Connelly, 7 Moore P. C. C. 438; Long v. Dennis, 4 Burr. 2052; Maddox v. Maddox, 11 Gratt. 804; Waters v. Tazewell, 9 Md. 291. The same is true of other conditions opposed to public policy, annexed to testamentary gifts; e. g., preventing husband and wife from living together, tending to procure a divorce, and the like: Tennant v. Braie, Toth. 141; Brown v. Peck, 1 Eden, 140; Wren v. Bradley, 2 De Gex & S. 49;[a] but see Cooper v. Remsen, 5 Johns. Ch. 459, which hardly seems to be sustained by the weight of authority. A condition that a legacy to a daughter should cease if she became a nun has been held valid, although there was no gift over: In re Dickson's Trusts, 1 Sim., N. S., 37, 46; Clavering v. Ellison, 8 De Gex, M. & G. 662; 7 H. L. Cas. 707.

[3] Scott v. Tyler, 2 Brown Ch. 431; 2 Dick. 712; 2 Lead. Cas. Eq., 4th Am. ed., 429, 475; Stackpole v. Beaumont, 3 Ves. 89; Younge v. Furse, 8 De Gex, M. & G. 756; Allen v. Jackson, L. R. 1 Ch. Div. 399; reversing L. R. 19 Eq. 631; Desbody v. Boyville, 2 P. Wms. 547; Jervis v. Duke, 1 Vern. 19; Randal v. Payne, 1 Brown Ch. 55; Clarke v. Parker, 19 Ves. 1; Dashwood v. Bulkley, 10 Ves. 229; Lloyd v. Branton, 3 Mer. 108; Haughton v. Haughton, 1 Molloy, 611; Duggan v. Kelly, 10 I. R. Eq. 295; Collier v. Slaughter, 20 Ala. 263; Graydon v. Graydon, 23 N. J. Eq. 229.

(a) See, also, Hawke v. Enyart, 30 Nebr. 149, 27 Am. St. Rep. 391, 46 N. W. 422.

(b) Jenner v. Turner, 16 Ch. Div. 188.

of these two propositions, certain special rules have been settled with more or less certainty, depending upon the facts of the condition being precedent or subsequent, of there being, or not, a gift over upon its breach, and of the original gift to which the condition is annexed being one of real or of personal estate.[4] The system which has been developed

[4] I add a brief summary of these rules, together with some of the most important decisions illustrating them. There is, however, a very great conflict of judicial opinion with respect to their nature, extent, and operation. Some of the ablest judges have confessed that, amid all the uncertainty resulting from a comparison of the decisions, each case must, to a great extent, depend upon its own circumstances.

Whether there is or is not a gift over.— If a condition is in absolute restraint, and therefore void, it could make no difference whether there was a gift over or not. Where there is a gift over, and the condition is partial and reasonable, the gift over takes effect on a breach of the condition: Clarke v. Parker, 19 Ves. 1, 13; Lloyd v. Branton, 3 Mer. 108, 117, 119; Stratton v. Grymes, 2 Vern. 357; Barton v. Barton, 2 Vern. 308; Wheeler v. Bingham, 3 Atk. 364, 367; Malcolm v. O'Callaghan, 2 Madd. 349, 353; see Poole v. Bott, 11 Hare, 33. Where there is no gift over, the condition, although only partial, may be inoperative and merely *in terrorem*, and this seems to be the settled rule whenever the condition is annexed to a bequest of personal estate: Hervey v. Aston, 1 Atk. 361, 375, 377; Reynish v. Martin, 3 Atk. 330; Wheeler v. Bingham, 3 Atk. 364; Pullen v. Ready, 2 Atk. 587; Hicks v. Pendarvis, Freem. Ch. 41; Long v. Dennis, 4 Burr. 2052, 2055; Parsons v. Winslow, 6 Mass. 169; 4 Am. Dec. 107.

Gifts of real or of personal estate.— In devises and other gifts of real estate, courts of equity follow the rules of the common law concerning the operation of conditions generally, and their effects upon the vesting and divesting of estates. In gifts of real estate, therefore, when a condition in restraint of marriage is *precedent*, and is broken, it prevents the estate from vesting at all, whether the restraint be absolute or partial, and whether there be a gift over or not. When the condition is *subsequent* and void, it is entirely inoperative, and the donee retains the property unaffected by its breach. When the condition is subsequent and valid, on its breach the donee's estate ceases; if there is a gift over, that gift takes effect; if there is none, then it seems the heir may re-enter and take the property: Bertie v. Lord Falkland, 2 Cas. Ch. 129; 2 Vern. 333; 2 Freem. 220; Fry v. Porter, 1 Cas. Ch. 138; 1 Mod. 300; Hervey v. Aston, 1 Atk. 361; Reynish v. Martin, 3 Atk. 330; Long v. Ricketts, 2 Sim. & St. 179; Commonwealth v. Stauffer, 10 Pa. St. 350; 51 Am. Dec. 489; and see 2 Lead. Cas. Eq., 4th Am. ed., 478–480; Eng. ed., notes to Scott v. Tyler.

Gifts of personal estate.— In deciding upon the effect of the conditions when annexed to these dispositions, courts of equity have not followed the common-law doctrines concerning conditions. Where the condition is *subsequent*, and in unreasonable restraint, it is void, and the legacy becomes

is a partial compromise between the technical common-law rules concerning conditions, and the doctrines of the Roman law, which made void all attempts to restrict the perfect freedom of marriage; and, like most compromises, it has some incongruous features. If a condition is precedent and annexed to a gift of land, it operates as at the common law;

absolute, whether there is or is not a gift over: Morley v. Rennoldson, 2 Hare, 570; Bellairs v. Bellairs, L. R. 18 Eq. 510. Where the condition is *subsequent*, partial, and reasonable, and there is a gift over, then it is operative, and on its breach the gift over takes effect. But under the same circumstances, if there is no gift over, then the condition is regarded as inserted only *in terrorem;* it has no effect, and the legacy continues to be absolute, even though it be broken: Lloyd v. Branton, 3 Mer. 108, 117; Marples v. Bainbridge, 1 Madd. 590; Garret v. Pritty, 2 Vern. 293; Wheeler v. Bingham, 3 Atk. 364; Waters v. Tazewell, 9 Md. 291; Maddox v. Maddox, 11 Gratt. 804; Hoopes v. Dundas, 10 Pa. St. 75; McIlvaine v. Gethen, 3 Whart. 575; Cornell v. Lovett, 35 Pa. St. 100; Hotz's Estate, 38 Pa. St. 422; 80 Am. Dec. 490. In the case In re Dickson's Trusts, 1 Sim., N. S., 37, 43, 44, Lord Cranworth, in a very able opinion, expressed a strong dislike for the notion of a condition being regarded as *in terrorem*. Where the condition annexed to a bequest of personal estate is *precedent*, and general in its restraint, it is absolutely void, and the legacy takes effect notwithstanding its breach: Morley v. Rennoldson, 2 Hare, 570, 579. Where the condition is precedent, and partial and reasonable, and there is a gift over, then on its breach the first legacy does not vest, and the gift over takes effect. Where the condition is *precedent*, and partial and reasonable, and there is no gift over, a few cases hold that the result is exactly the same as with conditions subsequent under like circumstances, namely, that it is merely *in terrorem* and inoperative: Reynish v. Martin, 3 Atk. 330; Keily v. Monck, 3 Ridg. App. 205, 263; Malcolm v. O'Callaghan, 2 Madd. 349, 353. It is now settled, however, that such a condition is operative; and if broken, the legacy does not vest, whether there is a gift over or not. Younge v. Furse, 8 De Gex, M. & G. 756; Clifford v. Beaumont, 4 Russ. 325; Clarke v. Parker, 19 Ves. 1, 13; Knight v. Cameron, 14 Ves. 389; Hemmings v. Munckley, 1 Brown Ch. 303; and see 2 Lead. Cas. Eq. 480–482.

Conditions restraining marriage by widows.— Conditions annexed to devises and legacies restraining the testator's widow from marrying have generally been pronounced valid and operative:[c] Lloyd v. Lloyd, 2 Sim., N. S., 255; Grace v. Webb, 15 Sim. 384; Poole v. Bott, 11 Hare, 33; Shewell v. Dwarris, Johns. 172; Craven v. Brady, L. R. 4 Eq. 209; Parsons v. Winslow, 6 Mass. 169; 4 Am. Dec. 107; Phillips v. Medbury, 7 Conn. 568; Chapin v. Marvin, 12 Wend. 538; Stroud v. Bailey, 3 Grant Cas. 310; Commonwealth

(c) Cited in Knight v. Mahoney, 152 Mass. 523, 25 N. E. 971, 9 L. R. A. 573. See, also, Bennett v. Packer, 70 Conn. 357, 39 Atl. 739, 66 Am. St. Rep. 112; Chapin v. Cooke, 73 Conn. 72, 46 Atl. 282, 84 Am. St. Rep. 139.

when broken, it prevents the estate from vesting, whatever be its nature; when annexed to a gift of personal property, if general or unreasonable, it is wholly void, and the gift takes effect; if partial and reasonable, it is operative. When a condition is subsequent and annexed to a gift of land, if general, it is void, and although broken, the estate

v. Stauffer, 10 Pa. St. 350; 51 Am. Dec. 489; McCullough's Appeal, 12 Pa. St. 197; Hoopes v. Dundas, 10 Pa. St. 75; Bennett v. Robinson, 10 Watts, 348; Binnerman v. Weaver, 8 Md. 517; Gough v. Manning, 26 Md. 347; O'Neale v. Ward, 3 Har. & McH. 93; Collier v. Slaughter, 20 Ala. 263; Vance v. Campbell's Heirs, 1 Dana, 229; Holmes v. Field, 12 Ill. 424. When the gift is not upon condition, but the devise or legacy is limited to be during widowhood, or until she marries, the disposition is generally held to be valid:[d] Beekman v. Hudson, 20 Wend. 53; Hotz's Estate, 38 Pa. St. 422; 80 Am. Dec. 490; Cornell v. Lovett, 35 Pa. St. 100; Mitchell v. Mitchell, 18 Md. 405; 29 Md. 581; Pringle v. Dunkley, 14 Smedes & M. 16; Hughes v. Boyd, 2 Sneed, 512; and see American cases *supra*. In some cases, however, a condition subsequent in restraint of marriage by a widow, where there was no gift over, has been held merely *in terrorem:* See Parsons v. Winslow, 6 Mass. 169; 4 Am. Dec. 107; Hoopes v. Dundas, 10 Pa. St. 75; Mellvaine v. Gethen, 3 Whart. 575; Mack v. Mulcahy, 47 Ind. 68. A condition in restraint of the marriage of the widow of another person, not of the testator, has been held operative. Newton v. Marsden, 2 Johns. & H. 356; Allen v. Jackson, L. R. 1 Ch. Div. 399. It has also been held that a condition in restraint of the second marriage of a man — the husband of the testator's niece — is valid: Allen v. Jackson, L. R. 1 Ch. Div. 399; reversing L. R. 19 Eq. 631.

Limitations as distinguished from conditions.— It appears to be the tendency of the English cases to draw a material distinction between conditions in restraint of marriage annexed to testamentary dispositions, and restraints on marriage contained in the very terms of the limitation of the estate given, and to hold such limitations valid although the restraint if imposed in the form of a condition might be void.[e] See this question fully discussed in the English editor's note to Scott v. Tyler, 2 Lead. Cas. Eq. 483–485; Evans v. Rosser, 2 Hem. & M. 190; Morley v. Rennoldson, 2 Hare, 570, 580; Heath v. Lewis, 3 De Gex, M. & G. 954; Webb v. Grace, 2 Phill. Ch. 701; Potter v. Richards, 1 Jur., N. S., 462; Little v. Birdwell, 21 Tex. 597; 73 Am. Dec. 242; Hotz's Estate, 38 Pa. St. 422; 80 Am. Dec. 490; see, *per contra*, Otis v. Prince, 10 Gray, 581. In my opinion, this theory, as maintained by the English courts, is directly opposed to the spirit of equity jurisprudence. Undoubtedly the common-law rules are well settled which establish a distinction between a *limitation* and a *condition* subsequent. If land is devised

(d) Cited to this effect in Mann v. Jackson, 84 Me. 400, 30 Am. St. Rep. 358, 24 Atl. 886, 16 L. R. A. 707.

(e) The distinction is made in Mann v. Jackson, 84 Me. 400, 30 Am. St. Rep. 358, 24 Atl. 886, 16 L. R. A. 707.

of the donee continues; if partial and reasonable, it is operative, and on its breach the estate of the donee is defeated. When a subsequent condition is annexed to a gift of personal property, if general, it is void; if partial and reasonable, and there is a gift over, it is operative, and upon its breach the interest of the first donee ceases, and the gift over takes effect; but if there is no gift over, then the condition is said to be *in terrorem* merely, and is inoperative.[f] It seems to be settled by an overwhelming weight of authority that limitations and conditions, precedent or subsequent, tending to restrain the second marriage of women are valid, and by the most recent decisions the same rule has been applied to the second marriages of men. Where a partial and reasonable condition has been imposed, requiring the consent of certain persons to the marriage of a donee, courts of equity are very liberal in construing the provision so that the gift shall not be defeated by a mere *formal* omission.

to a widow "for and during her widowhood, and if she marries," then over; and in another case land is devised to a widow "for and during her natural life, but if she marries," then over; at the common law the nature and operation of these two dispositions are quite different. These rules belong to the law of conveyancing, of future and expectant estates, of contingent remainders and conditional limitations; they are in the highest degree arbitrary and technical. To adopt them and apply them in equity, for the purpose of determining the validity of restraints imposed upon marriage, and especially in bequests of personal property, seems to violate the spirit of equity jurisprudence in dealing with kindred questions. It is the settled and familiar policy of courts of equity, except when they are prevented by some compulsory legal dogma, to disregard the *mere form* in which the intention of parties is expressed, to ascertain that intention as correctly as possible, and then to carry out the actual intention unrestricted by technical rules which relate solely to external form. If it is considered that the common-law doctrines concerning limitations and conditions in dispositions of real estate are too firmly established to be disregarded, there is certainly no necessity for extending those rules to dispositions of personal property. Such a course of decision is not only unnecessary,— it is improper; for it tends to subvert some of the fundamental principles of equity.

(f) This portion of the text is quoted in Phillips v. Ferguson, 85 Va. 509, 8 S. E. 241, 17 Am. St. Rep. 78, 1 L. R. A. 837; and cited, in Fifield v. Van Wyck, 94 Va. 557, 27 S. E. 446, 64 Am. St. Rep. 745 (same rule as to conditions against disputing will).

Where the consent of three trustees or guardians is requisite, the consent of two without consulting the third is insufficient; but if one of the three has renounced, or has never acted, his consent is unnecessary. Where the consent of three is required, and one of them dies, the action of the other two becomes valid. And generally, "where the condition has become impossible by the person dying whose consent was necessary before marriage, it is an excuse."[5] Where the required consent has been refused, and the refusal is alleged to be fraudulent, or to be the result of any vicious, corrupt, or unreasonable cause or motive, a court of equity will examine into the matter, and if the fact is clearly established, it will grant relief; the court will not suffer the gift to be defeated by *such* a breach of the condition.[6]

§ 934. **C. Contracts Directly Belonging to and Affecting Business Relations.**— It has been the policy of the law to promote the freedom of engaging in and carrying on all kinds of business which are beneficial to the public, and to maintain fairness and honesty *towards the public* in all business transaction. The monopolies which were so frequent in the early periods of English history resulted in most instances from the exercise of the royal prerogative or from legislation. The common law and equity would prevent, as far as possible, all contrivances and means by which the public would be deprived of the skill, industry, or economic and productive labor of individual citizens, or by which the pub-

[5] Clarke v. Parker, 19 Ves. 1, 15, 16; Worthington v. Evans, 1 Sim. & St. 165; Graydon v. Hicks, 2 Atk. 16; Aislabie v. Rice, 3 Madd. 256; Peyton v. Bury, 2 P. Wms. 626; Grant v. Dyer, 2 Dow, 93; Collett v. Collett, 35 Beav. 312, 315.

[6] Dashwood v. Lord Bulkeley, 10 Ves. 230, 245; Clarke v. Parker, 19 Ves. 1, 18. Generally, however, and in the first instance, the person is not obliged to assign his reason for his refusal to consent: Clarke v. Parker, 19 Ves. 1, 22, per Lord Eldon. The English decisions concerning consent under these circumstances are very numerous. The questions are fully discussed in the English editor's note to Scott v. Tyler, 2 Lead. Cas. Eq. 486–493.

lic would be deceived in business dealings. The following are the important applications of the principle: Contracts in restraint of trade: Contracts in general restraint of trade, whatever be their form or the nature and immediate object of their stipulations, are void at law as well as in equity. The term "general" is not synonymous with "universal." The criterion is the *unreasonableness* of the restraint; and this is always a matter of law to be determined by the court. This unreasonableness may be, and often is, in respect to the amount of territory over which the restriction extends, or it may be in respect alone to the number of persons with whom the trading is debarred, or in respect to the duration of the restraint. Where the agreement is thus void, a court of equity may always exercise its jurisdiction defensively, by defeating a suit brought for the enforcement of the contract; or affirmatively, by granting the remedy of cancellation or of injunction when the defensive remedy at law would not be certain, complete, and adequate.[1 a] On the other hand, contracts in partial re-

[1] Since the illegality does not depend upon the form of the agreement, it is impossible to describe the kinds of contracts which might operate in a general restraint of trade within the principle. The simplest and ordinary species is a contract between A and B, whereby A agrees not to carry on a trade within a specified territory. The principle extends to combinations among workmen for the purpose of forcing a higher rate of wages from employers, by preventing others from working or being employed, etc.; analogous combinations and agreements among employers for the purpose of forcing a lower rate of wages, by stipulating not to carry on their business, etc.; combinations and agreements by parties engaged in the same business to enhance prices by compelling the public to deal with themselves, and preventing it from trading with others who are engaged in the same employment; combinations by two or more parties in the same business to prevent other persons from carrying on the business, and thus to create a monopoly for themselves; similar combinations and agreements between several parties, for the purpose of preventing some of them from engaging in the business, so that the other might secure a monopoly; combinations by several parties to enhance the price of an article by temporarily withdrawing it from the

(a) Davies v. Davies, 36 Ch. Div. 359; Baker v. Hedgecock, 39 Ch. Div. 520; American Biscuit Co. v. Klotz, 44 Fed. 721; Pacific Postal Tel. Cable Co. v. Western Union Tel. Co., 50 Fed. 493 (contract to give telegraph com-

straint of trade are valid. To this end, they must be partial with respect to the territory included; reasonable with respect to the amount of territory, the circumstances and rights of the party burdened and the one benefited by the restriction, and the number and interests of the public whose

market and preventing any dealing with it by the public in open market, often called "making a corner"; combinations and agreements between persons engaged in the same business for the express purpose of destroying competition, and thus defeating the natural results of economic laws when left to their free operation. This last species of agreement, so common at the present day, and which is doing much to overthrow the entire system of economic science, in my opinion, falls directly within the operation of the general principle; more than any other kind, perhaps, it tends to defeat the freedom of trade which the principle protects. The following cases are illustrations: Mitchel v. Reynolds, 1 P. Wms. 181; 1 Smith's Lead. Cas. 705 (the leading case, in which the doctrine is carefully discussed and the previous authorities are cited); Morris v. Coleman, 18 Ves. 436; Bryson v. Whitehead, 1 Sim. & St. 74; Kimberley v. Jennings, 6 Sim. 340; Kemble v. Kean, 6 Sim. 333; Harms v. Parsons, 32 Beav. 328; Benwell v. Inns, 24 Beav. 307; Whittaker v. Howe, 3 Beav. 383; Allsopp v. Wheatcroft, L. R. 15 Eq. 59; Rigby v. Connol, L. R. 14 Ch. Div. 482; Oregon etc. Co. v. Winsor, 20 Wall. 64; Alger v. Thacher, 19 Pick. 51; 31 Am. Dec. 119; Bowen v. Matheson, 14 Allen, 499; Taylor v. Blanchard, 13 Allen, 370; 90 Am. Dec. 203; Carew v. Rutherford, 106 Mass. 1; 8 Am. Rep. 287; Sampson v. Shaw, 101 Mass. 145; Boutelle v. Smith, 116 Mass. 111; Lawrence v. Kidder, 10 Barb. 641, 653; Stanton v. Allen, 5 Denio, 434; 49 Am. Dec. 282; Brewer v. Marshall, 19 N. J. Eq. 537; 97 Am. Dec. 679; Morris Run etc. Co. v. Barclay C. Co., 68 Pa. St. 173; Keeler v. Taylor, 53 Pa. St. 467; 91 Am. Dec. 221; Crawford v. Wick, 18 Ohio St. 190; 98 Am. Dec. 103; Maguire v. Smock, 42 Ind. 1; Gale v. Kalamazoo, 23 Mich. 344; 9 Am. Rep. 80; Long v. Towl, 42 Mo. 545; 97 Am. Dec. 355; Callahan v. Donnolly, 45 Cal. 152; 13 Am. Rep. 172; More v. Bonnet, 40 Cal. 251; 6 Am. Rep. 621; Wright v. Ryder, 36 Cal. 342; 95 Am. Dec. 186; Rigby v. Connol, L. R. 14 Ch. Div. 482, 491 ("trades unions" held to be illegal at the common law, and still illegal except so far as their provisions and rules had been *expressly* authorized by statute); Sampson v. Shaw, 101 Mass. 145 (an agreement to "make a corner" in stocks held illegal); Central etc. Co. v. Guthrie, 35 Ohio St. 666 (an agreement by a voluntary association of salt manufacturers that no member should sell salt except on certain conditions, void); Dethlefs v. Tamsen, 7 Daly, 354; Wiggins Ferry Co. v. Chicago etc. R. R., 5 Mo. App. 347 (contract between common carriers to refuse shippers advantages of improvements or new facili-

pany an exclusive privilege along a railroad will not be enforced by injunction); Merchants' Ad-Sign Co. v. Sterling, 124 Cal. 429, 57 Pac. 468, 71 Am. St. Rep. 94, 46 L. R. A. 142; Chicago Gas Light Co. v. Gas Light Co., 121 Ill. 530, 13 N. E. 169, 2 Am. St. Rep. 124 (contract by a corpora-

freedom of trading is circumscribed; and made upon a valuable and sufficient consideration. The jurisdiction of equity is generally exercised, in respect to these contracts, for the purpose of indirectly compelling their specific per-

ties for transportation, void); Arnot v. Pittston etc. Co., 68 N. Y. 558; 23 Am. Rep. 190 (an agreement between two coal-mining companies that one should take all the other should mine, and that the latter should not sell to any third persons, void); Craft v. McConoughy, 79 Ill. 346; 22 Am. Rep. 171 (a contract between several grain dealers for the purpose of forming a secret combination to control the price of grain, the cost of storage, and the expense of shipment, void).

tion to abandon a public duty, as by a gaslight company to refrain from supplying gas to a certain portion of the city, though only in partial restraint of trade, will not be enforced in equity); Samuels v. Oliver, 130 Ill. 73, 22 N. E. 499 (agreement to effect a "corner," void); Lanzit v. Sefton Mfg. Co., 184 Ill. 326, 56 N. E. 393, 75 Am. St. Rep. 171; Wilmington City Ry. Co. v. Wilmington & B. S. Ry. Co., (Del. Ch.) 46 Atl. 12 (traffic agreement restraining competition); South Chicago City Ry. Co. v. Calumet Electric St. Ry. Co., 171 Ill. 391, 49 N. E. 576 (contract tending to create monopoly will not be specifically enforced); Consumers' Oil Co. v. Nunnemaker, 142 Ind. 560, 41 N. E. 1048, 51 Am. St. Rep. 193; Chapin v. Brown, 83 Iowa, 156, 48 N. W. 1074, 32 Am. St. Rep. 297, 12 L. R. A. 428 (contract creating monopoly); Greer v. Payne, 4 Kan. App. 153, 46 Pac. 190; Keene Syndicate v. Wichita Gas, E. L. & P. Co., (Kan.) 76 Pac. 834; Gamewell Fire Alarm Tel. Co. v. Crane, 160 Mass. 50, 35 N. E. 98, 39 Am. St. Rep. 458, 22 L. R. A. 673 (contract tending to monopoly); Bishop v. Palmer, 146 Mass. 469, 16 N. E. 299, 4 Am. St. Rep. 339; Western Wooden-Ware Assn. v. Starkey, 84 Mich. 76, 47 N. W. 604, 22 Am. St. Rep. 686, 11 L. R. A. 503; Mandeville v. Harman, 42 N. J. Eq. 185, 7 Atl. 37; Leonard v. Poole, 114 N. Y. 371, 21 N. E. 707, 11 Am. St. Rep. 667, 4 L. R. A. 728; Emery v. Ohio Candle Co., 47 Ohio St. 320, 24 N. E. 660, 21 Am. St. Rep. 819 (association organized for the purpose of increasing the price and decreasing the production of a commodity of general use); State v. Standard Oil Co., 49 Ohio St. 137, 30 N. E. 279, 34 Am. St. Rep. 541, 15 L. R. A. 145 (agreement of stockholders to transfer stock to trustee, in order to create a monopoly, void); Nester v. Continental Brewing Co., 161 Pa. St. 473, 29 Atl. 102, 34 Wkly. Notes Cas. 387, 24 L. R. A. 247, 41 Am. St. Rep. 894; Francis T. Simmons & Co. v. Terry, (Tex. Civ. App.) 79 S. W. 1103; Wiggins v. Bisso, 92 Tex. 219, 47 S. W. 637, 71 Am. St. Rep. 837 (partnership accounting refused where contract in restraint of trade); Tardy v. Creasy, 81 Va. 553, 59 Am. Rep. 676; West Virginia Transportation Co. v. Ohio River Pipe Line Co., 22 W. Va. 600, 46 Am. Rep. 527, and cases cited; Berlin v. Perry, 71 Wis. 495, 38 N. W. 82, 5 Am. St. Rep. 236; Walsh v. Association of Master Plumbers, 97 Mo. App. 280, 71 S. W. 455 (combination to fix prices).

formance, by means of an injunction preventing their violation.[2 b] Interfering with bidding at auctions: Where property is to be sold at public auction, and especially where the sale is by order of a court, or is made in the course of governmental administration, a secret combination and agree-

[2] Mitchel v. Reynolds, 1 Smith's Lead. Cas. 705, and notes. Such contracts are frequently made in connection with a sale of a business and good-will, the vendor stipulating that he will not carry on the same business within a specified distance from the old place, or for a specified time, or will not solicit the old customers for their trade, and the like. These kinds of stipulations, if reasonable as to territory and time, will be enforced against the vendor, often by an injunction: Catt v. Tourle, L. R. 4 Ch. 654; Harms v. Parsons, 32 Beav. 328; Leather Cloth Co. v. Lorsont, L. R. 9 Eq. 345; Carter v. Williams, L. R. 9 Eq. 678; Gravely v. Barnard, L. R. 18 Eq. 518; Altman v. Royal etc. Co., L. R. 3 Ch. Div. 228; Ginesi v. Cooper, L. R. 14 Ch. Div. 596; Rousillon v. Rousillon, L. R. 14 Ch. Div. 351; Leggott v. Barrett, L. R. 15 Ch. Div. 306 (soliciting old customers restrained); Perkins v. Clay, 54 N. H. 518; Dean v. Emerson, 102 Mass. 480; Morse etc. Co. v. Morse, 103 Mass. 73; 4 Am. Rep. 513; Taylor v. Blanchard, 13 Allen, 370; 90 Am. Dec. 203; Gilman v. Dwight, 13 Gray, 356; 74 Am. Dec. 634; McClurg's Appeal, 58 Pa. St. 51; Keeler v. Taylor, 53 Pa. St. 467; 91 Am. Dec. 221; Gillis v. Hall, 2 Brewst. 342; Warfield v. Booth, 33 Md. 63; Guerand v. Dandelet, 32 Md. 561; 3 Am. Rep. 164; Lange v. Werk, 2 Ohio St. 519; Hubbard v. Miller, 27 Mich. 15; 15 Am. Rep. 153; Lightner v. Menzel, 35 Cal. 452; Schwalm v. Holmes, 49 Cal. 665; Cal. Nav. Co. v. Wright, 6 Cal. 258; 65 Am. Dec. 511; Smalley v. Greene, 52 Iowa, 241; 35 Am. Rep. 267; 3 N. W. 78 (contract not to engage in law business in a certain town, valid); Dethlefs v. Tamsen, 7 Daly, 354 (sale of a good-will and agreement not to carry on a competing business); Hedge v. Lowe, 47 Iowa, 137 (sale of a business and good-will, and contract not to engage in the same business in a certain town for a certain time, valid); Goodman v. Henderson, 58 Ga. 567 (agreement to withdraw from the purchasing of hides in a particular market, valid); Curtis v. Gokey, 68 N. Y. 300 (agreement by a retiring partner not to engage in the business at the place for a certain time, or so long as the other shall continue the business, valid); Ellis v. Jones, 56 Ga. 504 (a contract not to carry on a certain trade within a specified town will

(b) The text is cited in Rakestraw v. Lanier, 104 Ga. 188, 30 S. E. 735, 69 Am. St. Rep. 154; and quoted in Robinson v. Suburban Brick Co., (C. C. A.) 127 Fed. 804. See, also, Bowling v. Taylor, 40 Fed. 404; Moore, etc., Hdw. Co. v. Hardware Co., 87 Ala. 206, 6 South. 41, 13 Am. St. Rep. 23; Bohn Mfg. Co. v. Hollis, 54 Minn. 223, 55 N. W. 1119, 40 Am. St. Rep. 319, 21 L. R. A. 337 (agreement between retailers not to patronize wholesalers who sell to rivals, valid); Manchester & Lawrence R. R. v. Concord R. R., 66 N. H. 100, 20 Atl. 383, 49 Am. St. Rep. 582, 9 L. R. A. 689 (contract between railroads to prevent competition is not necessarily illegal, at common law, the rates established being not unreasonable).

ment among persons interested in bidding, whereby they stipulate to refrain from bidding in order to prevent competition and to lower the selling price of the property, is illegal, according to the uniform course of decision in this country. The stipulations of the buyer to pay compensation to the others in consideration of their promise not to bid, or to share the property with them, are void, and the sale itself, made as the result of the combination, is also tainted with the frauds, and will be set aside at the suit of

be enforced).[c] Analogous to the sale of a good-will is the sale of a trade secret, or secret recipe or process of manufacture, with an agreement by the vendor not to use the secret in his business, or not to make or vend articles by its means, and the like. Such a contract will be enforced by enjoining its violation: Bryson v. Whitehead, 1 Sim. & St. 74; Benwell v. Inns, 24 Beav. 307; Peabody v. Norfolk, 98 Mass. 452; 96 Am. Dec. 664; Vickery v. Welch, 19 Pick. 523.[d]

(c) See, also, § 1344, note, and Baines v. Geary, 35 Ch. Div. 154; Badische, etc., Fabrik v. Schote, [1892] 3 Ch. 447; Nordenfelt v. Maxim-Nordenfelt Co., [1894] App. Cas. 535 (laying down the modern English rule that protection to the covenantee is the sole criterion of reasonableness, if the contract is not injurious to the public); Mills v. Dunham, [1891] 1 Ch. 576; Robinson v. Suburban Brick Co., (C. C. A.) 127 Fed. 804 (quoting the text and note); Carter v. Alling, 43 Fed. 208 (fact that restriction is unlimited as to the territory over which it extends does not necessarily render it unreasonable); A. Booth & Co. v. Davis, 127 Fed. 875; Robbins v. Welch, 68 Ala. 393; Gregory v. Spieker, 110 Cal. 150, 42 Pac. 576, 52 Am. St. Rep. 70; Linn County Abstract Co. v. Beechley, (Iowa) 99 N. W. 702; Timmerman v. Dever, 52 Mich. 34, 17 N. W. 230, 50 Am. Rep. 240; Thompson v. Andrus, 73 Mich. 551, 41 N. W. 683; National Benefit Co. v. Union Hospital Co., 45 Minn. 272, 47 N. W. 806, 11 L. R. A. 437 (an instructive case); Kronschnabel-Smith Co. v. Kronschnabel, 87 Minn. 230, 91 N. W. 892; Mitchell v. Branhan, (Mo. App.) 79 S. W. 739; Diamond Match Co. v. Roeber, 106 N. Y. 473, 13 N. E. 419, 60 Am. Rep. 464 (an important case, in which the tendency of modern decisions to a relaxation of the doctrine is pointed out; a covenant permitting the sale of a manufactured article only in Nevada and Montana was held not to be in general restraint); Tode v. Gross, 127 N. Y. 480, 24 Am. St. Rep. 475, 28 N. E. 469, 13 L. R. A. 652; Smith's Appeal, 113 Pa. St. 579, 6 Atl. 251. In Rakestraw v. Lanier, 104 Ga. 188, 30 S. E. 735. 69 Am. St. Rep. 154, a distinction is made between contracts binding one not to engage in a learned profession, and those which bind one who has sold the good-will of a business not to engage in a similar business. The court says that in the former case there must be a reasonable limit of time, while in the latter it is not necessary.

(d) See, also, § 1340, note.

the vendor.[3] [e] Where, in pursuance of its general policy of letting contracts for public works or for supplies to the lowest bidder, the governmental officers issue proposals for bids, a secret combination and agreement among contractors, to refrain from bidding and to prevent competition, falls under the same rule, and is equally illegal.[4] [f] Em-

[3] The English courts are said to have taken a different view, and to have held such a transaction valid: Galton v. Emuss, 1 Coll. C. C. 243; In re Carew's Estate, 26 Beav. 187. The rule established by the American courts is certainly a reasonable and just one. A secret combination as described is intrinsically much worse than the employment of "puffers" by the vendor: Jones v. Caswell, 3 Johns. Cas. 29; 2 Am. Dec. 134; Doolin v. Ward, 6 Johns. 194; Troup v. Wood, 4 Johns. Ch. 228; Hawley v. Cramer, 4 Cow. 717; Brisbane v. Adams, 3 N. Y. 129; Gardiner v. Morse, 25 Me. 140; Gulick v. Ward, 10 N. J. L. 87; 18 Am. Dec. 389; Hamilton v. Hamilton, 2 Rich. Eq. 355; 46 Am. Dec. 58; Johnston v. La Motte, 6 Rich Eq. 347; Grant v. Lloyd, 12 Smedes & M. 191; Newman v. Meek, 1 Freem. Ch. 441; Dudley v. Little, 2 Ohio, 508; 15 Am. Dec. 575; Plaster v. Burger, 5 Ind. 232; Wooton v. Hinkle, 20 Mo. 290; Piatt v. Oliver, 2 McLean, 267; Cocks v. Izard, 7 Wall. 559; Slater v. Maxwell, 6 Wall. 268; Trist v. Child, 21 Wall. 441. In connection with this rule, there are decisions which hold that a mere agreement of persons interested in the bidding, for the purpose of having them all share in the property when bid off by one of their number, and not for the purpose of preventing competition, is not open to the objection of illegality, but is valid. This is probably all that the English courts meant to decide in the cases cited *supra:* Kearney v. Taylor, 15 How. 494; Phippen v. Stickney, 3 Met. 384, 387; Goode v. Hawkins, 2 Dev. Eq. 393; National Bank of the Metropolis v. Sprague, 20 N. J. Eq. 159.

[4] In such a case, the stipulations among the parties to the arrangement for compensation to those who withhold their bids, or for a share in the contract when awarded, are clearly void, and the contract itself awarded by means of such combination might be set aside: Weld v. Lancaster, 56 Me. 453; Atcheson v. Mallon, 43 N. Y. 147; 3 Am. Rep. 678; People v. Stephens, 71 N. Y. 527; Stevens v. Perrier, 12 Kan. 297; Swan v. Chorpenning, 20 Cal. 182; and cases in last note.

(e) See, also, Milhaus v. Sally, 43 S. C. 318, 21 S. E. 268, 885, 49 Am. St. Rep. 834; Camp v. Bruce, 96 Va. 521, 70 Am. St. Rep. 873, 31 S. E. 901, 43 L. R. A. 146 (specific performance refused); McMullen v. Hoffman, 174 U. S. 639, 19 Sup. Ct. 839 (accounting refused). It is held that a statement made at the sale by a party in interest that tends to prevent others from bidding may vitiate the sale, although such statement is true: Herndon v. Gibson, 38 S. C. 357, 37 Am. St. Rep. 765, 17 S. E. 145, 20 L. R. A. 545 (statement by purchaser that she is a widow, dependent on the premises for support); Carson v. Law, 2 Rich. Eq. 296.

(f) Pendleton v. Asbury, (Mo. App.) 78 S. W. 651.

ployment of puffers:[g] The secret employment, by the vendor, of one or more persons — called "puffers" — to make fictitious and collusive bids at an auction, and thus to enhance the price by an apparent competition, is clearly a wrong against the *bona fide* bidders and against the one who finally becomes the purchaser. Whether it is absolutely illegal has given rise to a conflict of decision between the courts of law and of equity; and, strangely enough, the courts of law have been more equitable, more strict in maintaining good faith, than those of equity. A vendor can always protect himself against sacrifice by announcing, as one of the conditions of the sale, that he reserves the right to start the bidding by naming an "upset" price as the minimum, or the right to bid generally, or the right to withdraw the property. In regard to puffing, two cases may arise: 1. Where the sale is made without any preliminary announcement at all; 2. Where it is announced to be without reserve. In the first case, the rule is settled at law that *any* puffing — the employment of even one puffer — is illegal, and renders the sale voidable, at the option of the purchaser.[5] Courts of equity, in this case, allowed *one* puffer; in other words, puffing to the extent of one fictitious bidder did not render the sale voidable.[6] If the vendor

[5] Thornett v. Haines, 15 Mees. & W. 367, 372, per Parke, B.; Crowder v. Austin, 3 Bing. 368; Fuller v. Abrahams, 3 Brod. & B. 116; 6 Moore, 316; Green v. Baverstock, 14 Com. B., N. S., 204; Howard v. Castle, 6 Term Rep. 642; Bexwell v. Christie, Cowp. 395; Towle v. Leavitt, 23 N. H. 360; 55 Am. Dec. 195; Trust v. Delaplaine, 3 E. D. Smith, 219; Staines v. Shore, 16 Pa. St. 200; 55 Am. Dec. 492; Faucett v. Currier, 115 Mass. 20; Williams v. Bradley, 7 Heisk. 54. This rule is approved by Chancellor Kent, in 2 Com. 538, 539 (5th ed.).

[6] Although this rule was settled, it has been applied very reluctantly in recent decisions, and the tendency is evident, both in England and in the United States, to bring the equity rule into an agreement with the legal one, even in the absence of any statute: Bramley v. Alt, 3 Ves. 620; Smith v.

(g) The text, as to employment of puffers, is cited in McMillan v. Harris, 110 Ga. 72, 35 S. E. 334, 78 Am. St. Rep. 93, 48 L. R. A. 345. In this case the court states that where the puffer is employed by some one who has no authority to discharge the bidder, the sale is valid.

transgressed this limit, and employed more than one puffer, the transaction became illegal at equity as well as at law; the fictitious competition was a fraud upon the *bona fide* bidders, which rendered the sale voidable.[7] In the second place, where an announcement is made that "the sale will be without reserve," or words to that effect, this is a pledge by the vendor that the competition shall be absolutely free; the employment of any puffing — one or more puffers — renders the sale voidable in equity as well as at law, and of course defeats a specific performance.[8] The subject is now regulated in England by a recent statute.[9] Fraudulent trade-marks: Another illustration of frauds upon the public in business dealings consists in the use of fraudulent trade-marks. The whole doctrine of infringement of trade-marks is based upon the notion of misleading the public;

Clarke, 12 Ves. 477; Woodward v. Miller, 2 Coll. C. C. 279; Flint v. Woodin, 9 Hare, 618; Woods v. Hall, 1 Dev. Eq. 415.

[7] Thornett v. Haines, 15 Mees. & W. 367, 372, per Parke, B.; Bramley v. Alt, 3 Ves. 620; Conolly v. Parsons, cited 3 Ves. 625; Smith v. Clarke, 12 Ves. 477; Woodward v. Miller, 2 Coll. C. C. 279; Flint v. Woodin, 9 Hare, 618; Meadows v. Tanner, 5 Madd. 34; Robinson v. Wall, 10 Beav. 61; 2 Phill. Ch. 372; Mortimer v. Bell, L. R. 1 Ch. 10; Dimmock v. Hallett, L. R. 2 Ch. 21; Wood v. Hall, 1 Dev. Eq. 415; Morehead v. Hunt, 1 Dev. Eq. 35; Nat. Bank of Metropolis v. Sprague, 20 N. J. Eq. 159; Davis v. Petway, 3 Head, 667; 75 Am. Dec. 789; Williams v. Bradley, 7 Heisk. 54; Wicker v. Hoppock, 6 Wall. 94; Veazie v. Williams, 8 How. 134; 3 Story, 611, 622; Fed. Cas. No. 16,907. It is probable that most American courts of equity would *now* disregard this distinction between one puffer and more than one.[h]

[8] Thornett v. Haines, 15 Mees. & W. 367, and cases cited; Robinson v. Wall, 2 Phill. Ch. 372, 375, per Lord Cottenham; Meadows v. Tanner, 5 Madd. 34; Mortimer v. Bell, L. R. 1 Ch. 10; Dimmock v. Hallett, L. R. 2 Ch. 21; Gilliat v. Gilliat, L. R. 9 Eq. 60; Veazie v. Williams, 8 How. 134; 3 Story, 611, 622, Fed. Cas. No. 16,907.[i]

[9] 30 & 31 Vict., c. 48. This statute recites that different rules have prevailed in law and equity, and that the same rule should regulate both jurisdictions. It makes the employment of puffing unlawful in every case, unless the right to do so has been expressly reserved: See Gilliat v. Gilliat, L. R. 9 Eq. 60.

(h) See the authorities reviewed at length in Peck v. List, 23 W. Va. 338, 48 Am. Rep. 398.

(i) See, also, Flannery v. Jones, 180 Pa. St. 338, 36 Atl. 856, 57 Am. St. Rep. 648.

but this phase of the subject I do not at present touch upon.[j] The fraud now referred to is that of the original proprietor of the trade-mark, whose alleged right is invaded by an infringer, and who seeks the protection of courts. If a trade-mark contains a falsehood on its face, deceiving the public, and giving the goods a character and reputation which they do not possess nor deserve, or if the business of the proprietor is itself illegal, or is knowingly carried on by him in a false and deceptive manner, the trade-mark is in fact a fraud upon the public; no protection will be given to the proprietor against an infringement. It is added, however, that a false representation by the proprietor, as to a matter wholly collateral to his trade-mark, does not affect his right to a remedy either in equity or at law.[10] Contracts opposed

[10] Leather Cloth Co. v. American Leather etc. Co., 11 H. L. Cas. 523, 542; Pidding v. How, 8 Sim. 477; Perry v. Truefitt, 6 Beav. 66; Flavel v. Harrison, 10 Hare, 467; Marshall v. Ross, L. R. 8 Eq. 651; Lee v. Haley, L. R. 5 Ch. 155, 158; Ford v. Foster, L. R. 7 Ch. 611; Singer Mfg. Co. v. Wilson, L. R. 2 Ch. Div. 434; Siegert v. Findlater, L. R. 7 Ch. Div. 801; Orr v. Johnston, L. R. 13 Ch. Div. 434; Civil Service etc. Co. v. Dean, L. R. 13 Ch. Div. 512; Boulnois v. Peake, L. R. 13 Ch. Div. 513, note; Fetridge v. Wells, 4 Abb. Pr. 144; 13 How. Pr. 385; Curtis v. Bryan, 2 Daly, 312, 317; Palmer v. Harris, 60 Pa. St. 156; 100 Am. Dec. 557; Heath v. Wright, 3 Wall. Jr. 141.[k]

(j) See § 1354.

(k) A proprietary medicine label which falsely states that the medicine is put up by a physician will not be protected by injunction: Lemke v. Dietz, (Wis.) 98 N. W. 936. To the same effect, see Manhattan Med. Co. v. Wood, 108 U. S. 218, 2 Sup. Ct. 436, and cases cited (mis-statement as to name and place); Siegert v. Abbott, 61 Md. 276, 48 Am. Rep. 101 (same); Preservaline Mfg. Co. v. Heller Chem. Co., 118 Fed. 103 (mis-statement as to patent); Uri v. Hirsch, 123 Fed. 568; Kenny v. Gillet, 70 Md. 574, 17 Atl. 499; Buckland v. Rice, 40 Ohio St. 526. But mere statements of opinion as to curative properties, or as to the cause of a disease, concerning which there is a conflict of expert opinion, are not false representations, within the meaning of the rule, even though somewhat sweeping, or even extravagant: Newbro v. Undeland, (Neb.) 96 N. W. 635. Likewise, an injunction will not issue to protect a trade name which is calculated to deceive the public: Worden v. California Fig Syrup Co., 187 U. S. 516, 23 Sup. Ct. 161; Messer v. The Fadettes, 168 Mass. 140, 60 Am. St. Rep. 371, 46 N. E. 407. A party who has simulated another's trade-mark is in no condition to complain of a third party for simulating the trade-mark that he himself is using in fraud of the original

to the policy of some statute prescribing modes of certain business dealings.[11] Contracts of trading with alien enemies.[12]

§ 935. D. Contracts Affecting Public Relations.— Contracts made for the purpose of unduly controlling or affecting

[11] These cases depend each upon their own circumstances. Such statutes often prescribe the kinds of business which can be transacted by monetary corporations and associations, the methods of transacting, etc.: In re Arthur Average Ass'n, L. R. 10 Ch. 542; In re South Wales etc. Co., L. R. 2 Ch. Div. 763; Sykes v. Beadon, L. R. 11 Ch. Div. 170, 183, 197; Smith v. Anderson, L. R. 15 Ch. Div. 247 (overruling Sykes v. Beadon on one point); Rigby v. Connol, L. R. 14 Ch. Div. 482, 491; Johnson v. Shrewsbury etc. R'y, 3 De Gex, M. & G. 914, per Knight Bruce, L. J.; Aubin v. Holt, 2 Kay & J. 66, 70; Carey v. Smith, 11 Ga. 539, 547; Kelly v. Devlin, 58 How. Pr 487; Clarke v. Omaha etc. R. R., 5 Neb. 314; Christian Union v. Yount, 101 U. S. 352; Oscanyan v. Winchester etc. Co., 15 Blatchf. 79; Fed. Cas. No. 10,600.1

[12] Seaman v. Waddington, 16 Johns. 510, opinion of Chancellor Kent, and authorities cited by him; Clements v. Yturria, 81 N. Y. 285; Robinson v. Internat. Life Ins. Co., 42 N. Y. 54, 66; 1 Am. Rep. 400; Woods v. Wilder, 43 N. Y. 164; 3 Am. Rep. 684; Bank of N. O. v. Matthews, 49 N. Y. 12; Clements v. Graham, 24 La. Ann. 446; Hanauer v. Doane, 12 Wall. 342; Hanauer v. Woodruff, 15 Wall. 439; Montgomery v. United States, 15 Wall. 395; United States v. Grossmayer, 9 Wall. 72; The Ouachita Cotton, 6 Wall. 521; Sprott v. United States, 20 Wall. 459; United States v. Lapene, 17 Wall. 602; Carlisle v. United States, 16 Wall. 147, 151; United States v. Huckabee, 16 Wall. 414; Titus v. United States, 20 Wall. 475; Desmare v. United States, 93 U. S. 605; Whitfield v. United States, 92 U. S. 165.

owner's rights: Parlett v. Guggenheimer, 67 Md. 542, 1 Am. St. Rep. 416, and note. The principle is extended in McVey v. Brendel, 144 Pa. St. 235, 22 Atl. 912, 29 Wkly. Notes Cas. 1, 27 Am. St. Rep. 625, 13 L. R. A. 377, where the court refused to protect a cigarmakers' union in its right to a label which stigmatized all cigarmakers not members of the union.

(l) Anderson v. Carkins, 135 U. S. 483, 10 Sup. Ct. 905 (contract against the policy of the United States land laws); Dial v. Hair, 18 Ala. 798, 54 Am. Dec. 179 (specific performance of agreement to sell land when title should be acquired from government, refused); Mitchell v. Cline, 84 Cal. 409, 24 Pac. 164 (contract to locate mining claim contrary to United States statute); Moffatt v. Bulson, 96 Cal. 106, 30 Pac. 1022, 31 Am. St. Rep. 192 (agreement to sell homestead entry before final proof); Carley v. Gitchell, 105 Mich. 38, 62 N. W. 1003, 55 Am. St. Rep. 428 (violation of land laws). One who takes leases of Indian lands knowing them to be illegal is not entitled to an injunction against the government ousting him in any way it sees fit: Beck v. Flournoy Live-Stock & R. E. Co., 65 Fed. 30, 12 C. C. A. 497, 27 U. S. App. 618.

official conduct, or the exercise of legislative, administrative, and judicial functions, are plainly opposed to public policy. They strike at the very foundations of government, and tend to destroy that confidence in the integrity and discretion of public official action which is essential to the preservation of civilized society. The principle is universal, and is applied without any reference to the *mere* outward form and alleged purpose of the transaction. If a contract does unduly interfere with governmental functions, or with the relations of the citizen towards his own government in any of its departments, whether the interference be direct or indirect, such agreement is illegal, whatever form it may have assumed. It is impossible, therefore, to mention all the instances which properly come within this principle. The following are some of the most important species: Contracts for the procurement of office: All agreements which interfere with the integrity, discretion, or freedom of the electing or appointing power are illegal.[1] [a] Contracts inter-

[1] This group contains many varieties: contracts directly with the appointing power, for the purpose of obtaining the office by means of any reward, compensation, or consideration; contracts by which the applicant agrees to pay compensation to another, or to share the emoluments with him, in consideration of his procuring the office; contracts between opposing candidates, by which, in consideration that one withdraws, or aids the other, the latter stipulates to pay a compensation, or to share the emoluments. The form is immaterial wherever the purpose is to procure an office by private interference with the freedom and integrity of the appointing body. The principle applies to private offices in corporations, etc., as well as to public governmental offices: Hartwell v. Hartwell, 4 Ves. 811; Wallis v. Duke of Portland, 3 Ves. 494; Stevens v. Bagwell, 15 Ves. 139; Osborne v. Williams, 18 Ves. 379; Law v. Law, 3 P. Wms. 391; Cas. t. Talb. 140; Morris v. MacCullock, 2 Eden, 190; Hanington v. Du Chatel, 1 Brown Ch. 124; Boynton v. Hubbard, 7 Mass. 112, 119; Ferris v. Adams, 23 Vt. 136; Becker v. Ten Eyck, 6 Paige, 68; Hunter v. Nolf, 71 Pa. St. 282; Meguire v. Corwine, 101 U. S. 108 (contract by which A agrees to procure B's appointment as counsel in certain suits against the United States, and B

(a) West v. Camden, 135 U. S. 507, 10 Sup. Ct. 838 (contract by director of a corporation to keep another person permanently in place as an officer of the corporation is illegal); Basket v. Moss, 115 N. C. 448, 20 S. E. 733, 44 Am. St. Rep. 463, 48 L. R. A. 842.

fering with legislative proceedings: Where a private statute, or a statute directly affecting private rights, is pending before the legislature, a secret agreement between parties interested, which, if disclosed, might have determined the action of the legislature,— as, for example, an agreement by one party to withdraw his opposition in consideration of a compensation to be paid by the other,— has been held a fraud upon legislation, and therefore void.[2] The doctrine finds its most important application in dealing with contracts for the purpose of *procuring* legislation. All agreements, in every possible form, for the purpose of securing or using private and personal *influence* with members of a legislature, or of securing or using *labor and services* with legislators privately, personally, and individually, for the object of obtaining legislation either public or private, are in the highest degree contrary to the fundamental theory of free legislative action.[3] Contracts interfering with execu-

agrees to give A half of the fee obtained, held void); Hager v. Catlin, 18 Hun, 448; Gaston v. Drake, 14 Nev. 175; 33 Am. Rep. 548 (agreement to share the salary of a public office in consideration that one party shall use his influence to secure the other's election, void); Reed v. Peper etc. Co., 2 Mo. App. 82 (agreement by which A was to receive part of the salary of certain officers, in consideration of his forbearing to use his influence and efforts to procure a repeal of the statute creating the offices, void); Guernsey v. Cook, 120 Mass. 501 (contract for the sale of stock for the purpose of procuring one of the parties to be elected treasurer of the corporation, illegal).

2 The most recent English decisions, however, have modified this conclusion, by requiring not merely a secret agreement, but one which it was the duty of the parties to disclose to the legislature: Vauxhall Bridge Co. v. Earl Spencer, 2 Madd. 356; Jacob, 64; Simpson v. Lord Howden, 1 Keen, 583; 3 Mylne & C. 97; 9 Clark & F. 61; 10 Ad. & E. 793; Earl of Shrewsbury v. North Staffordshire R'y, L. R. 1 Eq. 593; and see Mangles v. Grand Dock C. Co., 10 Sim. 519. It has been held that where a statute has been procured by actual fraud upon the legislature, equity may relieve, not by setting aside the statute or declaring it void, but by depriving the wrongdoers of the advantages acquired thereby, treating them as trustees, etc. This doctrine must, I think, be confined within very narrow limits: See Williamson v. Williamson, 3 Smedes & M. 715; 41 Am. Dec. 636; State v. Reed, 4 Har. & McH. 6.

3 Our law permits a private citizen to endeavor to influence a legislature, and to obtain the enactment of a statute, in an open, public manner, by ar-

tive proceedings: These are subject to the same general rules which apply to similar agreements concerning legislation. All agreements, whether made with officials or with third persons, which directly or indirectly control or interfere with the due exercise of executive and administrative functions as prescribed or regulated by law, are clearly illegal.[4][c] Contracts interfering with judicial proceedings:

guments directed to the whole body or to a committee, in the same manner as arguments are presented to a court by counsel. To this end, agreements for the employment of an agent or attorney, upon a compensation, to argue before the legislature or its committees, or to collect facts, reasons, etc., and present them openly to all the legislature or to its proper committees, are valid. Agreements which go beyond this line, and stipulate for private services to be rendered by dealing with individual legislators privately and personally, have been uniformly condemned by courts of the highest authority. The varieties of such agreements are very numerous. The following cases furnish illustrations: Edward v. Grand Junc. R'y, 1 Mylne & C. 650; Marshall v. Baltimore & O. R. R., 16 How. 314 (a leading case; the opinion of Grier, J., is an able discussion of the doctrine); Frost v. Inhabitants of Belmont, 6 Allen, 152; Sedgwick v. Stanton, 14 N. Y. 289; Nickelson v. Wilson, 60 N. Y. 362; Mills v. Mills, 40 N. Y. 543; 100 Am. Dec. 535; Rose v. Truax, 21 Barb. 361; Smith v. Applegate, 23 N. J. L. 352; Clippinger v. Hepbaugh, 5 Watts & S. 315; 40 Am. Dec. 519; Miles v. Thorne, 38 Cal. 335; 99 Am. Dec. 384; Powell v. Maguire, 43 Cal. 11; McBratney v. Chandler, 22 Kan. 692; 31 Am. Rep. 213 (where the services are partly those of an attorney and partly of a lobbyist, but blended as a single employment, the entire contract is void).[b]

[4] This group includes contracts with officers themselves stipulating for the omission or violation of their official duties, or stipulating for compensation other or greater than the fees provided by law for the performance of their duties; contracts with third persons stipulating for their influence in procuring administrative acts to be done or omitted, and the like: Cooth v. Jackson, 6 Ves. 12, 31, 35; Methwold v. Walbank, 2 Ves. Sr. 238; Tool Co. v. Norris, 2 Wall. 45; Trist v. Child, 21 Wall. 441; Nichols v. Mudgett, 32 Vt. 546; Robinson v. Kalbfleisch, 5 Thomp. & C. 212; Cook v. Freudenthal, 80 N. Y. 202; Hatzfield v. Gulden, 7 Watts, 152; 31 Am. Dec. 750; Winpenny v. French, 18 Ohio St. 469; Edwards v. Estell, 48 Cal. 194; Packard v. Bird, 40 Cal. 378; Swan v. Chorpenning, 20 Cal. 182; Spence v. Harvey, 22 Cal. 337; 83 Am. Dec. 69; Kelly v. Devlin, 58 How. Pr. 487; Macon v. Huff, 60 Ga. 221; Berryman v. Cincinnati etc. R'y, 14 Bush, 755 (contract with an officer of a railroad company to use his influence to pro-

(b) See, also, Houlton v. Nichol, 93 Wis. 393, 67 N. W. 715, 57 Am. St. Rep. 928, 33 L. R. A. 166.

(c) Oscanyan v. Arms Co., 103 U. S. 261 (a contract entered into by a consul-general of a foreign govern-

All agreements directly or indirectly preventing or controlling the due administration of justice are opposed to the universal and most elementary principles of public policy. Whatever be their form and immediate purpose, and however innocent may be the motives of the parties, they are plainly invalid.[5] [e]

cure the railroad to be located in a particular place, void);[d] St. Louis v. St. Louis etc. Co., 5 Mo. App. 484 (an agreement by a corporation not to exercise a portion of the franchises granted to it for public purposes is invalid); Western U. T. Co. v. Chicago etc. R. R., 86 Ill. 246; 29 Am. Rep. 28; Western U. T. Co. v. Atlantic etc. T. Co., 7 Biss. 367; Fed. Cas. No. 17,445 (contracts between a railroad and telegraph company giving exclusive right of way and of use are valid); Denison v. Crawford Co., 48 Iowa, 211 (agreement between a county and its agent for special services and compensation held valid); Reed v. Peper etc. Co., 2 Mo. App. 82; Stanton v. Embrey, 93 U. S. 548 (an agreement to pay counsel a contingent fee for legitimate professional services in prosecuting a claim against the United States is valid); Fowler v. Donovan, 79 Ill. 310 (an agreement between several persons to contribute and pay for a substitute for such of them as should be drafted into the United States military service is valid); Marsh v. Russell, 66 N. Y. 288; Caton v. Stewart, 76 N. C. 357; Ashburner v. Parrish, 81 Pa. St. 52; and see cases of contracts made *colore officii*, in the next following note.

5 Under this head are included agreements with judicial officers relating to and controlling their judicial action; with third persons stipulating for their personal influence in procuring judicial action; contracts to remove witnesses, or in any manner to prevent them from testifying; or to remove, conceal, suppress, or in any way prevent the production of documentary or other evidence at an expected trial; agreements to procure witnesses *to testify to a certain state of facts;* agreements to indemnify sheriffs and other executive officers of a court for a *willful* violation or neglect of their official duty; and a great variety of others: Ferris v. Adams, 23 Vt. 136; Cook v. Freudenthal, 80 N. Y. 202; Winter v. Kinney, 1 N. Y. 365; Richardson v.

ment, residing in this country, whereby, in consideration of a stipulated percentage, he agreed to use his influence in favor of a manufacturing company with an agent of his government sent to examine and report in regard to the purchase of arms for it); Hawkeye Ins. Co. v. Brainard, 72 Iowa, 130, 33 N. W. 603 (contract whereby an officer agrees to accept a less or greater compensation than that prescribed by statute, or whereby he agrees not to avail himself of the statutory mode of enforcing the collection of his fees, void).

(d) Woodstock Iron Co. v. Extension Co., 129 U. S. 643, 9 Sup. Ct. 402 (an agreement by which agents of a railroad company may acquire gain by inducing the company unnecessarily to lengthen the road, and thus impose a burden on the public, illegal).

(e) See Racey v. Racey, (Okl.) 73 Pac. 305 (agreement for divorce, invalid); Goodrich v. Tenney, 144 Ill. 422, 33 N. E. 44, 36 Am. St. Rep.

§ 936. 3. Contracts Opposed to Good Morals.— It is unnecessary to discuss the meaning of the phrase *contra bonos mores*, since the doctrine is familiar. It is enough to say that all agreements in which the consideration past or future, or the executory terms stipulating for acts to be done or omitted, are contrary to good morals, are illegal and void in equity, and with a very few exceptions at the common law. This doctrine applies in equity, whatever be the external form of the contract, or its immediate purpose, or the particular nature of its illegality. Among the most important and familiar illustrations are the following: Contracts based upon the consideration, either past or future, of illicit sexual intercourse, or stipulating for such future intercourse, or in any manner promoting or furnishing op-

Crandall, 48 N. Y. 348; Barnard v. Viele, 21 Wend. 88; People v. Meighan, 1 Hill, 298 (cases of bonds taken *colore officii*); Dawkins v. Gill, 10 Ala. 206; Odineal v. Barry, 24 Miss. 9; Valentine v. Stewart, 15 Cal. 387, 404, 405, and cases cited; Patterson v. Donner, 48 Cal. 369, 379; Speck v. Dausman, 7 Mo. App. 165 (agreement between the parties to a pending divorce suit held void); Hamilton v. Hamilton, 89 Ill. 349 (ditto); Comstock v. Adams, 23 Kan. 513; 33 Am. Rep. 191 (an agreement not to disturb a decree for divorce wrongfully granted, invalid); Bradley v. Coolbaugh, 91 Ill. 148 (a special agreement among the creditors of an absconding debtor, providing for judicial proceedings in the name of one for the benefit of all, held valid); Averbeck v. Hall, 14 Bush, 505 (a contract to endeavor to procure the dismissal of a criminal prosecution, void); Breathwit v. Rogers, 32 Ark. 758; Lindsay v. Smith, 78 N. C. 328; 24 Am. Rep. 463; Mahler v. Phœnix Ins. Co., 9 Heisk. 399; Veramendi v. Hutchins, 48 Tex. 531; Laing v. McCall, 50 Vt. 657; Wight v. Rindskopf, 43 Wis. 344; Ecker v. Bohn, 45 Md. 278; Ecker v. McAllister, 45 Md. 290; Glenn v. Mathews, 44 Tex. 400.

459, 19 L. R. A. 371 (contract to procure false evidence, invalid); Moyer v. Cantieny, 41 Minn. 242, 42 N. W. 1060 (a contract to secure a pardon, improper methods not being contemplated, valid); Bowman v. Phillips, 41 Kan. 364, 21 Pac. 230, 13 Am. St. Rep. 292, 3 L. R. A. 631 (an agreement by attorneys at law to defend persons for criminal offenses — violations of prohibitory liquor laws — which were, in contemplation of the parties, to be committed in the future, void); Olson v. Lamb, 56 Neb. 104, 76 N. W. 433, 71 Am. St. Rep. 670 (stifling competition at judicial sale); Camp v. Bruce, 96 Va. 521, 31 S. E. 901, 70 Am. St. Rep. 873, 43 L. R. A. 146 (contract to stifle bidding at judicial sale will not be specifically enforced).

portunities for unlawful cohabitation or prostitution;[1][a] contracts which constitute or amount to champerty or maintenance, these being highly criminal at the common law;[2]

[1] All contracts providing for future illicit intercourse, and all unsealed contracts upon the consideration of past intercourse, were void at law as well as in equity. On account of the arbitrary effect given to a seal, contracts based upon the consideration of past intercourse, if sealed, were not void at the common law; and this fact furnished an occasion for the exercise of the equitable jurisdiction in canceling such instruments, since there was no defense at law. In most of the states where the common-law effect of the seal has been abrogated, or where a seal is not conclusive evidence of consideration, this technical distinction can no longer exist: Bengon v. Nettlefold, 3 Macn. & G. 94, 102, 103; Batty v. Chester, 5 Beav. 103; Smyth v. Griffin, 13 Sim. 245; Hill v. Spencer, Amb. 641, 836; Gray v. Mathias, 5 Ves. 286; and cases cited *ante*, § 402, note 1. In the same class are leases of premises for the purpose of being used as houses of prostitution, or for other known illegal objects: Newby v. Sharpe, L. R. 8 Ch. Div. 39; Riley v. Jordan, 122 Mass. 231; Marlatt v. Warwick, 19 N. J. Eq. 439; Cutler v. Tuttle, 19 N. J. Eq. 549, 562; Sweet v. Tinslar, 52 Barb. 271; D'Wolf v. Pratt, 42 Ill. 198; Smith v. White, L. R. 1 Eq. 626.

[2] The common-law rules concerning champerty and maintenance have been greatly modified in the United States, and to a large extent abrogated. Many agreements concerning litigations, legal controversies, and disputed claims, which were condemned by the ancient law, are not only sustained by the modern law of this country, but are of frequent occurrence. The good policy of the change may well be doubted. Many other ancient common-law rules, which modern civilization came to regard as merely arbitrary and oppressive, are found by experience, after their abolishment, to have been wise, and based upon the unchangeable facts of human nature: Powell v. Knowler, 2 Atk. 224; Strachan v. Brander, 1 Eden, 303; cited 18 Ves. 127, 128; Stevens v. Bagwell, 15 Ves. 139; Wallis v. Duke of Portland, 3 Ves. 494; Reynell v. Sprye, 1 De Gex, M. & G. 660; Knight v. Bowyer, 2 De Gex & J. 421; Strange v. Brennan, 15 Sim. 346; Hilton v. Woods, L. R. 4 Eq. 432; Sprye v. Porter, 7 El. & B. 58; 3 Jur., N. S., 330; Grell v. Levy, 16 Com. B., N. S., 73; Earle v. Hopwood, 9 Com. B., N. S., 566; 7 Jur., N. S., 775; Stanton v. Embrey, 93 U. S. 548; Ballard v. Carr, 48 Cal. 74 (agreement giving counsel an interest in or a part of the property to be recovered, as a contingent fee for his services in a litigation, valid);

(a) See Chateau v. Singla, 114 Cal. 91, 45 Pac. 1015, 55 Am. St. Rep. 63, 33 L. R. A. 750 (partnership to let furnished apartments for purposes of prostitution); Watkins v. Nugen, (Ga.) 45 S. E. 262; Brindley v. Lawton, 53 N. J. Eq. (8 Dick.) 259, 31 Atl. 394 (bill to compel restoration of stock given in consideration of illicit relations cannot be sustained); Vincent v. Moriarty, 31 App. Div. 484, 52 N. Y. Supp. 519.

contracts, executed or executory, given upon the consideration of or stipulating for the compounding a felony, the forbearance to prosecute for a crime, or the abandonment of a pending criminal prosecution.[3] [c]

Hoffman v. Vallejo, 45 Cal. 564 (ditto); Dorwin v. Smith, 35 Vt. 69; Thurston v. Percival, 1 Pick. 415; Arden v. Patterson, 5 Johns. Ch. 44; Thalimer v. Brinkerhoff, 20 Johns. 386; Slade v. Rhodes, 2 Dev. & B. Eq. 24; Holloway v. Lowe, 7 Port. 488; Brown v. Beauchamp, 5 T. B. Mon. 413; 17 Am. Dec. 81; Bryant v. Hill, 9 Dana, 67; Cardwell v. Sprigg, 7 Dana, 36; Wilhite v. Roberts, 4 Dana, 172; Coquillard v. Bearss, 21 Ind. 479; 83 Am. Dec. 362; Martin v. Veeder, 20 Wis. 466.[b]

[3] This illegality affects not only the main agreement, but all collateral securities given upon such consideration, such as notes, bonds, mortgages, etc.: Johnson v. Ogilby, 3 P. Wms. 277; Shaw v. Reed, 30 Me. 105; Harrington v. Bigelow, 11 Paige, 349; Atwood v. Fisk, 101 Mass. 363; Swartzer v. Gillett, 1 Chand. 207, 209, 210; Averbeck v. Hall, 14 Bush, 505; Lindsay v. Smith, 78 N. C. 328; 24 Am. Rep. 463 (an agreement upon a single consideration to do certain acts, not of themselves illegal, and to stop a criminal prosecution, is wholly void); Laing v. McCall, 50 Vt. 657 (a contract of sale of chattels made in order to prevent a prosecution for forgery is void); Wight v. Rindskopf, 43 Wis. 344 (an agreement to compromise a criminal case arising under the United States internal revenue laws will not be enforced in the state courts).[d] As illustrations of somewhat analogous contracts which are not illegal, see Breathwit v. Rogers, 32 Ark. 758 (a promise not to bring a *civil* action for damages on account of a tort which is also a crime, is a valid consideration of a contract, provided no promise is involved

(b) Champertous: James v. Kerr, 40 Ch. Div. 449; Blackwell v. Webster, 29 Fed. 614; Ackert v. Barker, 131 Mass. 436 (contingent fee); Gargano v. Pope, (Mass.) 69 N. E. 343 (same); Casserleigh v. Wood, 119 Fed. 309, (C. C. A.) (specific performance refused although court of law might not regard contract as champertous). Not champertous: Torrence v. Shedd, 112 Ill. 466; Ware's Adm'rs v. Russell, 70 Ala. 174, 45 Am. Rep. 82; Gilman v. Jones, 87 Ala. 691, 5 South. 785, 4 L. R. A. 113; Brown v. Bigné, 21 Or. 260, 28 Pac. 11, 28 Am. St. Rep. 752, 14 L. R. A. 745.

(c) The text is cited in Gorringe v. Reed, 23 Utah, 120, 63 Pac. 902, 90 Am. St. Rep. 692. See, also, Rock v. Mathews, 35 W. Va. 531, 14 S. E. 137, 14 L. R. A. 508; Davis v. Smith, 68 N. H. 253, 44 Atl. 344, 73 Am. St. Rep. 584; Treadwell v. Torbert, 119 Ala. 279, 24 South. 54, 72 Am. St. Rep. 918 (compounding a felony); Mack v. Campeau, 69 Vt. 558, 38 Atl. 149, 60 Am. St. Rep. 948 (suppression of criminal prosecution); Moore v. Adams, 8 Ohio (8 Ham.), 372, 32 Am. Dec. 723 (agreement not to prosecute); George v. Curtis, 45 W. Va. 1, 30 S. E. 69 (agreement not to prosecute).

(d) See, also, Given's Appeal, 121 Pa. St. 260, 15 Atl. 468, 6 Am. St. Rep. 795.

§ 937. III. Equitable Jurisdiction in Case of Illegal Contracts — Usurious Contracts.[a]— Equitable relief is granted against usurious contracts, whether executory or executed, since, from considerations of public policy, the two parties are not regarded as standing *in pari delicto*. While the contract is executory, equity will not aid the creditor in enforcing it. If, therefore, suit is brought upon such an agreement, the borrower may set up the usury as a defense, without paying or offering to pay the amount actually borrowed, or legal interest thereon, and a recovery will be entirely defeated. Equity will never assist a party to carry into effect his own intentional violation of the law.[1] It is well settled that courts of equity will go farther, and will give all the affirmative relief which is just to the borrower. If the contract is executory, the borrower may obtain the remedy of a surrender and cancellation of the securities which he has given for the usurious loan.[2] If the contract is executed, he may recover back the usurious amount paid in excess of the

not to prosecute or give evidence of the crime);[e] Mahler v. Phœnix Ins. Co., 9 Heisk. 399; Ecker v. Bohn, 45 Md. 278; Ecker v. McAllister, 45 Md. 290.

1 Mason v. Gardiner, 4 Brown Ch. 436; Fanning v. Dunham, 5 Johns. Ch. 122; 9 Am. Dec. 283; Hart v. Goldsmith, 1 Allen, 145; Smith v. Robinson, 10 Allen, 130; Union Bank v. Bell, 14 Ohio St. 200; Sporrer v. Eifler, 1 Heisk. 633, 636; Kukner v. Butler, 11 Iowa, 419; Spain v. Hamilton, 1 Wall. 604; O'Neil v. Cleveland, 30 N. J. Eq. 273 (one of two executors loaned money of the estate on bond and mortgage, reserving usury, which he appropriated to his own use; on a foreclosure by the executors on behalf of the estate, held that the usury could be set up as a defense); Powers v. Chaplain, 30 N. J. Eq. 17 (defendant in a foreclosure suit was let in to answer, on terms which precluded him from setting up usury as a defense; usury was shown by the evidence. Held, that the plaintiff could only recover the amount justly and equitably due).

2 Peters v. Mortimer, 4 Edw. Ch. 279.

(e) See, also, Barrett v. Weber, 125 N. Y. 18, 25 N. E. 1068; Moog v. Strang, 69 Ala. 98; but where, in such a contract, a promise not to prosecute criminally is by implication involved, the contract is invalid: Jones v. Merionethshire, etc., Soc., [1891] 2 Ch. 587; affirmed, [1892] 1 Ch. 173. See, further, last note under § 402.

(a) §§ 937–941 of the text are cited in Beer v. Landman, 88 Tex. 450, 31 S. W. 805.

sum actually borrowed, and legal interest thereon.[3 b] This affirmative interposition of the court is subject, however, to the principle that the plaintiff must himself do equity. It is a firmly settled rule, in the absence of contrary statutes, that where a borrower, who has not already paid the debt, brings a suit for affirmative relief against a usurious contract, he can obtain the remedy only upon the condition of repaying, or offering to repay, the sum which is justly and equitably due to his creditor,— the amount actually loaned and legal interest. The absence of such an offer is ground for defeating the suit.[4 c] Since the illegality of usury is

[3] Bosanquett v. Dashwood, Cas. t. Talb. 38, 41; Rawden v. Shadwell, Amb. 269; Fanning v. Dunham, 5 Johns. Ch. 122, 142, 143, 144; 9 Am. Dec. 283; Davis v. Demming, 12 W. Va. 246; Morrison v. Miller, 46 Iowa, 84; Gantt v. Grindall, 49 Md. 310 (where the usurious interest already paid and the installments of the principal paid together equal or exceed the amount of the actual loan secured by a usurious mortgage, equity will restrain any suit or proceeding to foreclose the mortgage). See also cases cited in the next note. In one or two states, by reason of a statutory requirement, it seems that the borrower can recover back the entire sum which has been paid, and not merely the usurious excess. Wherever the usurious loan is concealed under the appearance of a pretended sale, equity will look at the real transaction, and give relief by setting aside the sale: Waller v. Dalt, 1 Ch. Cas. 276; 1 Dick. 8; Barny v. Beak, 2 Ch. Cas. 136; Barker v. Vansommer, 1 Brown Ch. 149.

[4] Mason v. Gardiner, 4 Brown Ch. 436; Fanning v. Dunham, 5 Johns. Ch. 122, 142, 143, 144; 9 Am. Dec. 283; Rogers v. Rathbun, 1 Johns. Ch. 367; Williams v. Fitzhugh, 37 N. Y. 444; Ballinger v. Edwards, 4 Ired. Eq. 449; Ware v. Thompson, 13 N. J. Eq. 66; Whitehead v. Peck, 1 Ga. 140; Noble v. Walker, 32 Ala. 456; Ruddell v. Ambler, 18 Ark. 369; Sporrer v. Eifler, 1 Heisk. 633, 636; Alden v. Diossy, 16 Hun, 311; Purnell v. Vaughan, 82 N. C. 134; Campbell v. Murray, 62 Ga. 86; Pickett v. Merchants' Nat. Bank, 32 Ark. 346; Morrison v. Miller, 46 Iowa, 84. The same principle has been applied to a lender seeking to reform a usurious security in a state where the statute only avoided the excess of illegal interest: Corby v. Bean, 44 Mo. 379. In one or two states the statute requires courts of

(b) See, also, Dickerson v. Thomas, 67 Miss. 777, 7 South. 503; Moseley v. Brown, 76 Va. 419. In stating an account between the parties, credit will be allowed upon the principal for whatever usurious interest has been paid: Norvell v. Hedrick, 21 W. Va. 523.

(c) See § 391; Mathews v. Warner, 6 Fed. 461; Grider v. Driver, 46 Ark. 50; Whatley v. Barker, 79 Ga. 790, 4 S. E. 387; Neurath v. Hecht, 62 Md. 221; Cook v. Patterson, 103 N. C. 130, 9 S. E. 402; Carver v. Brady, 104 N. C. 220, 10 S. E. 565.

wholly the creature of legislation, the provisions of the statute must furnish the rule determining the extent, limits, and occasion of relief. It results from a just interpretation of the legislation that the right to complain is a personal one, belonging only to the borrower and his representatives; no other party is entitled to relief, defensive or affirmative. The doctrine is therefore generally settled, that where land subject to a usurious mortgage is conveyed to a grantee who assumes the payment thereof as a part of the consideration of the conveyance, he cannot set up the usury either as a defense to a foreclosure or as a ground for a cancellation of the security. The same is true of any transferee of property who, as a part of the transaction, assumes payment of a usurious debt. For the same reason a subsequent mortgagee or encumbrancer cannot defeat a prior encumbrance or procure it to be set aside upon allegations of its usurious character.[5] [e]

equity to grant affirmative relief to the borrower, without imposing any condition as above described: Bissell v. Kellogg, 60 Barb. 617; and see Cooper v. Tappan, 4 Wis. 376.[d]

[5] The reasons for these conclusions given by different courts in the following cases are not always the same; but they are not conflicting: De Wolf v. Johnson, 10 Wheat. 367, 392; Green v. Kemp, 13 Mass. 515, 575; 7 Am. Dec. 169; Shufelt v. Shufelt, 9 Paige, 137, 145; 37 Am. Dec. 381; Cole v. Savage, 10 Paige, 583; Post v. Dart, 8 Paige, 639, 641; Morris v. Floyd, 5 Barb. 130; Sands v. Church, 6 N. Y. 347; Merchants' Ex. Bank v. Commercial etc. Co., 49 N. Y. 635, 643; Knickerbocker Life Ins. Co. v. Nelson, 78 N. Y. 137, 150, and cases cited; Barthet v. Elias, 2 Abb. N. C. 364; Spaulding v. Davis, 51 Vt. 77; Citizens' Bank v. Cook, 61 Ga. 177; Lee v. Stiger, 30 N. J. Eq. 610; Reed v. Eastman, 50 Vt. 67 (a purchaser of the mortgaged property cannot set up the defense); McGuire v. Van Pelt, 55 Ala. 344 (nor an assignee of the mortgagor); Pickett v. Merchants' Nat. Bank, 32 Ark. 346 (nor a third person who has assumed the debt);

(d) See, also, Turner v. Turner, 80 Va. 379; Missouri, K. & T. Co. v. Krumseig, 77 Fed. 32, 40 U. S. A. 620 (Minnesota).

(e) The text is quoted in Swope v. Jordan, 107 Tenn. 166, 54 S. W. 52; and cited, to the effect that one assuming a mortgage cannot set up usury, in Frost v. Pacific Sav. Co., (Or.) 78 Pac. 814. See Lea v. Feamster, 21 W. Va. 108, 45 Am. Rep. 549; Nance v. Gregory, 6 Lea, 343, 40 Am. Rep. 41; Scanlan v. Grimmer, 71 Minn. 351, 74 N. W. 146, 70 Am. St. Rep. 326.

§ 938. Gaming Contracts.— In gaming contracts, unlike usurious loans, it cannot be said that one party takes advantage of the necessities of the other, who is *in vinculis;* both act freely and are *in pari delicto;* the general maxims therefore apply. While the contract is still executory, a court of equity will not aid the creditor to enforce it, the illegality being a perfect defense in equity as well as at law.[1] After the agreement has been executed by the loser's payment of the money, or by a conveyance of land or other property, equity will not interfere on his behalf and decree a recovery back of the money paid, or a cancellation of the conveyance or assignment, unless perhaps there were circumstances of fraud, oppression, duress, and the like, in procuring the payment or transfer, which would of themselves be a sufficient ground for equitable interposition dis-

Lamoille Co. Nat. Bank v. Bingham, 50 Vt. 105; 28 Am. Rep. 490 (nor can a surety avail himself of usury paid by his principal); Ready v. Huebner, 46 Wis. 692; 32 Am. Rep. 749 (a subsequent mortgagee cannot set up usury in a prior mortgage as a defense thereto); Bensley v. Homier, 42 Wis. 631 (nor can a subsequent judgment creditor). It seems, however, under the statutes of some states, that a subsequent mortgagee, when made a defendant in a suit to enforce a prior mortgage given by his mortgagor, may allege usury thereon as a defense: See Union etc. Sav. Inst. v. Clark, 59 How. Pr. 342. In the recent case of Knickerbocker Life Ins. Co. v. Nelson, 78 N. Y. 137, A gave a usurious mortgage on certain land; he afterwards conveyed the land subject to the mortgage to B, who assumed to pay it as "part of the purchase price of the premises"; B then conveyed the same land to C, subject to the mortgage, who in like manner assumed its payment; finally, C reconveyed the land to A, but this conveyance was not subject to the mortgage. The mortgagee brought suit to enforce the mortgage, but asked no relief against B and C, and made no allegations showing that he had accepted the agreements between A and them. Held, that A was not debarred from setting up the defense of usury and defeating the action. See also Hetfield v. Newton, 3 Sand. Ch. 564; Hartley v. Harrison, 24 N. Y. 170, 173; Schermerhorn v. Talman, 14 N. Y. 93; Cope v. Wheeler, 41 N. Y. 303.[f]

[1] Bosanquett v. Dashwood, Cas. t. Talb. 38, 41; Adams v. Gay, 19 Vt. 358; Spaulding v. Preston, 21 Vt. 9; 50 Am. Dec. 68; Adams v. Barrett, 5 Ga. 404; Gotwalt v. Neal, 25 Md. 434; Pope v. Chafee, 14 Rich. Eq. 69; and cases in the two following notes.

(f) Brooks v. Todd, 79 Ga. 692, 4 S. E. 156.

tinct from the mere illegality.[2] [a] Finally, as long as the contract is still executory, equity has jurisdiction to aid the losing party by ordering the written agreement and other securities to be surrendered up and canceled, and by granting the ancillary remedy of injunction to restrain their negotiation, transfer, or enforcement; and when the circumstances are such that the defensive remedy at law would not be equally certain, complete, and adequate, this jurisdiction ought to be and will be exercised. This conclusion is sustained by the highest authority, and is in perfect accord with principle.[3] [c]

2 There were a few early *dicta*, and perhaps decisions, opposed to this conclusion; but they have been overruled: Bosanquett v. Dashwood, Cas. t. Talb. 38, 41; Rawden v. Shadwell, Amb. 269; Thomas v. Cromise, 16 Ohio, 54; Cowles v. Raguet, 14 Ohio, 38, 55; Adams v. Gay, 19 Vt. 358; Spaulding v. Preston, 21 Vt. 9; 50 Am. Dec. 68; Gotwalt v. Neal, 25 Md. 434; Adams v. Barrett, 5 Ga. 404; Pope v. Chafee, 14 Rich. Eq. 69; Paine v. France, 26 Md. 46; Weakley v. Watkins, 7 Humph. 356, 357; and see Solinger v. Earle, 82 N. Y. 393, 397, 399. Where money is loaned expressly to enable the borrower to pay a gambling debt, it may be recovered back: Ex parte Pyke, L. R. 8 Ch. Div. 754, 756, 757.[b]

3 See Adams's Equity, 360, 361, 362 (m. p. 175), where this doctrine is expressly stated. Judge Story also lays down the same rule in the most

(a) The text is cited to this effect in Beer v. Landman, 88 Tex. 450, 31 S. W. 805. See, also, Smith v. Kammerer, 152 Pa. St. 98, 25 Atl. 165 (where a mortgage is assigned to secure a gambling debt, and such assignment is an executed contract, no relief); Albertson v. Laughlin, 173 Pa. St. 525, 34 Atl. 216, 51 Am. St. Rep. 777; Baxter v. Deneen, (Md.) 57 Atl. 601 (no injunction to prevent the withdrawal of money from a bank when object of injunction is to enforce a gambling contract); Stewart v. Parnell, 147 Pa. St. 523, 23 Atl. 838, 29 Wkly. Notes Cas. 537; Central Trust & S. D. Co. v. Respass, 112 Ky. 606, 66 S. W. 421, 99 Am. St. Rep. 317 (no accounting of profits of partnership for a gaming business). By the statutes of several states, the loser is authorized to recover the money or other property from the winner: See Jamieson v. Wallace, 167 Ill. 388, 59 Am. St. Rep. 302, 47 N. E. 762 (stock gambling); Pearce v. Foote, 113 Ill. 228, 55 Am. Rep. 414 (same); Lester v. Buel, 49 Ohio St. 240, 34 Am. St. Rep. 556, 30 N. E. 821 (same).

(b) It is said that advances made by a broker who has no interest in the stock gambling contract are recoverable by him: Hawley v. Bibb, 69 Ala. 52; but see Harvey v. Merrill, 150 Mass. 1, 22 N. E. 49, 15 Am. St. Rep. 159, 5 L. R. A. 200.

(c) The text is cited to this ef-

§ 939. Other Illegal Contracts.[a]— I have already, in the former volume, stated and illustrated the general rules which determine when relief will or will not be given in cases of ordinary illegal contracts. Without repeating what was there said, I purpose to explain the meaning and effect of the three maxims which limit the exercise of the equitable jurisdiction, and to ascertain and formulate, if possible, such conclusions as shall be sustained both by prin-

positive manner: Eq. Jur., sec. 303; Rawden v. Shadwell, Amb. 269; Woodroffe v. Farnham, 2 Vern. 291. In Lord Portarlington v. Soulby, 3 Mylne & K. 104, the plaintiff had given a bill of exchange for money lost in gaming, which had been transferred to the defendant under such circumstances that he was not a *bona fide* holder without notice. Plaintiff sought to have the bill surrendered and canceled and the defendant enjoined from negotiating it and suing on it at law. The lord chancellor held that the jurisdiction was settled beyond a doubt, that the plaintiff was entitled to maintain the suit, and he continued an injunction which had been granted. In Wynne v. Callander, 1 Russ. 293, 296, 297, plaintiff lost money at play to defendant, and gave bills of exchange therefor; when they fell due he renewed them by giving others in their place. He brought a suit to have the latter securities surrendered and canceled. The master of rolls granted the relief as asked, and the existence of the jurisdiction was hardly denied by counsel, and was regarded by the court as unquestionable. The master of rolls expressly declared the plaintiff *particeps criminis*, and for that reason, and because of his delay in suing, refused to give him costs. In Osbaldiston v. Simpson, 13 Sim. 513, securities given by the plaintiff in a gaming transaction were decreed to be given up and canceled, the vice-chancellor treating the jurisdiction as firmly settled. See also Chapin v. Dake, 57 Ill. 295; 11 Am. Rep. 15. In Skipwith v. Strother, 3 Rand. 214, it was held that a court of equity may enjoin a judgment recovered at law on a gaming contract. This decision necessarily involves the whole doctrine. If the creditor may be restrained from enforcing a judgment, he may certainly be restrained from proceeding upon the contract to obtain a judgment; and if the remedy of injunction is conceded, the jurisdiction to order a surrender and cancellation cannot be consistently denied. Whenever the loser's contract is no longer executory, but he has performed it by conveying land or other property, the case is entirely different; to relieve

fect in Tantum v. Arnold, 42 N. J. Eq. 63, 6 Atl. 316; quoted, Kahn v. Walter, 46 Ohio St. 195, 20 N. E. 203. See, also, Kuhl v. Gally Universal Press Co., 123 Ala. 452, 26 South. 535, 82 Am. St. Rep. 135 (cancellation of note and mortgage given in consideration of sale of gambling machine).

(a) Sections 939–942 are cited in Basket v. Moss, 115 N. C. 448, 20 S. E. 733, 44 Am. St. Rep. 463, 48 L. R. A. 842.

ciple and by authority.[1] These maxims are, *Ex turpi causa non oritur actio, In pari delicto melior est conditio possidentis,* or *In pari delicto melior est conditio defendentis.* What is meant by the "condition" of the possessor, or the defendant, which is so much "better" — or, as the maxim sometimes reads, "stronger" (*potior*) — that it will not be disturbed? Plainly, it is not the condition merely of an executory contract having been made and subsisting between the parties; the maxim does not refer to the condition of the executory contract which has been entered into remaining unaltered and unmolested; otherwise the setting up the illegality as a defense would be prohibited, for it would directly violate the maxim. The defense is always allowed, and this necessarily disturbs the condition of the contract. The "condition" referred to in the maxim is clearly the condition of the parties with respect to their property rights created by or resulting from the contract. If the contract is still executory, the promisor is left undisturbed in the possession of the money or other property which he agreed to pay or transfer;[b] if the contract has been executed, the promisee is left undisturbed in the possession of the money or other property which has been paid or conveyed to him. This is the true meaning of the maxim, and

him would be a violation of the general maxim. A cancellation of the conveyance is then properly denied: Cowles v. Raguet, 14 Ohio, 38, 55; Thomas v. Cronise, 16 Ohio, 54. If in these or other cases courts have gone farther, and held that equity has no power to cancel an *executory* gaming security, they have clearly misapprehended and misapplied the general maxim, and have reached a conclusion opposed to authority as well as to principle. Of course, the equitable jurisdiction to grant the affirmative relief of cancellation will not be *exercised* whenever the losing party might have a perfect, certain, and adequate remedy at law by way of defense; it is therefore peculiarly appropriate when the gaming securities consist of negotiable instruments. It has not, however, been entirely confined to that species of securities.

[1] §§ 401, 402, 403, and notes.

(b) Cited to this point in Drinkall v. Movius State Bank, 11 N. Dak. 10, 88 N. W. 724, 95 Am. St. Rep. 693, 57 L. R. A. 341.

it involves no requirement that the contract, as a *mere executory instrument,* should remain unmolested; it deals solely with the rights flowing, or which would flow, from the agreement.[c] The form, therefore, which correctly expresses the thought is, *Melior est conditio possidentis; "defendentis"* is appropriate only when regarded as equivalent to *possidentis.* The foregoing analysis is not a mere verbal discussion. Upon the true signification given to "condition," in the maxim, depends to a great extent the doctrine concerning affirmative equitable relief against illegal contracts.

§ 940. **In Pari Delicto — General Rules.**—The proposition is universal that no action arises, in equity or at law, from an illegal contract; no suit can be maintained for its specific performance, or to recover the property agreed to be sold or delivered, or the money agreed to be paid, or damages for its violation. The rule has sometimes been laid down as though it were equally universal, that where the parties are *in pari delicto,* no affirmative relief of any kind will be given to one against the other. This doctrine, though true in the main, is subject to limitations and exceptions which it is the special object of the present inquiry to determine.[1 a]

[1] Bosanquett v. Dashwood, Cas. t. Talb. 38; Neville v. Wilkinson, 1 Brown Ch. 543, 547; cited Jacob, 67; Rawden v. Shadwell, Amb. 269; Astley v. Reynolds, 2 Strange, 915; Smith v. Bromley, 2 Doug. 696, 697, 698; Osborne v. Williams, 18 Ves. 379; St. John v. St. John, 11 Ves. 526, 535, 536; Knowles v. Haughton, 11 Ves. 168; Rider v. Kidder, 10 Ves. 360, 366; Thomson v. Thomson, 7 Ves. 470; East I. Co. v. Neave, 5 Ves. 173, 181, 184; Watts v. Brooks, 3 Ves. 612; Sharp v. Taylor, 2 Phill. Ch. 801; Batty v. Chester, 5 Beav. 103; Smith v. White, L. R. 1 Eq. 626; Newby v. Sharpe,

(c) The text is quoted in Kahn v. Walton, 46 Ohio St. 195, 20 N. E. 203.

(a) The text is cited in Snipes v. Kelleher, 31 Wash. 386, 72 Pac. 67. See, also, Gibbs v. Baltimore Gas Co., 130 U. S. 405, 9 Sup. Ct. 553; Samuels v. Oliver, 130 Ill. 73, 22 N. E. 499; Gould v. Kendall, 15 Neb. 549, 19 N. W. 483; Ellicott v. Chamberlin, 38 N. J. Eq. 604, 48 Am. Rep. 327; Leonard v. Poole, 114 N. Y. 371, 21 N. E. 707, 11 Am. St. Rep. 667, 4 L. R. A. 728; Kahn v. Walter, 46 Ohio St. 195, 20 N. E. 203; Davis v. Sitting, 65 Tex. 497; Horn v. Star Foundry Co., 23 W. Va. 522.

As applications of this principle, the following rules may be regarded as settled, where the parties are *in pari delicto:* If the contract has been voluntarily executed and performed, a court of equity will not, in the absence of controlling motives of public policy to the contrary, grant its aid by decreeing a recovery back of the money paid or property delivered, or a cancellation of the conveyance or transfer.[2] [b] As long as the contract is executory, it cannot be enforced in any kind of action brought directly upon it; the illegality constitutes an absolute defense.[3] [c] As an ap-

L. R. 8 Ch. Div. 39; Sykes v. Beadon, L. R. 11 Ch. Div. 170; York v. Merritt, 77 N. C. 213; Shaw v. Carlile, 9 Heisk. 594; Inhabitants of Worcester v. Eaton, 11 Mass. 368, 375–379; Wells v. Smith, 13 Gray, 207; 74 Am. Dec. 631; Harvey v. Varney, 98 Mass. 118; Harrington v. Bigelow, 11 Paige, 349; Sweet v. Tinslar, 52 Barb. 271; Solinger v. Earle, 82 N. Y. 393; Marlatt v. Warwick, 19 N. J. Eq. 439; Cutler v. Tuttle, 19 N. J. Eq. 549, 562; Ownes v. Ownes, 23 N. J. Eq. 60; Roman v. Mali, 42 Md. 513; Jones v. Gorman, 7 Ired. Eq. 21; Logan v. Gigley, 11 Ga. 243; Galt v. Jackson, 9 Ga. 151; Adams v. Barrett, 5 Ga. 404; D'Wolf v. Pratt, 42 Ill. 198; and see cases under preceding paragraphs concerning various illegal contracts.

2 Solinger v. Earle, 82 N. Y. 393, 397, 399; Shaw v. Carlile, 9 Heisk. 594; York v. Merritt, 77 N. C. 213. See also cases cited in the last note, under the preceding paragraphs, and *ante*, under §§ 401, 402. Several of the decisions referred to were rendered in actions at law; but as these rules prevail alike in equity and at law, such cases are authorities.

3 Ibid. There are a few apparent exceptions or limitations. If money has been illegally borrowed and used by a corporation with the assent of its

(b) See, also, Equitable Life Assur. Soc. v. Wetherill, (C. C. A.) 127 Fed. 947; White v. Equitable Nuptial Benefit Union, 76 Ala. 251, 52 Am. Rep. 325; Treadwell v. Torbert, 119 Ala. 279, 24 South. 54, 72 Am. St. Rep. 918; Watkins v. Nugen, (Ga.) 45 S. E. 262; Beard v. White, (Ga.) 48 S. E. 400 (deed upon immoral consideration); Brady v. Huber, 197 Ill. 291, 64 N. E. 264, 90 Am. St. Rep. 161; Brindley v. Lawton, 53 N. J. Eq. (8 Dick.) 259, 31 Atl. 394; Sparks v. Sparks, 94 N. C. 527; Moore v. Adams, 8 Ohio (8 Ham.), 372, 32 Am. Dec. 723; Markley v. Mineral City, 58 Ohio St. 430, 51 N. E. 28, 65 Am. St. Rep. 776; Nester v. Continental Brewing Co., 161 Pa. St. 473, 29 Atl. 102, 34 Wkly. Notes Cas. 387, 24 L. R. A. 247; Teoli v. Nardolillo, 23 R. I. 87, 49 Atl. 489; Booker v. Wingo, 29 S. C. 116, 7 S. E. 49; Rock v. Mathews, 35 W. Va. 531, 14 S. E. 137, 14 L. R. A. 508; George v. Curtis, 45 W. Va. 1, 30 S. E. 69.

(c) See Casserleigh v. Wood, 119 Fed. 309 (C. C. A.); Dial v. Hair, 18 Ala. 798, 54 Am. Dec. 179; Chicago Gas Light Co. v. Gas Light Co., 121 Ill. 530, 13 N. E. 169, 2 Am. St. Rep. 124; South Chicago City Ry.

plication of the same doctrine merely in a different form, while the agreement is executory, courts of equity may relieve the debtor or promising party by ordering the written instrument and other securities to be surrendered and can-

stockholders, the corporation may be estopped from setting up the illegality as a defense to a suit by the creditor: In re Cork etc. R'y, L. R. 4 Ch. 748; In re Magdalena St. Nav. Co., Johns. 690.[d] Where the contract has been executed, the party in possession of the proceeds or profits may be unable to set up the illegality to defeat an action for an accounting, or to recover the proceeds, brought by a third person entitled to the money: Gilliam v. Brown, 43 Miss. 641; Harvey v. Varney, 98 Mass. 118; Sykes v. Beadon, L. R. 11 Ch. Div. 170, 193, 197, per Jessel, M. R.; Worthington v. Curtis, L. R. 1 Ch. Div. 419, 423; Davies v. London etc. Co., L. R. 8 Ch. Div. 469, 477; Thomson v. Thomson, 7 Ves. 470; Tenant v. Elliott, 1 Bos. & P. 3; Farmer v. Russell, 1 Bos. & P. 296; Sharp v. Taylor, 2 Phill. Ch. 801; Joy v. Campbell, 1 Schoales & L. 328, 339; McBlair v. Gibbes, 17 How. 232, 237; Brooks v. Martin, 2 Wall. 70, 81; Tracy v. Talmage, 14 N. Y. 162; 67 Am. Dec. 132; and see *ante*, vol. 1, § 403, and note.[e] It should be observed that the defense of illegality is allowed from motives of public policy, rather than from a regard for the interests of the objecting party. When a person, having actively participated in the illegal transaction, and having obtained all the benefit of it from the other party, refuses to perform his own executory undertaking, and sets up the illegality as a defense, his position, considered by itself, is unjust, but the law sustains it out of regard to the interests of society. The objection comes in appearance from the individual litigant, but in reality from society — the state — speaking through the courts: See Holman v. Johnson, Cowp. 341, 343, per Lord Mansfield; Wood v.

Co. v. Calumet Electric St. Ry. Co., 171 Ill. 391, 49 N. E. 576; Garrett v. Kansas City Coal Min. Co., 113 Mo. 330, 20 S. W. 965, 35 Am. St. Rep. 713; Brooks v. Cooper, 50 N. J. Eq. 761, 26 Atl. 978, 35 Am. St. Rep. 793, 21 L. R. A. 617; Camp v. Bruce, 96 Va. 521, 31 S. E. 901, 70 Am. St. Rep. 873, 43 L. R. A. 146.

(d) See, also, *ante*, § 819.

(e) The leading case of Brooks v. Martin, 2 Wall. 70, was a bill in equity for an account of profits between the parties under an executed partnership contract for the purchase and location of soldiers' land warrants, "confessedly against public policy," as well as in violation of the express provisions of an act of Congress; but the court held that the partner in whose hands the profits were could not refuse to account for or divide them, on the ground of the illegal character of the original contract. So, a railroad which has used the roadbed, rolling stock and equipments of another railroad under a contract in violation of a statute against the consolidation of competing railroads, cannot set up the illegality of the contract as a defense to a bill in equity for an accounting and a return of the property: Manchester & L. R. R. v. Concord R. R., 66 N. H. 100, 130–133, 49 Am. St. Rep. 582, 587–591, 9 L. R. A. 689, citing many cases.

celed, and by granting the ancillary remedies of injunction, discovery, and the like. Whenever the circumstances are such that the defensive remedy at law would not be equally certain, perfect, and adequate, this jurisdiction will be exercised. The equitable relief so conferred does not violate the general maxim concerning parties *in pari delicto;* on the contrary, it carries that maxim into effect.[f] It has already been shown that the maxim, rightly interpreted, does not require the condition of the parties, *with respect to the subsisting executory contract,* to remain unchanged and undisturbed. The remedy of cancellation or injunction, under the circumstances, is simply the equitable proceeding identical with the setting up the illegality as a defense to defeat a recovery at law, and thus to get rid of the contract as a binding executory obligation. The parties are left undisturbed as to their property rights.[4] [g]

Griffith, 1 Swanst. 43. In a suit for the specific enforcement of a contract, therefore, if the illegality is not alleged, but is first disclosed by the evidence, the court will itself pursue the inquiry, and dismiss the suit upon the fact being established: Parken v. Whitby, Turn. & R. 366; Evans v. Richardson, 3 Mer. 469. In respect to the *certainty* with which the illegality must be established, in order to be a defense in equitable suits on the contract, there is some discrepancy of opinion. By one theory, the agreement must appear with reasonable certainty, to be *legal;* by the other, the *illegality* must be clearly shown by convincing evidence. In Johnson v. Shrewsbury etc. R'y, 3 De Gex, M. & G. 914, 923, Knight Bruce, L. J., said: "The court must be satisfied that there was not a reasonable ground for contending that it [i. e., the contract] is illegal or against the policy of the law." In Aubin v. Holt, 2 Kay & J. 66, 70, Page Wood (Lord Hatherley), V. C., said: "The agreement must be legal or illegal; and it is not within the discretion of the court to refuse specific performance because an agreement *savors* of illegality; it must be shown to be illegal." The latter opinion would seem, upon principle, to be the correct one.

4 The setting aside gaming contracts, heretofore considered, is merely a particular instance of this general rule: See *ante,* § 938, and cases cited.

(f) Quoted in Basket v. Moss, 115 N. C. 448, 20 S. E. 733, 44 Am. St. Rep. 463, 48 L. R. A. 842. And see Harvey v. Linville Imp. Co., 118 N. C. 693, 24 S. E. 489, 54 Am. St. Rep. 749, 32 L. R. A. 265 (injunction granted to prevent illegal pooling of stock under an agreement).

(g) The text is quoted in Missouri, K. & T. Co. v. Krumseig, 77 Fed. 32, 40 U. S. A. 620; Kahn v. Walton, 46 Ohio St. 195, 20 N. E. 203; cited in

§ 941. In Pari Delicto — Limitation on the General Rules.— To the foregoing rules there is an important limitation. Even where the contracting parties are *in pari delicto,* the courts may interfere from motives of public policy. Whenever public policy is considered as advanced by allowing either party to sue for relief against the transaction, then relief is given to him. In pursuance of this principle, and

Mr. Adams lays down this rule in the most positive manner. Speaking of illegal contracts, he says: "Its invalidity will be a defense at law, while it remains unexecuted; and, *pari ratione,* if its illegal character be not apparent on the face of it, will be a ground for cancellation in equity. . . . . So long as the contract continues executory, the maxim of *in pari delicto* does not apply; for the nature of the contract would be a defense at law, and the decree of cancellation is only an equitable mode of rendering that defense effectual": Batty v. Chester, 5 Beav. 103; W—— v. B——, 32 Beav. 574. In such cases the party can obtain and should ask nothing but a mere cancellation. If his allegations show that he still relies upon the provisions of the illegal contract for any relief growing out of it, whether specific performance, reformation, or pecuniary recovery, the court will refuse all aid: Batty v. Chester, 5 Beav. 103. In W—— v. B——, 32 Beav. 574, a mortgage given upon a grossly immoral consideration was ordered to be surrendered up and canceled at the suit of the mortgagor. It cannot be denied that this view has been rejected by certain American cases, which seem to show some misconception of the meaning and effect of the general maxim. See remarks *ante,* in note under § 938.[h] Where an assignment was made for an illegal purpose, and "where the purpose for which the assignment was made is not carried into execution, and nothing is done under it, the mere intention to effect an illegal object does not deprive the assignor of his right to recover the property back from the assignee who has given no consideration for it": Symes v. Hughes, L. R. 9 Eq. 475, 479; Davies v. Otty, 35 Beav. 208. In such case equity will not permit the assignee to work a fraud and retain the property himself by setting up the statute of frauds as a defense: Haigh v. Kaye, L. R. 7 Ch. 469; Lincoln v. Wright, 4 De Gex & J. 16.

Booker v. Wingo, 29 S. C. 116, 7 S. E. 49; Gunnison Gas & W. Co. v. Whitaker, 91 Fed. 191, citing cases (cancellation of bonds issued *ultra vires* and contrary to statute); Hamilton v. Wood, 55 Minn. 482, 57 N. W. 208. See, also, Foley v. Greene, 14 R. I. 618, 51 Am. Rep. 419; Gargano v. Pope, (Mass.) 69 N. E. 343; McCutcheon v. Merz Capsule Co., 71 Fed. 787, 19 C. C. A. 108, 31 L. R. A. 415, and cases cited (injunction against enforcement of an unexecuted contract to join an unlawful combination; an important case). In pursuance of the rule stated in the text, equity may perpetually enjoin suit upon an illegal note, although the defense of illegality could be made in an action at law upon the note: Booker v. Wingo, 29 S. C. 116, 7 S. E. 49.

(h) Shipley v. Reasoner, 80 Iowa, 548, 45 N. W. 1077.

in compliance with the demands of a high public policy, equity *may* aid a party equally guilty with his opponent, not only by canceling and ordering the surrender of an executory agreement, but even by setting aside an executed contract, conveyance, or transfer, and decreeing the recovery back of money paid or property delivered in performance of the agreement. The cases in which this limitation may apply and the affirmative relief may thus be granted include the class of contracts which are intrinsically contrary to public policy,— contracts in which the illegality itself consists in their opposition to public policy, and any other species of illegal contracts in which, from their particular circumstances, incidental and collateral motives of public policy require relief.[1] [a]

[1] It is not asserted that in *all* contracts which are illegal because opposed to public policy relief will thus be given to a party *in pari delicto;* but simply that in this class of contracts the limitation finds its special field of operation. The equitable remedies of borrowers in usurious contracts are a familiar illustration. Marriage-brokerage contracts are another, the cases holding that money paid in pursuance of their stipulations may be recovered back: Reynell v. Sprye, 1 De Gex, M. & G. 660, 679, per Knight Bruce, L. J.; Benyon v. Nettlefold, 3 Macn. & G. 94, 102, 103; Hill v. Spencer, Amb. 641; Rider v. Kidder, 10 Ves. 360, 366; Smith v. Bruning, 2 Vern. 392; Goldsmith v. Buning, 1 Eq. Cas. Abr. 89; Roberts v. Roberts, 3 P. Wms. 66, 74; Morris v. MacCullock, 2 Eden, 190; Amb. 432; Hatch v. Hatch, 9 Ves. 292, 298; St. John v. St. John, 11 Ves. 526, 535, 536; Smith v. Bromley, cited 2 Doug. 696, 697, 698; Eastabrook v. Scott, 3 Ves. 456; Cullingworth v. Loyd, 2 Beav. 385, 390, note; McNeill v. Cahill, 2 Bligh, 228; Bellamy v. Bellamy, 3 Fla. 62, 103; Weakley v. Watkins, 7 Humph. 356; and see *ante,* § 403, and note.

(a) The text is quoted in Meech v. Lee, 82 Mich. 274, 46 N. W. 383; Gorringe v. Reed, 23 Utah, 120, 63 Pac. 902, 90 Am. St. Rep. 692; Basket v. Moss, 115 N. C. 448, 20 S. E. 733, 44 Am. St. Rep. 463, 48 L. R. A. 842. Cited, in Missouri, K. & T. Co. v. Krumseig, (C. C. A.) 77 Fed. 32 (usurious contract); Daniels v. Benedict, 50 Fed. 347; Kahn v. Walton, 46 Ohio St. 195, 20 N. E. 203; Board of Trade v. O'Dell Commission Co., 115 Fed. 574, 588, holding that the principle of the text did not support an application for an injunction against the unwarranted use of plaintiff's stock quotations in "bucket-shop" transactions, where it was shown that the greater part of the transactions in the plaintiff's exchange were of the same illegal character (but see Board of Trade v. L. A. Kinsey Co., (C. C. A.) 130 Fed. 507). See, also, Cox v. Donnelly, 34 Ark. 762 (contract in violation of the homestead act). Marriage brokerage

§ 942. **Not in Pari Delicto.**— Lastly, when the contract is illegal, so that both parties are to some extent involved in the illegality,— in some degree affected with the unlawful taint,— but are not *in pari delicto*,— that is, both have not, with the same knowledge, willingness, and wrongful intent, engaged in the transaction, or the undertakings of each are not equally blameworthy,— a court of equity may, in furtherance of justice and of a sound public policy, aid the one who is comparatively the more innocent, and may grant him full affirmative relief, by canceling an executory contract, by setting aside an executed contract, conveyance, or transfer, by recovering back money paid or property delivered, as the circumstances of the case shall require, and sometimes even by sustaining a suit brought to enforce the contract itself, or if this be impossible, by permitting him to recover the amount justly due, by means of an appropriate action not directly based upon the contract.[a] Such an inequality of condition exists so that relief may be given to the more innocent party, in two distinct classes of cases: 1. It exists where the contract is intrinsically illegal, and is of such a nature that the undertakings or stipulations of each, *if considered by themselves alone,* would show the parties equally in fault, but there are collateral and incidental circumstances attending the transaction, and affecting the relations of the two parties, which render one of them comparatively free from fault. Such circumstances are imposition, oppression, duress, threats, undue

contracts: Duval v. Wellman, 124 N. Y. 158, 26 N. E. 343; see, however, White v. Equitable, etc., Union, 76 Ala. 251, 52 Am. Rep. 325. If the party equally in guilt is given a right of action by statute, a court of equity will not refuse relief based on a judgment recovered in the statutory action: Pierstoff v. Joyes, 86 Wis. 128, 56 N. W. 735, 39 Am. St. Rep. 881 (creditor's bill based on judgment in bastardy proceedings). That a trustee may sue in his representative capacity to recover trust property, although he colluded with the defendant in the breach of trust, see Wetmore v. Porter, 92 N. Y. 76; Zimmerman v. Kinkle, 108 N. Y. 287, 15 N. E. 407.

(a) The text is quoted and followed in Meech v. Lee, 82 Mich. 274, 46 N. W. 383; Wright v. Stewart, 130 Fed. 905, 921.

influence, taking advantage of necessities or of weakness, and the like, as a means of inducing the party to enter into the agreement, or of procuring him to execute and perform it after it had been voluntarily entered into.[1 b] 2. The

[1] Some of these cases were decisions at law, but they are none the less authorities on this point in equity: Smith v. Bromley, 2 Doug. 696; Browning v. Morris, Cowp. 790; Smith v. Cuff, 6 Maule & S. 160; Atkinson v. Denby, 7 Hurl. & N. 934; Bosanquett v. Dashwood, Cas. t. Talb. 38, 40, 41; Osborne v. Williams, 18 Ves. 379; Bayley v. Williams, 4 Giff. 638 (an agreement made in consequence of threats to prosecute the plaintiff's son for forgery was canceled);[c] Davies v. Otty, 35 Beav. 208 (a conveyance made

(b) The text is quoted in Wright v. Stewart, 130 Fed. 905, 921; cited in Donnelly v. Rees, 141 Cal. 56, 74 Pac. 433; Anderson v. Merideth, 82 Ky. 564, 565; Bell v. Campbell, 123 Mo. 1, 45 Am. St. Rep. 505, 25 S. W. 359; Adams v. Irving National Bank, 116 N. Y. 606, 23 N. E. 7, 15 Am. St. Rep. 447, 6 L. R. A. 492; Gorringe v. Reed, 23 Utah, 120, 63 Pac. 902, 90 Am. St. Rep. 692. See, also, Harrington v. Grant, 54 Vt. 236 (mortgage and agreement made by mother under son's influence, to facilitate his escaping military duty); Daniels v. Benedict, 50 Fed. 347 (fraudulent divorce decree set aside, although to some extent collusive). Agreements compounding a felony, or to stifle criminal prosecution, obtained by duress, threats, etc.: Harris v. Carmody, 131 Mass. 51, 41 Am. Rep. 188; Meech v. Lee, 82 Mich. 274, 46 N. W. 383; Bell v. Campbell, 123 Mo. 1, 25 S. W. 359, 45 Am. St. Rep. 505; Turner v. Overall, 112 Mo. 271, 72 S. W. 644; Eadie v. Slimmon, 26 N. Y. 9, 82 Am. Dec. 395; Schoener v. Lissauer, 107 N. Y. 112, 13 N. E. 741; Adams v. Irving National Bank, 116 N. Y. 606, 23 N. E. 7, 15 Am. St. Rep. 447, 6 L. R. A. 491, and cases cited; Foley v. Greene, 14 R. I. 618, 51 Am. Rep. 419; Gorringe v. Reed, 23 Utah, 120, 63 Pac. 902, 90 Am. St. Rep. 692 (fear of prosecution of plaintiff's husband). But see Haynes v. Rudd, 83 N. Y. 251, 102 N. Y. 372, 55 Am. Rep. 815, where it was held that when the element of compounding a felony enters into a contract, the parties are necessarily *in pari delicto*, notwithstanding that the contract may have been procured by fraud, duress, or undue influence. Illegal conveyance in fraud of creditors, made to and at the solicitation of one occupying a fiduciary relation to the grantor, or obtained by fraud or undue influence of the grantee: Nichols v. McCarthy, 53 Conn. 299, 55 Am. Rep. 105, 23 Atl. 93; Herrick v. Lynch, 150 Ill. 283, 37 N. E. 221; Williams v. Collins, 67 Iowa, 413, 25 N. W. 682; Davidson v. Carter, 55 Iowa, 117, 7 N. W. 466; Anderson v. Merideth, 82 Ky. 565, 571; Harper v. Harper, 85 Ky. 160, 7 Am. St. Rep. 579, and note, 3 S. W. 5; O'Conner v. Ward, 60 Miss. 1025; Holliway v. Holliway, 77 Mo. 392; Kleeman v. Peltzer, 17 Nebr. 381, 22 N. W. 793; Boyd v. De la Montagnie, 73 N. Y. 498, 29 Am. Rep. 197; Ford v. Harrington, 16 N. Y. 285; Melbye v. Melbye, 15 Wash. 648, 47 Pac. 16; Clemens v. Clemens, 28 Wis. 637, 9 Am. Rep. 520; Donnelly v. Rees, 141 Cal. 56, 74 Pac. 433.

(c) The judgment in Bayley v. Williams was quoted and followed in Foley v. Greene, 14 R. I. 618, 51 Am. Rep. 419.

condition also exists where, in the absence of any incidental and collateral circumstances, the contract is illegal, but is *intrinsically* unequal; is of such a nature that one party is necessarily innocent as compared with the other; the stipulations, undertakings, and position of one are essentially less illegal and blameworthy than those of the others.[2 d]

under fear of being prosecuted for bigamy was set aside at the grantor's suit); Phalen v. Clark, 19 Conn. 421; 50 Am. Dec. 253; Pinckston v. Brown, 3 Jones Eq. 494; see Erie R'y Co. v. Vanderbilt, 5 Hun, 123. Smith v. Bromley, 2 Doug. 696, is one of the leading cases. The limitations which should be placed upon this and kindred cases are well stated in Solinger v. Earle, 82 N. Y. 393, 397, 399. While the *decision* in Solinger v. Earle, 82 N. Y. 393, is correct, the doubt which it suggests concerning Smith v. Bromley, 2 Doug. 696, and other cases of the same class, is unfounded. The opinion of Lord Mansfield has been adopted and followed by other courts, has been approved by text-writers, and is based upon principle; it will hardly be shaken at this day by a *dictum*.

[2] Cases of this class must largely depend upon their own particular circumstances. Relief is sometimes given even by enforcing the contract itself directly or indirectly: Osborne v. Williams, 18 Ves. 379; W—— v. B——, 32 Beav. 574; Prescott v. Norris, 32 N. H. 101; White v. Franklin Bank, 22 Pick. 181, 186; Lowell v. Boston, etc. R. R., 23 Pick. 24, 32; 34 Am. Dec. 33; Bellamy v. Bellamy, 6 Fla. 62, 103; Poston v. Baleh, 69 Mo. 115; Tracy v. Talmage, 14 N. Y. 162, 167, 67 Am. Dec. 132, per Selden, J.; 210, per Comstock, J.,— in whose opinions the subject is discussed most ably and exhaustively; see also Curtis v. Leavitt, 15 N. Y. 9.

Under the general doctrine of the text, a few more specific rules have been settled, which I will briefly state. It is true, these rules have generally been applied in actions at law; but cases involving the same questions, and depending upon the same principle, might arise in equity, and these rules and decisions would then furnish an authoritative guide for the courts of equity. The following propositions determine when an action may or may not be maintained upon the illegal contract itself: 1. Where a contract of sale or of lending is made, or any other contract by which money or other property is transferred or agreed to be transferred, the *mere knowledge or belief* of the vendor or the lender, that the purchaser or borrower intends to put the money or property thus acquired to some illegal use, does not render the contract void as against the vendor or lender, and does not prevent him from maintaining an action upon it to recover the purchase price of the property sold or agreed to be sold, or to recover back the money loaned. Although the purchaser or borrower may be completely *in delicto*, and his own illegal purpose may prevent *him* from maintaining any action on the contract, the vendor

(d) The text is quoted in Wright v. Stewart, 130 Fed. 905, 921; cited in Missouri, K. & T. Co. v. Krumseig, 77 Fed. 32 (usurious contract; plaintiff unaware of the illegality).

or lender is not in equal delict. 2. But if the illegal purpose of the purchaser or borrower *enters into and forms a part of the very contract itself,*— in other words, if it is *stipulated* as a part of the contract that the money or property is to be used for an illegal purpose; or if the vendor or lender parts with the property or money with the express intention on his own side of having it used for an illegal purpose; or if the vendor or lender, knowing of the unlawful purpose intended by the buyer or borrower, does anything in addition to the mere sale or loan to aid or carry into effect that illegal purpose,— then in either of these cases the contract is illegal as to both parties; both are *in pari delicto,* and neither of them can maintain any action upon the contract, or to obtain relief for its non-performance.[e] 3. The first of these propositions is subject, however, to the following exceptions: If the vendor or lender has simply a knowledge that the purchaser or borrower intends to use the property or money for the purpose of committing some positive *crime,* such mere knowledge will prevent him from recovering the price or maintaining any action: Tracy v. Talmage, 14 N. Y. 162, 167, 210; 67 Am. Dec. 132; Holman v. Johnson, Cowp. 341; Biggs v. Lawrence, 3 Term Rep. 454; Clugas v. Penaluna, 4 Term Rep. 466; Waymell v. Reed, 5 Term Rep. 599; Hodgson v. Temple, 5 Taunt. 181; Pellecatt v. Angell, 2 Cromp. M. & R. 311; Bowry v. Bennet, 1 Camp. 348; Cheney v. Duke, 10 Gill & J. 11. Another group of authorities sustains the doctrine that if the vendor or lender *can be connected in intention* with the illegal purpose, it is enough to defeat an action by him, even though the illegal purpose is not expressly specified in the contract, and although he does not do any act in furtherance of the illegal purpose beyond the mere entering into the agreement. This is the farthest limit to which the cases go: Lightfoot v. Tenant, 1 Bos. & P. 551; Cannan v. Bryce, 3 Barn. & Ald. 179; McKinnell v. Robinson, 3 Mees. & W. 434; Gaslight Co. v. Turner, 5 Bing. N. C. 666; 6 Bing. N. C. 324; White v. Buss, 3 Cush. 448. The illegal contract may also be sometimes enforced *indirectly,* at the suit of the more innocent party, by an action not brought upon the very contract itself. It is a well-settled doctrine with respect to implied contracts that where an express contract does not involve a *malum in se,* but is made illegal solely by some statute, and the parties are not, from the nature of their respective stipulations or their relations, *in pari delicto,* the more innocent one may maintain an action upon implied contract, to recover back the consideration, or the money advanced, or the value of the property, etc. In such a case, the less guilty party is entitled to relief, whether the agreement has been executed on both sides, or whether it be executory on the side of the defendant. What contracts are thus unequal in their illegality, so that the doctrine of implied promise may be invoked, must depend, in great measure, upon the language of the statute creating the illegality. It may be said, in general, that if the act prohibited is in itself innocent or indifferent, and the statute imposes a penalty or loss on one party only, or addresses its prohibitions and sanctions in consequence of a violation to one party only of the contract, then the illegality of the two parties is

(e) This rule is well illustrated by the case of Kuhl v. Gally Universal Press Co., 123 Ala. 452, 26 South. 535, 82 Am. St. Rep. 135.

§ 943. Second. Constructive Fraud Inferred from the Condition and Relations of the Immediate Parties to the Transaction.[a] — This division embraces those cases in which a transaction, although it may be perfectly regular in its external form, and valid perhaps by the original rules of the common law, is impeachable in equity because it lacks that absolute *consent* which is regarded as essential by courts of equity. The equitable conception of true consent as-

unequal.[f] Although the doctrine of implied promises and actions on implied contracts belongs primarily and peculiarly to the law, yet this is chiefly so as it affects the forms of action and rules of pleading. Exactly the same circumstances arise in equity, and the granting of equitable relief will then depend upon exactly the same principles, although under the equitable notions of remedies the suit may not be regarded or represented as based upon an implied promise: See Jaques v. Golightly, 2 W. Black. 1073; Browning v. Morris, 2 Cowp. 790; Jaques v. Withy, 1 H. Black. 65; Williams v. Hedley, 8 East, 461; Worcester v. Eaton, 11 Mass. 368; White v. Franklin Bank, 22 Pick. 181; Lowell v. Boston etc. R. R., 23 Pick. 24; 34 Am. Dec. 33; Atlas Bank v. Nahant Bank, 3 Met. 581; Mount v. Waite, 7 Johns. 434. The doctrine finds one of its most important applications in the case of contracts of corporations which are made illegal by their charters, or by other statutes, and *a fortiori* in the case of their contracts which are merely *ultra vires*:[g] Pratt v. Short, 79 N. Y. 437, 445–448; 35 Am. Rep. 531; Tracy v. Talmage, 14 N. Y. 162, 167, 210; 67 Am. Dec. 132 (overruling Leavitt v. Palmer, 3 N. Y. 19, 51 Am. Dec. 333, and Talmage v. Pell, 7 N. Y. 328); Curtis v. Leavitt, 15 N. Y. 9, 97, per Comstock, J., and see opinion of Selden, J.; Utica Ins. Co. v. Scott, 19 Johns. 1; Utica Ins. Co. v. Cadwell, 3 Wend. 296; Utica Ins. Co. v. Bloodgood, 4 Wend. 652; Buffalo City Bank v. Codd, 25 N. Y. 163–169; Parker v. Rochester, 4 Johns. Ch. 329, 332; Robinson v. Bland, 2 Burr. 1077. As to agreements *ultra vires*,[h] see Bissell v. Michigan Southern etc. R. R. Co., 22 N. Y. 258; Buffett v. Troy and Boston R. R. Co., 40 N. Y. 168; Whitney Arms Co. v. Barlow, 63 N. Y. 62; 20 Am. Rep. 504; New York State L. & T. Co. v. Helmer, 77 N. Y. 64; Oil Creek etc. R. R. Co. v. Pennsylvania Tran. Co., 83 Pa. St. 160; Darst v. Gale, 83 Ill. 136;

(f) A clear illustration may be found in the case of Bond v. Montgomery, 56 Ark. 563, 20 S. W. 525, 35 Am. St. Rep. 119, citing § 403 of the text.

(g) See, also, Manchester & Lawrence R. R. v. Concord R. R., 66 N. H. 100, 20 Atl. 383, 49 Am. St. Rep. 582, 9 L. R. A. 689, citing many cases.

(h) Application of the rule to *ultra vires* transaction: See, also, Pullman Palace Car Co. v. Central Transportation Co., 65 Fed. 158, citing many cases: Manchester & Lawrence R. R. v. Concord R. R., 66 N. H. 100, 20 Atl. 383, 49 Am. St. Rep. 582, 9 L. R. A. 689.

(a) This section is cited in Tribou v. Tribou, 96 Me. 305, 52 Atl. 795.

sumes a physical power of the party, an intellectual and moral power, and that he exercised these powers freely and deliberately. While the execution of an instrument in the regular legal manner will undoubtedly, in the absence of all contrary evidence, raise a *prima facie* presumption that the consent was present, the real consent may be prevented or destroyed by surrounding physical circumstances, by the want of intellectual or moral capacity in the party himself, or by physical, intellectual, or moral force controlling the free operations of his own will. This phase of so-called constructive fraud necessarily involves a great variety of instances, and several degrees of invalidity. It includes transactions absolutely void from complete incapacity, others which are voidable, and others which are only presumptively invalid, and which throw the burden of proof upon the parties claiming their benefit to overcome this presumption.[1] The whole subject is there-

Thompson v. Lambert, 44 Iowa, 239; Miners' Ditch Co. v. Zellerbach and Powers, 37 Cal. 543; 99 Am. Dec. 300; Ex parte Chippendale, 4 De Gex, M. & G. 19; In re National etc. Soc., L. R. 5 Ch. 309; In re Cork etc. R'y, L. R. 4 Ch. 748; Attorney-General v. Great Eastern R'y, L. R. 11 Ch. Div. 449, and cases cited; Mulliner v. Midland R'y, L. R. 11 Ch. Div. 611.

[1] This last group was described in Cowee v. Cornell, 75 N. Y. 99, 31 Am. Rep. 428, by Hand, J.: "It may be stated as universally true that fraud vitiates all contracts, but as a general thing it is not presumed, but must be proved. Whenever, however, the relations between the contracting parties appear to be of such a character as to render it certain that they do not deal on terms of equality, but that either on the one side from superior knowledge of the matter derived from a fiduciary relation, or from overmastering influence, or on the other from weakness, dependence, or trust justifiably reposed, unfair advantage in a transaction is rendered probable, there the burden is shifted, the transaction is presumed void, and it is incumbent upon the stronger party to show affirmatively that no deception was practiced, no undue influence was used, and that all was fair, open, voluntary, and well understood. This doctrine is well settled. And this is, I think, the extent to which the well-considered cases go, and is the scope of constructive fraud." The learned judge is clearly mistaken in the last statement, that his description covers all instances of "constructive fraud"; and, with all deference, it seems to me that he has mingled together and confused two distinct classes of cases, which are governed by quite different rules, namely, those in which, from the relations

fore separated into two branches: 1. Transactions void or voidable with persons totally or partially incapacitated; 2. Transactions presumptively invalid between persons in fiduciary relations.

§ 944. 1. Transactions Void or Voidable with Persons Totally or Partially Incapacitated.— The incapacities embraced under this head are either total or partial. They may be created by the policy of the law, such as coverture and infancy; they may be intellectual, such as insanity, mental weakness, intoxication; they may result from external forces, physical or moral, such as duress, undue influence, pecuniary necessity; or they may inhere in the very position and circumstances of the parties, such as sailors, expectant heirs, and reversioners. In several instances, which are placed under this head because they are governed by the same doctrine and rules, it must be admitted that the term "incapacity" can be used only by way of analogy.[1]

§ 945. Coverture.— At the common law, married women were without the capacity to bind themselves by contract, and their agreements were, in general, void in equity as

of the parties, invalidity is merely presumed, and the burden of proof is cast upon the one benefited to overcome such presumption by showing good faith; and those in which the voidable character is inferred as a conclusion of fact, without any presumption, from the partial incapacity of one party, or the overmastering influence exerted by the other. In the latter class, if the evidence of the incapacity or unlawful influence is satisfactory, the voidable character of the transaction results as a necessary conclusion; there is no mere presumption to overcome. It is of great importance to keep these two classes distinct; otherwise the whole subject will become confused and inaccurate.

[1] In other words, there is no true "incapacity"; the term is applied only to these instances because the condition of the parties is analogous to that of persons who are affected by some real incapacity, and they are all governed by the same rules. The nature and extent of several of the most important incapacities mentioned in this division are fully discussed in treatises upon contracts and upon persons. I shall describe them only so far as may be necessary to indicate the equitable rules concerning them, and to show the mode of exercising the equitable jurisdiction. Among these are coverture, infancy, insanity, *non compos mentis*, intoxication, duress, etc.

well as at law. With respect to their equitable separate property, however, married women are regarded by equity, independently of statutes, in many respects as though they were single; they are permitted to deal with such estate, and to make contracts concerning it; and such contracts are enforced by courts of equity against the property, though not against the married women personally.[1] Coverture, however, is no excuse, in equity, for fraud; in other words, the fraud of a married woman will furnish an occasion for appropriate equitable relief, and the fact that the fraudulent party is a married woman will not prevent such relief.[2] *Infancy:* The incapacity of infants to enter into binding contracts is the same in equity as in law; but such contracts are generally voidable only, and may therefore be ratified after the infant attains his majority. Fraud, however, will prevent the disability of infancy from being made available in equity. If an infant procures an agreement to be made through false and fraudulent representations that he is of age, a court of equity will enforce

[1] Hulme v. Tenant, 1 Brown Ch. 16; 1 Lead. Cas. Eq., 4th Am. ed., 679; Murray v. Barlee, 3 Mylne & K. 209, 220; Johnson v. Gallagher, 3 De Gex, F. & J. 494. The subject of married women's contracts in equity is treated in a subsequent chapter. The modern legislation concerning married women's property and contracts has made great changes in the rules which originally prevailed at law and in equity. An abstract of this legislation will be given in the subsequent chapter mentioned above.

[2] The relief may be defensive, by defeating a suit brought by the married woman; or it may be affirmative, as setting aside a fraudulent conveyance or agreement; pecuniary relief would not be given against her, personally, on account of her fraud, unless permitted by the modern legislation: Savage v. Foster, 9 Mod. 35; Vaughan v. Vanderstegen, 2 Drew. 363, 379; Sharpe v. Foy, L. R. 4 Ch. 35; In re Lush's Trusts, L. R. 4 Ch. 591; McHenry v. Davies, L. R. 10 Eq. 88; Jones v. Kearney, 1 Dru. & War. 134; Hobday v. Peters, 28 Beav. 354; Schmitheimer v. Eiseman, 7 Bush, 298; Curd v. Dodds, 6 Bush, 681; Sexton v. Wheaton, 8 Wheat. 229. The American decisions are conflicting on the question, how far a married woman is estopped by fraud from alleging her coverture. In addition to those cited *ante*, in the section on estoppel,[a] see Keen v. Coleman, 39 Pa. St. 299; 80 Am. Dec. 524; Glidden v. Strupler, 52 Pa. St. 400; Bank of United States v. Lee, 13 Pet. 107; Drake v. Glover, 30 Ala. 382.

(a) See § 814.

his liability as though he were adult, and may cancel a conveyance or executed contract obtained by fraud.[3 b]

§ 946. Insanity.— In general, a lunatic, idiot, or person completely *non compos mentis* is incapable of giving a true consent in equity, as at law; his conveyance or contract is invalid, and will generally be set aside.[1 a] While

[3] Ex parte Unity Bank, 3 De Gex & J. 63; Nelson v. Stocker, 4 De Gex & J. 458, 464; Cory v. Gerteken, 2 Madd. 40; Wright v. Snowe, 2 De Gex & S. 321; Hannah v. Hodgson, 30 Beav. 19, 25; Overton v. Banister, 3 Hare, 503; Clarke v. Cobley, 2 Cox, 173; Lemprière v. Lange, L. R. 12 Ch. Div. 675 (lease obtained by fraud set aside). In Martin v. Gale, L. R. 4 Ch. Div. 428, a deed given by an infant to secure the repayment of money advanced for necessaries was held voidable, although he was liable for the money actually loaned; and see Ex parte Taylor, 8 De Gex, M. & G. 254. An infant may be estopped from asserting his title, when he has intentionally concealed it: Savage v. Foster, 9 Mod. 35.

[1] Manning v. Gill, L. R. 13 Eq. 485; Price v. Berrington, 3 Macn. & G. 486; Gibson v. Soper, 6 Gray, 279; 66 Am. Dec. 414; Arnold v. Richmond Iron Works, 1 Gray, 434; Allis v. Billings, 6 Met. 415; 39 Am. Dec. 744; Howe v. Howe, 99 Mass. 88; Ingraham v. Baldwin, 9 N. Y. 45; Beals v. See, 10 Pa. St. 56; 49 Am. Dec. 573; Bensell v. Chancellor, 5 Whart. 371, 376; 34 Am. Dec. 561; Ballard v. McKenna, 4 Rich. Eq. 358; Frazer v. Frazer, 2 Del. Ch. 260; Breckenridge v. Ormsby, 1 J. J. Marsh. 236; 19 Am. Dec. 71; Ashcraft v. De Armond, 44 Iowa, 229; Knelcamp v. Hidding, 31 Wis. 503. As to defense of the mortgagor's lunacy set up in a foreclosure suit, and the right to have the issue tried at law, see Jacobs v. Richards, 5 De Gex, M. & G. 55. A conveyance will not be set aside, on the ground of the grantor's lunacy, as against a *bona fide* purchaser: Ashcraft v. De Armond, 44 Iowa, 229.[b] Several of these cases hold that the deeds of lunatics are voidable only, and not void: Freed v. Brown, 55 Ind. 310.

§ 945, (b) The text is quoted in Rice v. Boyer, 108 Ind. 472, 58 Am. Rep. 61, 9 N. E. 420 (under the reformed procedure, the equity rule on this subject appears to have supplanted the legal rule); cited in Hayes v. Parker, 41 N. J. Eq. 632, 7 Atl. 511. See, also, Williamson v. Jones, 43 W. Va. 562, 64 Am. St. Rep. 891, 27 S. E. 411, 38 L. R. A. 694.

§ 946, (a) Jacks v. Estee, 139 Cal. 507, 73 Pac. 247; Penington v. Thompson, 5 Del. Ch. 328; Helberg v. Schumann, 150 Ill. 12, 37 N. E. 99, 41 Am. St. Rep. 339; Warfield v. Warfield, 76 Iowa, 633, 41 N. W. 383; Lombard v. Morse, 155 Mass. 136, 29 N. E. 205, 14 L. R. A. 273; Raynett v. Balus, 54 Mich. 469, 20 N. W. 533; Ricketts v. Jolliff, 62 Miss. 440; Collins v. Toppin, (N. J. Ch.) 55 Atl. 124, and cases cited; Crawford v. Scovell, 94 Pa. St. 48; Brothers v. Bank of Kaukauna, 84 Wis. 381, 54 N. W. 786, 36 Am. St. Rep. 932.

§ 946, (b) Arnett's Committee v. Owens, 23 Ky. Law Rep. 1409, 65 S. W. 151; Odom v. Riddick, 104 N. C. 515, 10 S. E. 609, 17 Am. St. Rep. 686, 7 L. R. A. 118; Chamblee v. Broughton,

this rule is generally true, the *mere* fact that a party to an agreement was a lunatic will not operate as a defense to its enforcement, or as ground for its cancellation. A contract executed or executory made with a lunatic in good faith, without any advantage taken of his position, and *for his own benefit,* is valid both in equity and at law.[2] [c] And where a conveyance or contract is made in ignorance of the insanity, with no advantage taken, and with perfect good faith, a court of equity will not set it aside, if the parties cannot be restored to their original position, and injustice would be done.[3] [d] The conveyance or agreement of a monomaniac will be defeated or set aside, if it is the result of his insane delusion.[4] The nature and extent of

[2] Ex parte Hall, 7 Ves. 261, 264; Selby v. Jackson, 6 Beav. 192, 204; Nelson v. Duncombe, 9 Beav. 211; Snook v. Watts, 11 Beav. 105; Stedman v. Hart, Kay, 607; Fitzgerald v. Reed, 9 Smedes & M. 94.

[3] Niell v. Morley, 9 Ves. 478, 482; Sergeson v. Sealy, 2 Atk. 412; Price v. Berrington, 3 Macn. & G. 486; Manby v. Bewicke, 3 Kay & J. 342; Campbell v. Hooper, 3 Smale & G. 153; Williams v. Wentworth, 5 Beav. 325; Jacobs v. Richards, 18 Beav. 300; Yauger v. Skinner, 14 N. J. Eq. 389; Carr v. Holliday, 5 Ired. Eq. 167. For an exception, see Elliot v. Ince, 7 De Gex, M. & G. 475.

[4] There has been some discrepancy among the decisions on this subject. A few English cases, adopting a supposed medical theory that there is no such condition as monomania, hold that a person laboring under any single insane delusion is to be regarded as wholly insane, and his contracts as therefore voidable. The latest decisions lay down the rule as given in the text, and also its converse,— that a conveyance or agreement which does not appear to be the result of the delusion is valid and binding: Jenkins v. Morris, L. R. 14 Ch. Div. 674, following Banks v. Goodfellow, L. R. 5 Q. B. 549, and Boughton v. Knight, L. R. 3 P. & M. 64, and Smee v. Smee, 49 L. J. P. & M. 8, and

120 N. C. 170, 27 S. E. 111. But see Hull v. Louth, 109 Ind. 315, 10 N. E. 270, 58 Am. Rep. 405; Dewey v. Allgire, 37 Neb. 6, 55 N. W. 276, 40 Am. St. Rep. 468 (it is not necessary to return any part of the consideration to such purchaser); Gray v. Turley, 110 Ind. 254, 11 N. E. 40.

(c) See, also, *post,* § 1300; Rhodes v. Rhodes, 44 Ch. D. 94.

(d) This portion of the text is quoted in Gribben v. Maxwell, 34 Kan. 8, 7 Pac. 584, 55 Am. Rep. 233 and cited in Odom v. Riddick, 104 N. C. 515, 10 S. E. 609, 17 Am. St. Rep. 686, 7 L. R. A. 118; Bank v. Sneed, 97 Tenn. 120, 36 S. W. 716, 56 Am. St. Rep. 788, 34 L. R. A. 274. See, also, Abbott v. Creal, 56 Iowa, 175, 9 N. W. 115; Brown v. Cory, 9 Kan. App. 702, 59 Pac. 1097; Schaps v. Lehner, 54 Minn. 208, 55 N. W. 911.

mental capacity and incapacity are the same at law and in equity.[5]

§ 947. **Mental Weakness.**— It is well settled that there may be a condition of extreme mental weakness and loss of memory, either congenital, or resulting from old age, sickness, or other cause, and not being either idiocy or lunacy, which will, *without any other incidents or accompanying circumstances,* of itself destroy the person's testamentary capacity, and *a fortiori* be ground for defeating or setting aside his agreements and conveyances.[1] It is

overruling Waring v. Waring, 6 Moore P. C. C. 341, and Smith v. Tebbetts, L. R. 1 P. & M. 398. The case of Jenkins v. Morris, L. R. 14 Ch. Div. 674, decided by the vice-chancellor and the court of appeal, is a full discussion of the subject and very remarkable in its facts. See also Creagh v. Blood, 2 Jones & L. 509; Dew v. Clarke, 5 Russ. 163, 167; Steed v. Calley, 1 Keen, 620; Boyce v. Smith, 9 Gratt. 704; 60 Am. Dec. 313. The same rule has been applied in this country to wills: Seamen's F. Soc. v. Hopper, 33 N. Y. 619; Clapp v. Fullerton, 34 N. Y. 190; 90 Am. Dec. 681; Thompson v. Thompson, 21 Barb. 107; Stanton v. Wetherwax, 16 Barb. 259; Lathrop v. Am. Bd. of For. Miss., 67 Barb. 590; Mill's Appeal, 44 Conn. 484.[c]

[5] Bennett v. Vade, 2 Atk. 324, 327, per Lord Hardwicke; Osmond v. Fitzroy, 3 P. Wms. 130; Manby v. Bewicke, 3 Kay & J. 342.

[1] It is undoubtedly difficult to formulate any rule for determining the amount of this mental weakness. The following has been adopted by the highest authority, and is clearly just: "Had the testator a disposing memory? Was he able, without prompting, to recollect the property he was about to bequeath, the manner of distributing it, and the objects of his bounty? To sum up the whole in the most simple and intelligible form, Were his mind and memory sufficiently sound to enable him to know and to understand the business in which he was engaged at the time when he executed the will?" If any of these questions must be answered in the negative, if such an amount of mind and memory does not exist, then there is no testamentary capacity: Den ex dem. Stevens v. Vancleve, 4 Wash. C. C. 262, 267, 268; Harrison v. Rowan, 3 Wash. C. C. 580, 585, 586; Parish Will Case, 25 N. Y. 9, and cases cited.[a] The same rule applies to conveyances and other agreements *inter vivos:* Ball v. Mannin, 3 Bligh, N. S., 1; Coleman v. Frazer, 3 Bush, 300; Shaw v. Dixon, 6 Bush, 644; Shakespeare v. Markham, 72 N. Y 400.[b] Un-

(c) See, also, Riggs v. American Tract Society, 95 N. Y. 503. Monomania which does not extend to the matter in question is not sufficient to warrant the setting aside of a conveyance: Lewis v. Arbuckle, 85 Iowa, 335, 52 N. W. 237, 16 L. R. A. 677.

(a) See, also, Campbell v. Campbell, 130 Ill. 466, 22 N. E. 620, 6 L. R. A. 167.

(b) King v. Davis, 60 Vt. 502, 11 Atl. 727.

equally certain that *mere* weak-mindedness, whether natural or produced by old age, sickness, or other infirmity, unaccompanied by any other inequitable incidents, if the person has sufficient intelligence to understand the nature of the transaction, and is left to act upon his own *free* will, is not a sufficient ground to defeat the enforcement of an executory contract, or to set aside an executed agreement or conveyance.[2] If, as is frequently if not generally the

doubtedly the line is very difficult to draw between this extreme condition of mental weakness and actual lunacy on one side, and *mere* weak-mindedness on the other; each case must largely depend upon its own facts; and some of the early cases refused to lay down any rule: Osmond v. Fitzroy, 3 P. Wms. 129; Bennett v. Vade, 9 Mod. 312, 315; Bell v. Howard, 9 Mod. 302; Manby v. Bewicke, 3 Kay & J. 342; Harrod v. Harrod, 1 Kay & J. 4, 7; Hudson v. Beauchamp, 3 Bligh, 20, note; Addis v. Campbell, 4 Beav. 401; Longmate v. Ledger, 2 Giff. 157, 163; Jackson v. King, 4 Cow. 207; 15 Am. Dec. 354; Clarke v. Sawyer, 3 Sand. Ch. 351, 357. Notwithstanding the difficulty, there is certainly such a condition of mental weakness and want of memory, which of itself, without any undue influence, unfairness, or other incident, will be ground for the interposition of equity and its relief, either defensive or affirmative: See cases in next two notes.

[2] If a court can see that there were no inequitable incidents, such as undue influence, great ignorance and want of advice, very inadequate price, and the like, it will not interfere merely because one party possessed very much less intelligence than the other, nor because the transaction is not one which the court in all respects approves:[c] Ball v. Mannin, 3 Bligh, N. S., 1; Osmond v. Fitzroy, 3 P. Wms. 129; Lewis v. Pead, 1 Ves. 19; Pratt v. Barker, 1 Sim. 1; 4 Russ. 507; Clark v. Malpas, 31 Beav. 80; Prideaux v. Lonsdale, 1 De Gex, J. & S. 433; Harrison v. Guest, 6 De Gex, M. & G. 424; 8 H. L. Cas. 481; Stone v. Wilbern, 83 Ill. 105; Pickerell v. Morss, 97 Ill. 220; Graham v. Castor, 55 Ind. 559; Mulloy v. Ingalls, 4 Neb. 115; Cowee v. Cornell, 75 N. Y. 91, 99, 100; 31 Am. Rep. 428; Paine v. Roberts, 82 N. C. 451; Wellemin v. Dunn, 93 Ill. 511; Beverley v. Walden, 20 Gratt. 147; Mann v. Betterly, 21 Vt. 326; Howe v. Howe, 99 Mass. 88; Ex parte Allen, 15 Mass. 58; Stiner v. Stiner, 58 Barb. 643; Hyer v. Little, 20 N. J. Eq. 443; Lozear v. Shields, 23 N. J. Eq. 509; Aiman v. Stout, 42 Pa. St. 114; Dean v. Fuller, 40 Pa. St. 474; Graham v. Pancoast, 31 Pa. St. 89; Nace v. Boyer, 31 Pa. St. 99; Greer v. Greers, 9 Gratt. 330, 332; Rippy v. Gant, 4 Ired. Eq. 543; Thomas v. Sheppard, 2 McCord Eq. 36; 16 Am. Dec. 632; Oldham v. Oldham, 5 Jones Eq. 89; Graham v. Little, 3 Jones Eq. 152; Long v. Long, 9 Md. 348; Prewitt v. Coopwood, 30 Miss. 369; Killian v. Badgett, 27 Ark. 166; Darnell v. Rowland, 30 Ind. 342; Wray v. Wray, 32 Ind. 126; Gratz v. Cohen, 11 How. 1, 19; Harding v. Handy, 11 Wheat. 103.

[c] See, also, Sawyer v. White, (C. C. A.) 122 Fed. 223; President, etc., of Bowdoin College v. Merritt, 75 Fed. 480; Oxford v. Hopson, (Ark.)

case, the mental weakness and failure of memory are accompanied by other inequitable incidents, and are taken undue advantage of through their means, equity not only may but will interpose with defensive or affirmative relief.[3 d] Finally, in a case of real mental weakness, a pre-

[3] Where mental weakness, not of itself sufficient to destroy capacity, is accompanied by undue influence, inadequacy of price, taking advantage of pecuniary necessities, ignorance and want of advice, misrepresentations or concealments, and the like, a contract or conveyance procured by their combined means will be defeated or set aside; it is not a simple presumption of invalidity which thus arises, but the presumption has become established. Of course, in the vast majority of instances, the mental weakness is wrought upon through such inequitable instrumentalities, in order to obtain a contract or conveyance for an inadequate consideration: Huguenin v. Baseley, 14 Ves. 273; Boyse v. Rossborough, 6 H. L. Cas. 2; Nottidge v. Prince, 2 Giff. 246; Baker v. Monk, 33 Beav. 419; Harrison v. Guest, 6 De Gex, M. & G. 424; 8 H. L. Cas. 481; Moore v. Moore, 56 Cal. 89; Poston v. Balch, 69 Mo. 115; White v. White, 89 Ill. 460; Waddell v. Lanier, 62 Ala. 347; Allore v. Jewell, 94 U. S. 506; Bogie v. Bogie, 41 Wis. 209; Bainter v. Fults, 15 Kan. 323; Harris v. Wamsley, 41 Iowa, 671; Mead v. Coombs, 26 N. J. Eq. 173; Lavette v. Sage, 29 Conn. 577; Whelan v. Whelan, 3 Cow. 537; Hutchinson v. Tindall, 3 N. J. Eq. 357; Hetrick's Appeal, 58 Pa. St. 477; Brady's Appeal, 66 Pa. St. 277; Hunt v. Moore, 2 Pa. St. 105; Highberger v. Stiffler, 21 Md. 338; 83 Am. Dec. 593; Brogden v. Walker, 2 Har. & J. 285; Maddox v. Simmons, 31 Ga. 512; Rumph v. Abercrombie, 12 Ala. 64; Hill v. McLaurin, 28 Miss. 288; Tracey v. Sacket, 1 Ohio St. 54; 59 Am. Dec. 610; Harding v. Handy, 11 Wheat. 103.e

83 S. W. 942; Reeve v. Bonwill, 5 Del. Ch. 1; Kimball v. Cuddy, 117 Ill. 213, 7 N. E. 589; Burt v. Quisenberry, 132 Ill. 385, 24 N. E. 622; Shea v. Murphy, 164 Ill. 614, 45 N. E. 1021, 56 Am. St. Rep. 215; Argo v. Coffin, 142 Ill. 368, 32 N. E. 679, 34 Am. St. Rep. 86; Crooks v. Smith, (Iowa) 99 N. W. 112; Nowlen v. Nowlen, (Iowa) 98 N. W. 383; Paulus v. Reed, (Iowa) 96 N. W. 757; Harrison v. Otley, 101 Iowa, 652, 70 N. W. 724; Hyman v. Wakeham, (Mich.) 94 N. W. 1062; Dundee Chemical Works v. Connor, 46 N. J. Eq. 576, 20 Atl. 50; Dean v. Dean, 42 Or. 290, 70 Pac. 1039; Beville v. Jones, 74 Tex. 148, 11 S. W. 1128; Stringfellow v. Hanson, 25 Utah, 480, 71 Pac. 1052; Delaplain v. Grubb, 44 W. Va. 612, 30 S. E. 201, 67 Am. St. Rep. 788.

(d) The text is cited to this effect in Bennett v. Bennett, (Neb.) 91 N. W. 409; Dingman v. Romine, 141 Mo. 466, 42 S. W. 1087.

(e) Kilgore v. Cross, 1 Fed. 578; Richards v. Donner, 72 Cal. 207, 13 Pac. 584; Elmstedt v. Nicholson, 168 Ill. 580, 58 N. E. 381; Ashmead v. Reynolds, 134 Ind. 139, 33 N. E. 763, 39 Am. St. Rep. 238; Frush v. Green, 86 Md. 494, 39 Atl. 863; Williams v. Williams, 63 Md. 371 (a remarkable case); Loder v. Loder, 34 Neb. 824, 52 N. W. 814; Thorp v. Smith, 63 N. J. Eq. 70, 51 Atl. 437; Krause v. Krause, (N. J. Eq.) 55 Atl. 1095;

sumption arises against the validity of the transaction, and the burden of proof rests upon the party claiming the benefit of the conveyance or contract to show its perfect fairness and the capacity of the other party.[4 f]

§ 948. Persons in Vinculis.— Analogous to the condition of mental weakness is that of pecuniary or other necessity and distress. Whenever one person is in the power of another, so that a free exercise of his judgment and will would be impossible, or even difficult, and whenever a person is in pecuniary necessity and distress, so that he would be likely to make any undue sacrifice, and advantage is taken of such condition to obtain from him a conveyance or contract which is unfair, made upon an inadequate consideration, and the like, even though there be no actual duress or threats, equity may relieve defensively or affirmatively.[1 a] *Persons illiterate or ignorant:* By the same

[4] Longmate v. Ledger, 2 Giff. 157, 164; Kempson v. Ashbee, L. R. 10 Ch. 15; Harrison v. Guest, 6 De Gex, M. & G. 424; 8 H. L. Cas. 481; Shakespeare v. Markham, 72 N. Y. 400; Cowee v. Cornell, 75 N. Y. 91, 99, 100; 31 Am. Rep. 428; Graves v. White, 4 Baxt. 38; Bogie v. Bogie, 41 Wis. 209; Galpin v. Wilson, 40 Iowa, 90; Wartemberg v. Spiegel, 31 Mich. 400; Whelan v. Whelan, 3 Cow. 537; Brice v. Brice, 5 Barb. 533, 549; Highberger v. Stiffler, 21 Md. 338; 83 Am. Dec. 593; Marshall v. Billingsly, 7 Ind. 250; Martin v. Martin, 1 Heisk. 644, 653; Allore v. Jewell, 94 U. S. 506. The whole subject of weakness of mind is practically involved with undue influence. See Huguenin v. Baseley, 2 Lead. Cas. Eq., 4th Am. ed., 1156, 1174, 1192, 1242, for a discussion in the editor's notes. Many cases partly turning upon mental weakness will be found under the succeeding paragraphs of this subdivision.

[1] Relief will be granted in such cases with great caution. If it appears that, notwithstanding his necessitous condition, the party acted knowingly

Hammell v. Hyatt, 59 N. J. Eq. 174, 44 Atl. 953; Polt v. Polt, 205 Pa. St. 139, 54 Atl. 577; Hoeh v. Hoeh, 197 Pa. St. 387, 47 Atl. 351; Kelly v. Smith, 73 Wis. 191, 41 N. W. 69.

(f) The text is cited to this effect in Wilkinson v. Sherman, 45 N. J. Eq. 421, 18 Atl. 228. See, also, Jones v. Thompson, 5 Del. Ch. 374; Sands v. Sands, 112 Ill. 225; Crawford v. Hoeft, 58 Mich. 1, 23 N. W. 27, 24 N. W. 645; Gates v. Cornett, 72 Mich. 420, 40 N. W. 740; Dickson v. Kempinsky, 96 Mo. 252, 9 S. W. 618; Brummond v. Krause, 8 N. Dak. 573, 80 N. W. 686.

(a) The text is quoted in Buford v. Louisville, etc., R. R. Co., 82 Ky. 286; Dingman v. Romine, 141 Mo. 466, 42 S. W. 1087; and cited in

analogy, where a person is illiterate or ignorant of the nature and extent of his own rights, or ignorant of the nature of the transaction in which he is engaging, and acts without professional or other advice, and advantage is taken of his condition to obtain a conveyance or contract upon an inadequate consideration, or otherwise unfair, equity will relieve by setting it aside or defeating its enforcement. The relief is granted on the ground that there was not an intelligent and free consent; if the circumstances show such consent, equity will not interfere.[2] [b]

and intelligently, with a full comprehension of the situation, of his own acts, and of their consequences, and no undue pressure was used, equity will not interpose, even though the consideration is inadequate: See *ante*, paragraphs on inadequacy of consideration. A presumption of invalidity arises from the circumstances, but that presumption *may* be overcome: Johnson v. Nott, 1 Vern. 271; Kemeys v. Hansard, Coop. 125; Williams v. Bayley, L. R. 1 H. L. 200, 218; Gould v. Okeden, 4 Brown Parl. C. 198; Farmer v. Farmer, 1 H. L. Cas. 724; Boyse v. Rossborough, 6 H. L. Cas. 2; Hetrick's Appeal, 58 Pa. St. 477; Blackwilder v. Loveless, 21 Ala. 371; Neilson v. McDonald, 6 Johns. Ch. 201; French v. Shoemaker, 14 Wall. 314; and see 2 Lead. Cas. Eq., 4th Am. ed., 1230.

[2] Stanley v. Robinson, 1 Russ. & M. 527; Helsham v. Langley, 1 Younge & C. Ch. 175; Baker v. Monk, 4 De Gex, J. & S. 388; Clark v. Malpas, 4 De Gex, F. & J. 401; Harrison v. Guest, 6 De Gex, M. & G. 424; 8 H. L. Cas. 481; Lyons v. Van Riper, 26 N. J. Eq. 337; Connelly v. Fisher, 3 Tenn. Ch. 382; Hawkins v. Hawkins, 50 Cal. 558; Fish v. Leser, 69 Ill. 394; Gasque v. Small, 2 Strob. Eq. 72. Relief is granted in this case also with the greatest caution. Courts of equity have not in England, and much less in this country, adopted a rule that a conveyance or contract cannot be valid unless made with professional advice: Lightfoot v. Heron, 3 Younge & C. 586; Haberdashers' Co. v. Isaac, 3 Jur., N. S., 611. In applying the rules contained in the above paragraph and in the preceding one, it should be remembered that in all of them the special circumstances — mental weakness, necessities, ignorance, etc. — are assumed to show the absence of a free consent, a free act of the will. The mere fact, therefore, that a party was very old, or illiterate, or sick, or in pecuniary necessity, will not invalidate a trans-

Cowen v. Adams, 78 Fed. 536, 47 U. S. App. 676. See, also, Brown v. Hall, 14 R. I. 249, 51 Am. Rep. 375; James v. Kerr, 40 Ch. Div. 449. The mere fact that the bargain was unconscionable and made under business necessity was held insufficient in Miles v. Dover Furnace Iron Co., 125 N. Y. 294, 26 N. E. 261; Carley v. Tod, 83 Hun, 53, 31 N. Y. Supp. 635.

(b) See *post*, § 953; Green v. Wilkie, 98 Iowa, 74, 66 N. W. 1046, 60 Am. St. Rep. 184, 36 L. R. A. 434, and notes (note and mortgage invalid); Winfield Nat. Bank v. Croco, 46 Kan. 620, 26 Pac. 939.

§ 949. Intoxication.—Intoxication which merely exhilarates, and does not materially affect the understanding and the will, does not constitute a defense to the enforcement of an executory agreement, and much less is it any ground for affirmative relief.[1] [a] An intoxication which is absolute and complete, so that the party is for the time entirely deprived of the use of his reason, and is wholly unable to comprehend the nature of the transaction and of his own acts, is a sufficient ground for setting aside or granting other appropriate affirmative relief against a conveyance or contract made while in that condition, even in the absence of any fraud, procurement, or undue advantage by the other party.[2] [b] Where the intoxication is not thus

action, or be a ground for setting aside or defeating a contract, even though made upon an inadequate consideration and without advice, provided the evidence shows that he was competent to form an independent judgment, that he really knew the nature and effect of the transaction in which he was engaged, and acted in it intelligently and deliberately. To impeach *such* a transaction requires proof of actual fraud or coercion. Courts do not set aside conveyances and contracts simply because the judges may regard them unfavorably: Lewis v. Pead, 1 Ves. 19; Harrison v. Guest, 6 De Gex, M. & G. 424; 8 H. L. Cas. 481; McNeill v. Cahill, 2 Bligh, 228; Curson v. Belworthy, 3 H. L. Cas. 742; Hunter v. Atkins, 3 Mylne & K. 113; Pratt v. Barker, 1 Sim. 1; Price v. Price, 1 De Gex, M. & G. 308; Hovenden v. Lord Annesley, 2 Schoales & L. 607, 639; Murray v. Palmer, 2 Schoales & L. 474, 486; Cooke v. Lamotte, 15 Beav. 234; Ramsbottom v. Parker, 6 Madd. 6; Cowee v. Cornell, 75 N. Y. 91, 99, 100; 31 Am. Rep. 428.

[1] Lightfoot v. Heron, 3 Younge & C. 586; Shaw v. Thackray, 1 Smale & G. 537; Cavender v. Waddingham, 5 Mo. App. 457; Shackelton v. Sebree, 86 Ill. 616.

[2] There are some early *dicta* that equity would never grant affirmative relief to a party on the ground of his own intoxication, however complete, unless it was accompanied by conduct positively inequitable of the other party. The rule seems now to be settled, however, as stated in the text: Cooke v. Clayworth, 18 Ves. 12; Shackelton v. Sebree, 86 Ill. 616; Johnson v. Phifer, 6 Neb. 401; Bates v. Ball, 72 Ill. 108; Prentice v. Achorn, 2 Paige,

(a) The text is cited in Thackrah v. Haas, 119 U. S. 501, 7 Sup. Ct. 311. See, also, Watson v. Doyle, 130 Ill. 415, 22 N. E. 613. An habitual drunkard is not necessarily an incompetent person: Ralston v. Turpin, 25 Fed. 18; Wright v. Fisher, 65 Mich. 275, 32 N. W. 605, 8 Am. St. Rep. 886; Van Wyck v. Brasher, 81 N. Y. 260; Burnham v. Burnham, (Wis.) 97 N. W. 176.

(b) Hale v. Stery, 7 Colo. App. 165, 42 Pac. 598; Moetzel & Muttera v. Koch, (Iowa) 97 N. W. 1079.

absolute and complete, but is still sufficient to materially affect and interfere with the person's reason, judgment, and will, but is not procured nor taken advantage of unfairly by the other party, the doctrine is settled that a court of equity will not interfere in behalf of either of the parties to a contract which is made while one of them is in such a condition.[3] [c] Finally, although the intoxication was only partial, if the other party produced it by his contrivance, and then took advantage of it, or made it the opportunity for acts of imposition, unfairness, and *a fortiori* fraud, equity will grant full affirmative thereof.[4]

30; Hutchinson v. Brown, 1 Clarke Ch. 408; Crane v. Conklin, 1 N. J. Eq. 346; 22 Am. Dec. 519; Wigglesworth v. Steers, 1 Hen. & M. 70; 3 Am. Dec. 602; French v. French, 8 Ohio, 214; 31 Am. Dec. 441; Phillips v. Moore, 11 Mo. 600. If a person is thus completely intoxicated, a party openly dealing with him must, of course, perceive his condition; it would seem that the party knowingly taking the conveyance or contract under these circumstances was necessarily chargeable with inequitable conduct.

[3] The court will not specifically enforce an executory contract against the intoxicated party at the suit of the other, nor will it set aside a conveyance or contract at the suit of the intoxicated party or his representatives; the parties are left to their remedies at law. This rule is an application of the maxim *in pari delicto*, etc.: Johnson v. Medlicott, 3 P. Wms. 131, note; Cory v. Cory, 1 Ves. Sr. 19; Cooke v. Clayworth, 18 Ves. 12; Say v. Barwick, 1 Ves. & B. 195; Shackelton v. Sebree, 86 Ill. 616; Schramm v. O'Connor, 98 Ill. 539; Johnson v. Phifer, 6 Neb. 401; Bates v. Ball, 72 Ill. 108; Lavette v. Sage, 29 Conn. 577; Maxwell v. Pittenger, 3 N. J. Eq. 156; Selah v. Selah, 23 N. J. Eq. 185; Clifton v. Davis, 1 Pars. Cas. 31; Futrill v. Futrill, 5 Jones Eq. 61; Morrison v. McLeod, 2 Dev. & B. Eq. 221; Harbison v. Lemon, 3 Blackf. 51; 23 Am. Dec. 376; Dunn v. Amos, 14 Wis. 106, and cases in next note.

[4] Cory v. Cory, 1 Ves. Sr. 19; Cooke v. Clayworth, 18 Ves. 12; Say v. Barwick, 1 Ves. & B. 195; Butler v. Mulvihill, 1 Bligh, 137; Lightfoot v. Heron, 3 Younge & C. 586; Shaw v. Thackray, 1 Smale & G. 537; Nagle v. Baylor, 3 Dru. & War. 60; Addis v. Campbell, 4 Beav. 401; Martin v. Pycroft, 2 De Gex, M. & G. 785, 800; O'Connor v. Rempt, 29 N. J. Eq. 156; Crane v. Conklin, 1 N. J. Eq. 346; 22 Am. Dec. 519; Prentice v. Achorn, 2 Paige, 30; Lavette v. Sage, 29 Conn. 577; Calloway v. Witherspoon, 5 Ired. Eq. 128; Freeman v. Dwiggins, 2 Jones Eq. 162; Griffith v. Fred. Co. Bank, 6 Gill & J. 424; Phillips v. Moore, 11 Mo. 600. The case of Pittenger v. Pittenger, 3 N. J. Eq. 156, contains *dicta* conflicting with the course of authority. Courts of equity are extremely cautious in granting *any* relief on the ground of intoxication, and they will seldom give the remedy of cancellation, unless there was conduct plainly inequitable by the other party; to do so would require a very strong case in which the evidence was most convincing. Experience

(c) Youn v. Lamont, 56 Minn. 216, 57 N. W. 478.

§ 950. Duress.— Whenever a conveyance or contract is obtained by actual duress, equity will grant relief, defensively or affirmatively, by cancellation, injunction, or otherwise, as the circumstances may require. In determining what constitutes duress,— what force or threats,— equity follows the law. Courts of equity undoubtedly grant relief in many classes of instances where there is no legal duress, and where the wronged party would perhaps be remediless at the common law, but these cases properly belong to the head of "undue influence."[1a]

§ 951. Undue Influence.— Where there is no coercion amounting to duress, but a transaction is the result of a

shows that a man may be very much intoxicated and still be shrewd, hard in driving a bargain, and in every way competent to manage his own business: See Schramm v. O'Connor, 98 Ill. 539.

[1] Nicholls v. Nicholls, 1 Atk. 409; Roy v. Duke of Beauford, 2 Atk. 190; Thornhill v. Evans, 2 Atk. 330; Hawes v. Wyatt, 3 Browne Ch. 156; Evans v. Llewellin, 1 Cox, 333, 340; Lamplugh v. Lamplugh, 1 Dick. 411; Talleyrand v. Boulanger, 3 Ves. 447; Underhill v. Horwood, 10 Ves. 209, 219; Pickett v. Loggon, 14 Ves. 215; Peel v. ——, 16 Ves. 157; Middleton v. Middleton, 1 Jacob & W. 94; Gubbins v. Creed, 2 Schoales & L. 214; Williams v. Bayley, L. R. 1 H. L. 200; Reed v. Exum, 84 N. C. 430; Sharon v. Gager, 46 Conn. 189; Singer Mfg. Co. v. Rawson, 50 Iowa, 634; Thurman v. Burt, 53 Ill. 129; Harshaw v. Dobson, 64 N. C. 384; Jones v. Bridge, 2 Sweeny, 431. Acknowledgments of deeds by married woman obtained by duress: Louden v. Blythe, 16 Pa. St. 532; 55 Am. Dec. 527; Michener v. Cavender, 38 Pa. St. 334, 337; 80 Am. Dec. 486; McCandless v. Engle, 51 Pa. St. 309. It is sometimes difficult to determine whether the controlling influence amounts to actual, physical, or moral coercion: See Ramsbottom v. Parker, 6 Madd. 5; Middleton v. Sherburne, 4 Younge & C. 358, 389; Rhodes v. Bate, L. R. 1 Ch. 252. In determining what constitutes duress, equity adopts the legal definition and rules: Miller v. Miller, 68 Pa. St. 486; McLin v. Marshall, 1 Heisk. 678. Lawful arrest or imprisonment, or prosecution of the party himself, or threats of such lawful arrest, imprisonment, prosecution, or litigation directed against the party himself, do not constitute duress; the same is true of many other species of threats. Threats of prosecution, etc., against a near relative of the party who executes a contract in consequence thereof *may*

(a) Morrill v. Nightingale, 93 Cal. 452, 28 Pac. 1068, 27 Am. St. Rep. 207; Patterson v. Gibson, 81 Ga. 802, 10 S. E. 9, 12 Am. St. Rep. 356; Winfield Nat. Bank v. Croco, 46 Kan. 620, 26 Pac. 939; Goodrich v. Shaw, 72 Mich. 109, 40 N. W. 187; Bentley v. Robson, 117 Mich. 691, 76 N. W. 146; Meech v. Lee, 82 Mich. 274, 46 N. W. 383; Hullhorst v. Scharner, 14 Neb. 57, 17 N. W. 259; Galusha v. Sherman, 105 Wis. 263, 81 N. W. 495, 47 L. R. A. 441. In Miller v. Minor Lumber Co., 98 Mich. 163, 57 N. W. 101, 39 Am. St. Rep. 524, a deed executed under duress was held to be voidable merely.

moral, social, or domestic force exerted upon a party, controlling the free action of his will and preventing any true

be duress.[b] In the following cases there was held to be no duress: Wright v. Remington, 41 N. J. L. 48; 32 Am. Rep. 180 (threats of a husband to kill himself if his wife did not sign his note as a surety); Heaps v. Dunham, 95 Ill. 583; Compton v. Bunker Hill Bank, 96 Ill. 301; 36 Am. Rep. 147; Smillie v. Titus, 32 N. J. Eq. 51; State v. Harney, 57 Miss. 863; Tooker v. Sloan, 30 N. J. Eq. 394; Fogg v. Union Bank, 4 Baxt. 530; Landa v. Obert, 45 Tex. 539; Davis v. Luster, 64 Mo. 43; Plant v. Gunn, 2 Woods, 372; Smith v. Rowley, 66 Barb. 502; Mayhew v. Phœnix Ins. Co., 23 Mich. 105; Dixon v. Dixon, 22 N. J. Eq. 91; Seymour v. Prescott, 69 Me. 376; Fulton v. Loftis, 63 N. C. 393 (duress after a contract is made is not ground for relief).[c]

In the proposed Civil Code of New York the following definitions are given of duress and menace, which have been adopted by the Civil Code of California:

N. Y. Civ. Code, sec. 754; *Cal. Civ. Code*, sec. 1569: "Duress consists in, —

(b) Swint v. Carr, 76 Ga. 322, 2 Am. St. Rep. 44; Winfield Nat. Bank v. Croco, 46 Kan. 620, 26 Pac. 939; State Bank v. Hutchinson, 62 Kan. 9, 61 Pac. 443; Benedict v. Roome, 106 Mich. 378, 64 N. W. 193; Bell v. Campbell, 123 Mo. 1, 25 S. W. 359, 45 Am. St. Rep. 505; Turner v. Overall, 172 Mo. 271, 72 S. W. 644; Hensinger v. Dyer, 147 Mo. 219, 48 S. W. 912; Hargreaves v. Korcek, 44 Neb. 660, 62 N. W. 1086; Beindorf v. Kaufman, 41 Neb. 824, 60 N. W. 101; Schoener v. Lissauer, 107 N. Y. 112, 13 N. E. 741; Adams v. Irving National Bank, 116 N. Y. 606, 23 N. E. 7, 15 Am. St. Rep. 447, 6 L. R. A. 491; Foley v. Greene, 14 R. I. 618, 51 Am. Rep. 419; Coffman v. Lookout Bank, 5 Lea, 232, 40 Am. Rep. 31; Perkins v. Adams, 17 Tex. Civ. App. 331, 43 S. W. 529; Gorringe v. Reed, 23 Utah, 120, 63 Pac. 902, 90 Am. St. Rep. 692. For a full discussion of the effect of such threats, see note to City National Bank v. Kusworm, 88 Wis. 188, 26 L. R. A. 48, 59 N. W. 564, 43 Am. St. Rep. 880.

(c) See, also, Wood v. Craft, 85 Ala. 260, 4 South. 649; Cooper v. Chamberlin, 78 Cal. 450, 21 Pac. 14, and cases cited (threats of tax collector to sell property for a void tax do not constitute duress); Dear v. Varnum, 80 Cal. 86, 22 Pac. 76; Post v. First Nat. Bank, 138 Ill. 559, 28 N. E. 978; Green v. Scranage, 19 Iowa, 461, 87 Am. Dec. 447; Russell v. Durham, 17 Ky. Law Rep. 35, 303, 29 S. W. 635; Detroit Nat. Bank v. Blodgett, 115 Mich. 160, 73 N. W. 120, 885; Prichard v. Sharp, 51 Mich. 432, 16 N. W. 798; Sanford v. Sornborger, 26 Neb. 295, 41 N. W. 1102; Barrett v. Weber, 125 N. Y. 18, 25 N. E. 1068; Girty v. Standard Oil Co., 1 App. Div. 224, 37 N. Y. Suppl. 369 (threat by husband to commit suicide unless wife signed certain papers, not); Page v. Cranford, 42 S. C. 193, 20 S. E. 972; Loud v. Hamilton, (Tenn.) 51 S. W. 140, 45 L. R. A. 400; Wolff v. Bluhm, 95 Wis. 257, 70 N. W. 73, 60 Am. St. Rep. 115 (threat to prosecute unless provision is made for illegitimate child is not); York v. Hinkle, 80 Wis. 624, 50 N. W. 895, 27 Am. St. Rep. 73. Relief not granted against a *bona fide* purchaser: Moog v. Strang, 69 Ala. 98; Vancleave v. Wilson, 73 Ala. 387; Gardner v. Case, 111 Ind. 494, 13 N. E. 36.

consent, equity may relieve against the transaction, on the ground of undue influence, even though there may be no invalidity at law.[a] In the vast majority of instances, undue influence naturally has a field to work upon in the condition or circumstances of the person influenced, which render him peculiarly susceptible and yielding,— his dependent or fiduciary relation towards the one exerting the influence, his mental or physical weakness, his pecuniary necessities, his ignorance, lack of advice, and the like. All these circumstances, however, are incidental, and not essential. Where an antecedent fiduciary relation exists, a court of equity will *presume* confidence placed and influence exerted; where there is no such fiduciary relation, the confidence and influence must be *proved* by satisfactory extrinsic evidence; the rules of equity and the remedies which it bestows are exactly the same in each of these two cases. The doctrine of equity concerning undue influence is very broad, and is based upon principles of the highest morality. It reaches every case, and grants relief "where influence is acquired and abused, or where confidence is reposed and

1. Unlawful confinement of the person of the party, or of the husband or wife of such party, or of an ancestor, descendant, or adopted child of such party, husband, or wife"; citing Foshay v. Ferguson, 5 Hill, 154; Bates v. Butler, 46 Me. 387; Eadie v. Slimmon, 26 N. Y. 9; 82 Am. Dec. 395; McClintick v. Cummins, 3 McLean, 158. "2. Unlawful detention of the property of any such person" (conceded to be contrary to the weight of authority). "3. Confinement of such person, lawful in form, but fraudulently obtained, or fraudulently made, unjustly harassing or oppressive"; citing Strong v. Grannis, 26 Barb. 122; Richardson v. Duncan, 3 N. H. 508; Watkins v. Baird, 6 Mass. 511; 4 Am. Dec. 170; Severance v. Kimball, 8 N. H. 386.

N. Y. Civ. Code, sec. 755; *Cal. Civ. Code*, sec. 1570: "Menace consists in a threat,— 1. Of such duress as is specified in subdivisions one and three of the last section"; citing Eadie v. Slimmon, 26 N. Y. 9; 82 Am. Dec. 395; Whitefield v. Longfellow, 13 Me. 146. "2. Or of unlawful and violent injury to the person or property of any such person as is specified in the last section;

(a) This portion of the text is quoted in Detroit Nat. Bank v. Blodgett, 115 Mich. 160, 73 N. W. 120, 885. This section is cited in Ralston v. Turpin, 25 Fed. 18; Adams v. Cowen, 177 U. S. 471, 20 Sup. Ct. 668; Cowen v. Adams, 78 Fed. 536, 47 U. S. App. 676; Reeves v. Howard, 118 Iowa, 121, 91 N. W. 896; Dingman v. Romine, 141 Mo. 466, 42 S. W. 1087.

betrayed."[1b] It is specially active and searching in deal-

or 3. Of injury to the character of any such person." This last subdivision is conceded to be new legislation.

[1] Smith v. Kay, 7 H. L. Cas. 750, 779, per Lord Kingsdown; Huguenin v. Baseley, 14 Ves. 273; 2 Lead. Cas. Eq., note of Eng. ed., 1156, 1174–1176, 1189–1191; note of Am. ed., 1192–1215. The subject of undue influence is intimately connected with that of fiduciary relations; particular illustrations will be given in the next succeeding subdivision. It is impossible to formulate a single definition which shall embrace all forms and phases of undue influence; each case must largely depend upon its own circumstances. The following propositions, however, embody the doctrine. The conveyance or agreement must be that of the party himself; his own voluntary disposition. If such influence be exerted upon him, such mental, moral, or physical coercion employed towards him, that the act is not really his own, but is another's, then it is voidable. But within this limit there is no objection to argument, persuasion, or even influence, brought to bear upon a party, provided his mind is able to act and is left free to decide and act upon the considerations which are addressed to it, so that the agreement is really his own voluntary act. Still, persuasions and other such conduct by the one benefited are always looked upon as suspicious; they throw upon him the burden of showing that the other party acted freely. The question frequently arises on the probate of wills. In Hall v. Hall, 37 L. J. P. & M. 40; L. R. 1 P. & M. 481, Mr. Justice Wilde laid down the rules in a most admirable manner which apply to the execution of instruments *inter vivos* as well as to wills: "To make a good will, a man must be a free agent, but all influences are not unlawful. Persuasion appeals to the affections or ties of kindred, to a sentiment of gratitude for past services or pity for future destitution, or the like. These are all legitimate, and may be fairly pressed on a testator. On the other hand, pressure of whatever character, whether acting on the fears or the hopes, if so exerted as to overpower the volition without convincing the judgment, is a species of restraint under which no valid will can be made. Importunity or threats such as the testator has not the courage to resist; moral command asserted, and yielded to for the sake of peace and quiet, or of escaping from distress of mind or social discomfort, — these, if carried to a degree in which the free play of the testator's judgment, discretion, or wishes is overborne, will constitute undue influence, though no force is either used or threatened. In a word, a testator may be led, not driven, and his will must be the offspring of his own volition, and not that of another." See also, illustrating undue influence in obtaining wills, where the will was held invalid, Parish Will Case, 25 N. Y. 9; Tyler v. Gardiner, 35 N. Y. 559; Christy v. Clarke, 45 Barb. 529;[c]

(b) This portion of the text is quoted in Sims v. Sims, 101 Mo. App. 407, 74 S. W. 449; Fisher v. Bishop, 108 N. Y. 25, 2 Am. St. Rep. 357, 15 N. E. 331; and cited, Maddox v. Maddox, 114 Mo. 35, 21 S. W. 499, 35 Am. St. Rep. 734; Davis v. Strange's Executor, 86 Va. 808, 11 S. E. 406, 8 L. R. A. 261 (confidential relation of child and parent); Stringfellow v. Hanson, 25 Utah, 480, 71 Pac. 1052 (same).

(c) See, also, Hartman v. Strickler, 82 Va. 225.

ing with gifts, but is applied, when necessary, to

where the will was sustained: Gardiner v. Gardiner, 34 N. Y. 155; Horn v. Pullmann, 72 N. Y. 268; Meeker v. Meeker, 75 Ill. 260; Barnes v. Barnes, 66 Me. 286.[d]

The following cases are illustrations of undue influence in other transactions:[e] Dent v. Bennett, 4 Mylne & C. 269; Billage v. Southee, 9 Hare, 534, 540; Beanland v. Bradley, 2 Smale & G. 339; Wright v. Vanderplank, 8 De Gex, M. & G. 133, 137; Prideaux v. Lonsdale, 1 De Gex, J. & S. 433; In re Metcalfe's Trusts, 2 De Gex, J. & S. 122; Toker v. Toker, 3 De Gex, J. & S. 487; Skottowe v. Williams, 3 De Gex, F. & J. 535; Tomson v. Judge, 3 Drew. 386; Broun v. Kennedy, 33 Beav. 133; Hoghton v. Hoghton, 15 Beav. 278; Cooke v. Lamotte, 15 Beav. 234; Casborne v. Barsham, 2 Beav. 76; Lyon v. Home, L. R. 6 Eq. 655 (a striking case); Baker v. Loader, L. R. 16 Eq. 49; Everitt v. Everitt, L. R. 10 Eq. 405; Rhodes v. Bate, L. R. 1 Ch. 252; Turner v. Collins, L. R. 7 Ch. 329; Ellis v. Barker, L. R. 7 Ch. 104; Moxom v. Payne, L. R. 8 Ch. 881; Kempson v. Ashbee, L. R. 10 Ch. 15; Fulham v. McCarthy, 1 H. L. Cas. 703; Savory v. King, 5 H. L. Cas. 627; Smith v. Kay, 7 H. L. Cas. 750; Dalton v. Dalton, 14 Nev. 419; Moore v. Moore, 56 Cal. 89; Biglow v. Leabo, 8 Or. 147; Waddell v. Lanier, 62 Ala. 347; Mulock v. Mulock, 31 N. J. Eq. 594; Thornton v. Ogden, 32 N. J. Eq. 723; Miller v. Simonds, 5 Mo. App. 33; Graves v. White, 4 Baxt. 38; Leighton v. Orr, 44 Iowa, 679 (a very instructive case); Davis v. Dunne, 46 Iowa, 684; Ranken v. Patton, 65 Mo. 378; Bivins v. Jarnigan, 3 Baxt. 282; Bailey v. Woodbury, 50 Vt. 166; Yard v. Yard, 27 N. J. Eq. 114; Ross v. Ross, 6 Hun, 80; Bailey v. Litten, 52 Ala. 282; Mead v. Coombs, 26 N. J. Eq. 173; Lyons

(d) Mackall v. Mackall, 135 U. S. 171, 10 Sup. Ct. 705; Meyer v. Jacobs, 123 Fed. 900; Somers v. McCready, 96 Md. 437, 53 Atl. 1117; Schmidt v. Schmidt, 47 Minn. 457, 50 N. W. 598; Crossan v. Crossan, 169 Mo. 631, 70 S. W. 136; Maddox v. Maddox, 114 Mo. 35, 21 S. W. 499, 35 Am. St. Rep. 734 (citing the text: confidential relationship not proved); Herster v. Herster, 122 Pa. St. 239, 16 Atl. 342, 9 Am. St. Rep. 95; Carter v. Carter, 82 Va. 624.

(e) Elmstedt v. Nicholson, 186 Ill. 580, 58 N. E. 381; Ashmead v. Reynolds, 134 Ind. 139, 33 N. E. 763, 39 Am. St. Rep. 238; Fitch v. Reiser, 79 Iowa, 34, 44 N. W. 214; Frush v. Green, 86 Md. 494, 39 Atl. 863; Central Bank v. Copeland, 18 Md. 305, 81 Am. Dec. 597; Williams v. Williams, 63 Md. 371; Cherbonnier v. Evitts, 56 Md. 276; Rau v. Von Zedlitz, 132 Mass. 164 (defense to suit on contract); Graham v. Burch, 44 Minn. 33, 46 N. W. 148; Munson v. Carter, 19 Neb. 293, 27 N. W. 208; Hansen v. Berthelson, 19 Neb. 433, 27 N. W. 423; Bennett v. Bennett, (Neb.) 91 N. W. 409; Loder v. Loder, 34 Neb. 824, 52 N. W. 814; Haydock v. Haydock, 33 N. J. Eq. 494; Krause v. Krause, (N. J. Eq.) 55 Atl. 1095; Holland v. John, 60 N. J. Eq. 435, 46 Atl. 172; Hammell v. Hyatt, 59 N. J. Eq. 174, 44 Atl. 953; Hart v. Hart, 57 N. J. Eq. 543, 42 Atl. 153; White v. Daly, (N. J. Eq.) 58 Atl. 929; Slack v. Rees, (N. J. Eq.) 59 Atl. 466; Aldridge v. Aldridge, 120 N. Y. 614, 24 N. E. 1022; Disch v. Timm, 101 Wis. 179, 77 N. W. 196.

conveyances, contracts executory and executed, and wills.[g]

§ 952. Sailors.— From the peculiar qualities which, as is well known, belong to sailors as a class, from the circumstances in which they are placed, and the temptations to which they are exposed, courts and legislatures have long treated them as almost *non sui juris,* as analogous to infants or expectant heirs, and therefore as, in some respects, wards of court. It seems to be settled that equity has jurisdiction over contracts by sailors concerning wages made with their employers, and concerning the disposition of their prize money made with third persons, and will scrutinize such agreements with the utmost vigilance, and will

v. Van Riper, 26 N. J. Eq. 337; Brock v. Barnes, 40 Barb. 521; Wistar's Appeal, 54 Pa. St. 60; Greenfield's Estate, 14 Pa. St. 489, 507; Todd v. Grove, 33 Md. 188; Turner v. Turner, 44 Mo. 535; Taylor v. Taylor, 8 How. 183. In the following cases it was held there was no undue influence:[f] Paine v. Roberts, 82 N. C. 451; McClure v. Lewis, 4 Mo. App. 554; Crowe v. Peters, 63 Mo. 429; Hollocher v. Hollocher, 62 Mo. 267 (an instructive case, showing what kind of influence is *not* undue).

(f) Sawyer v. White, 122 Fed. 223, (C. C. A.); President, etc., of Bowdoin College v. Merritt, 75 Fed. 480; Whitten v. McFall, 122 Ala. 619, 26 South. 131; Donahoe v. Chicago Cricket Club, 177 Ill. 351, 52 N. E. 351; Latimer v. Latimer, 174 Ill. 418, 51 N. E. 548; Kimball v. Cuddy, 117 Ill. 213, 7 N. E. 589; Burt v. Quisenberry, 132 Ill. 385, 24 N. E. 622; Shea v. Murphy, 164 Ill. 614, 45 N. E. 1021, 56 Am. St. Rep. 215; Guild v. Hall, 127 Ill. 523, 20 N. E. 665; Crooks v. Smith, (Iowa) 99 N. W. 112; Mallow v. Walker, 115 Iowa, 238, 88 N. W. 452, 91 Am. St. Rep. 158; Wise v. Schwartzwelder, 54 Md. 292; Holmes v. Holmes, 129 Mich. 412, 89 N. W. 47, 95 Am. St. Rep. 444; Hyman v. Wakeham, (Mich.) 94 N. W. 1062; Richardson v. Smart, 152 Mo. 623, 54 S. W. 542, 75 Am. St. Rep. 488; Fitzpatrick v. Weber, 168 Mo. 562, 68 S. W. 913; Earle v. N. & N. B. H. Co., 36 N. J. Eq. 188; Thorp v. Smith, 63 N. J. Eq. 70, 51 Atl. 437; Coombe's Ex'r v. Carthew, 59 N. J. Eq. 638, 43 Atl. 1057; In re Holman's Estate, 42 Or. 345, 70 Pac. 908; Dean v. Dean, 42 Or. 290, 70 Pac. 1039; Revels v. Revels, 64 S. C. 256, 42 S. E. 111; Winn v. Winn, (Tex. Civ. App.) 80 S. W. 110; Chadd v. Moser, 25 Utah, 369, 71 Pac. 870; Stringfellow v. Hanson, 25 Utah, 480, 71 Pac. 1052; Delaplain v. Grubb, 44 W. Va. 612, 30 S. E. 201, 67 Am. St. Rep. 788; Hale v. Cole, 31 W. Va. 576, 8 S. E. 516; Erwin v. Hedrick, 52 W. Va. 537, 44 S. E. 165.

(g) The text is quoted in Dowie v. Driscoll, 203 Ill. 480, 68 N. E. 56.

cancel them if they are at all unfair, one-sided, or otherwise inequitable.[1]

§ 953. Expectants, Heirs, and Reversioners.— Expectant heirs, reversioners, and holders of other expectant interests stand in a position different from that of all other persons *sui juris,* and a special jurisdiction for their protection has long been well established. This jurisdiction rests upon two distinct foundations. In the first place, heirs, reversioners, and other expectants, during the lifetime of their ancestors and life tenants, are considered as peculiarly liable to imposition, and exposed to the temptation and danger of sacrificing their future interests, in order to meet their present wants. Being sometimes in actual, but more often in imaginary, distress, they do not stand upon an equal footing with those who deal with them concerning their expectant estates, and such persons are in a position to take advantage of their condition, and to dictate inequitable and even extravagantly hard terms in any contract of loan or purchase which may be made. In the second place, the dealings of heirs and reversioners with their expectant interests are often a gross violation of the moral if not legal duties which they owe to their ancestors and life tenants who are the present owners of the property, and from or through whom their future estates will come, and may be a virtual fraud upon the rights of those parties. Equity, therefore, treats such dealings with expectant interests as a possible fraud upon the heirs and reversioners who are immediate parties to the transaction, and as a virtual fraud upon their ancestors, life

[1] How v. Weldon, 2 Ves. Sr. 516, 518; Taylour v. Rochfort, 2 Ves. Sr. 281; Baldwin v. Rochford, 1 Wils. 229. If this jurisdiction was ever exercised by the American courts of equity, — which I think is very doubtful from the absence of reported cases, and from the fact that matters of foreign commerce belong exclusively to the cognizance of the national government, — it has been made obsolete by the stringent legislation of Congress for the protection of sailors which may be enforced by the United States courts.

tenants, and other present owners. Upon these two considerations the equitable jurisdiction is founded. The rule is well settled that all conveyances, sales, and charges, and contracts of sale or charge, of their future and expectant interests made by heirs, reversioners, and other expectants during the lifetime of their ancestors or life tenants, *upon an inadequate consideration,* will be relieved against in equity, and either wholly or partially set aside. In this instance, fraud is inferred from *mere* inadequacy of consideration. All dealings by such expectants are not necessarily and absolutely voidable. But in every such conveyance or contract with an heir, reversioner, or expectant, a presumption of invalidity arises from the transaction itself, and the burden of proof rests upon the purchaser or other party claiming the benefit of the contract to show affirmatively its perfect fairness, and that a full and adequate consideration was paid,— that is, the fair market value of the property, and not necessarily the value as shown by the life-tables.[a] If he succeeds in overcoming the presumption by showing these facts, the transaction will stand; otherwise it will be set aside. It is not necessary to show as a condition of relief that the heir or reversioner was an infant, or that he was in a condition of actual distress when the bargain was made. A court of equity presumes distress. The very fact of the sale or charge shows *prima facie* that he was not in a position to make his own terms, and that he submitted to have them dictated to him by the other party. The foregoing rules assume, simply, that there was an inadequacy of consideration, without any further element of fraud. If, in addition, the circumstances show actual fraud, misrepresentations, or concealments, oppression, taking undue advantage

(a) This portion of the text is quoted in McClure v. Raben, 125 Ind. 139, 25 N. E. 179, 9 L. R. A. 477.

of real necessities, or other unfair, inequitable dealing by the party who acquires the expectant interest, a court of equity will grant full relief without regard to any presumption.[1] [b] Whenever a conveyance, sale, or contract for

[1] Earl of Chesterfield v. Janssen, 2 Ves. Sr. 125; 1 Lead. Cas. Eq., Eng. ed. note, 773, 809–825; Am. ed. note, 825–836. The subject is fully discussed and the authorities examined in these notes. The American editor cites and comments upon the American decisions, especially those which have departed from the doctrine as generally settled. Although the subject is of great importance in England, it has comparatively little practical interest in the United States. I have not deemed it necessary, therefore, to enter into any extended discussion of the more special rules and limitations; it seemed sufficient to state the general conclusions, and to cite the important authorities. The following cases illustrate the doctrine, and show how it has been applied by the American courts:[c] Earl of Aylesford v. Morris, L. R. 8 Ch. 484; Tyler v. Yates, L. R. 11 Eq. 265; 6 Ch. 665; Miller v. Cook, L. R. 10 Eq. 641; In re Slater's Trusts, L. R. 11 Ch. Div. 227; Perfect v. Lane, 3 De Gex, F. & J. 369; Webster v. Cook, L. R. 2 Ch. 542, 546; Edwards v. Burt, 2 De Gex, M. & G. 55; O'Rorke v. Bolingbroke, L. R. 2 App. C. 814–834; Savery v. King, 5 H. L. Cas. 627; Aldborough v. Trye, 7 Clark & F. 436; Shelly v. Nash, 3 Madd. 232, 235; Fox v. Wright, 6 Madd. 111; Gowland v. De Faria, 17 Ves. 20, 24; Peacock v. Evans, 16 Ves. 512; Davis v. Marlborough, 2 Swanst. 108, 154; Edwards v. Browne, 2 Coll. C. C. 100; Hincksman v. Smith, 3 Russ. 433, 435; King v. Hamlet, 4 Sim. 223; 2 Mylne & K. 456; 3 Clark & F. 218; Newton v. Hunt, 5 Sim. 511; Roberts v. Tunstall, 4 Hare, 257; Bromley v. Smith, 26 Beav. 644; Jenkins v. Pye, 12 Pet. 241; Larrabee v. Larrabee, 34 Me. 477; Poor v. Hazleton, 15 N. H. 564; Boynton v. Hubbard, 7 Mass. 112; Trull v. Eastman, 3 Met. 121; 37 Am. Dec. 126; Fitch v. Fitch, 8 Pick. 480; Varick v. Edwards, 1 Hoff. Ch. 382; Power's Appeal, 63 Pa. St. 443; Davidson v. Little, 22 Pa. St.

(b) The text is cited in In re Wickersham's Estate, 138 Cal. 355, 70 Pac. 1076; In re Garcelon, 104 Cal. 584, 38 Pac. 414, 32 L. R. A. 595, 43 Am. St. Rep. 953.

(c) See, also, Fry v. Lane, L. R. 40 Ch. Div. 315 (citing these cases of mere undervalue, in addition to several of those mentioned by the author: Wiseman v. Beak, 2 Vern. 121; Berkley-Freeman v. Bishop, 2 Atk. 39; Earl of Portmore v. Taylor, 4 Sim. 182; Boothby v. Boothby, 1 Macn. & G. 604, 15 Beav. 212; Foster v. Roberts, 24 Beav. 467; Benyon v. Cook, L. R. 10 Ch. 389); McClure v. Raben, 125 Ind. 139, 25 N. E. 179, 9 L. R. A. 477, 133 Ind. 507, 33 N. E. 275, 36 Am. St. Rep. 558; Bacon v. Bonham, 33 N. J. Eq. 614; In re Fritz's Estate, 160 Pa. St. 156, 28 Atl. 642; Read v. Mosby, 87 Tenn. 759, 11 S. W. 940, 5 L. R. A. 122; McKinney v. Pinckard, 2 Leigh, 149, 21 Am. Dec. 601. The statements contained in the notes to McCall v. Hampton, in 56 Am. St. Rep. 339, and in 33 L. R. A. 266, to the effect that in America mere inadequacy of consideration is not sufficient in this class of cases, are hardly sustained by the authorities there cited.

sale is set aside in this manner on the sole ground of inadequacy of consideration, the relief is granted only upon condition that the sum actually paid or loaned, with interest thereon, is refunded; and the court will so frame its decree, if necessary, that the conveyance or sale, instead of being immediately and absolutely canceled, shall stand as security for the amount which, it is adjudged, should be repaid.[2] In analogy with this general doctrine concerning

245, 252; 60 Am. Dec. 81; Mastin v. Marlow, 65 N. C. 695; Butler v. Haskell, 4 Desaus. Eq. 651; Nimmo v. Davis, 7 Tex. 26; Needles v. Needles, 7 Ohio St. 432; 70 Am. Dec. 85; Lowry v. Spear, 7 Bush, 451; Meriweather v. Herran, 8 B. Mon. 162. In some cases the doctrine seems to have been rejected or only partially adopted:[d] See Mayo v. Carrington, 19 Gratt. 74; Cribbins v. Markwood, 13 Gratt. 495; 67 Am. Dec. 775. In Parmelee v. Cameron, 41 N. Y. 392, a sale of a legacy payable in future made by an improvident and dissipated legatee was sustained.

Since the relief is based in part upon the ground that the sale by an heir or reversioner is a constructive fraud upon the ancestor, it has been held that if a father knew of his son's design to dispose of his expectancy, and did not dissent, the transaction would not come within the general rule, and would be upheld: King v. Hamlet, 4 Sim. 223; 2 Mylne & K. 456, 473. In this case Lord Brougham expresses a very strong opinion in favor of the exception. But, as in many other instances, Lord Brougham's opinion has not been sustained. It is settled, at least in England, that the *mere* fact of the ancestor's assent, approval, or even assistance will not prevent the court from giving relief. The doctrine is established to secure the rights of heirs and reversioners, and *their* rights cannot be defeated by the action of the ancestor. This view seems to be in strict accordance with principle: Earl of Aylesford v. Morris, L. R. 8 Ch. 484, 491, per Lord Selborne; see also King v. Savery, 1 Smale & G. 271; 5 H. L. Cas. 627; Talbot v. Staniforth, 1 Johns. & H. 484; Jenkins v. Stetson, 9 Allen, 128; McBee v. Myers, 4 Bush, 356. If, however, the transaction is a fair family or other arrangement for the benefit of all parties interested, in which the ancestor or life tenant joins, and in which there is no undue influence, it will not be set aside on the ground of inadequacy: Tweddell v. Tweddell, Turn. & R. 13; Lord v. Jeffkins, 35 Beav. 7; Shelly v. Nash, 3 Madd. 232.[e]

[2] This particular rule is a fine illustration of the maxim, He who seeks equity must do equity, and is based upon the plainest principles of right and justice. Those few American decisions which have departed from it have so far failed to appreciate the essential conceptions of equity: In re Slater's Trusts, L. R. 11 Ch. Div. 227; Tyler v. Yates, L. R. 11 Eq. 265; 6 Ch. 665; Miller v. Cook, L. R. 10 Eq. 641; Bawtree v. Watson, 3 Mylne & K. 339; Wharton v. May, 5 Ves. 27, 68; Peacock v. Evans, 16 Ves. 512;

(d) Lee v. Lee, 2 Duvall, 134.

(e) And see Hoyt v. Hoyt, 61 Vt. 413, 18 Atl. 313.

dealings with expectant interests, courts of equity have extended a protection to young, inexperienced, and improvident heirs, by relieving against other kinds of unconscionable bargains which they may have made, and by reducing the claims against them to a reasonable amount.[3]

§ 954. Post Obit Contracts.— In strict analogy to the equitable relief against sales of expectancies, and depending upon the same reasons, is that against *post obit* contracts. A *post obit* contract is an agreement made by an expectant heir, successor, devisee, or legatee, whereby, in consideration of a smaller sum loaned, he promises to pay to the creditor a much larger sum, exceeding in amount the principal and lawful interest, upon the death of the person from whom he expects the inheritance, succession, or bequest, provided he himself should survive such person. Such an instrument is clearly an imposition upon the debtor, since it necessarily takes advantage of his

Croft v. Graham, 2 De Gex, J. & S. 155; Boynton v. Hubbard, 7 Mass. 112; Boyd v. Dunlap, 1 Johns. Ch. 478; Williams v. Savage Mfg. Co., 1 Md. Ch. 306; 3 Md. Ch. 418; but see Small v. Jones, 6 Watts & S. 122; Seylar v. Carson, 69 Pa. St. 81.

A modern English statute enacts that no purchase, made *bona fide*, of a reversionary interest shall be set aside merely on the ground of under-value: 31 & 32 Vict., c. 4. It is held that as this statute is confined to *fair* purchases, the equitable doctrine concerning *unfair* transactions, and the jurisdiction to relieve heirs and reversioners who have been actually imposed upon, is left unaltered: In re Slater's Trusts, L. R. 11 Ch. Div. 227; Earl of Aylesford v. Morris, L. R. 8 Ch. 484; Tyler v. Yates, L. R. 11 Eq. 265; 6 Ch. 665; Miller v. Cook, L. R. 10 Eq. 641;[f] nor are the doctrine and jurisdiction affected by the repeal of the usury laws: Id.; and Croft v. Graham, 2 De Gex, J. & S. 155.

[3] Thus where unscrupulous persons, taking advantage of such expectants, and furnishing them means for extravagance and dissipation, have sold them goods at outrageous prices, or loaned them money at outrageous rates of interest, even when there are no statutes against usury, courts of equity have reduced the securities given for such claims to a fair amount: Croft v. Graham, 2 De Gex, J. & S. 155; Bill v. Price, 1 Vern. 467; Lamplugh v. Smith, 2 Vern. 77; Whitley v. Price, 2 Vern. 78; Brooke v. Galley, 2 Atk. 34, 35; Freeman v. Bishop, 2 Atk. 39. I venture to doubt whether this relief would be given by the courts of the American states unless the circumstances of a case showed *actual* fraud. The English policy of protecting ancestral estates has never prevailed in this country.

(f) Fry v. Lane, L. R. 40 Ch. Div. 345.

actual or supposed necessities. It is also a gross fraud upon the ancestor or testator; it offers a premium upon his death; being a wagering contract, it renders the creditor's interests dependent upon his speedy death. *Post obit* contracts, and all other instruments essentially the same though differing in form, will be set aside. In granting this relief, as in the similar case of dealings with expectancies, where there are no special circumstances of unfairness or imposition, and the inadequacy of consideration is the sole ground of interference, the court will require a repayment to the lender of what is justly due, and may permit the security to stand for such amount until it is repaid.[1]

§ 955. II. Transactions Presumptively Invalid between Persons in Fiduciary Relations.[a]—It is of the utmost importance to obtain an accurate conception of the exact *circum-*

[1] Chesterfield v. Janssen, 2 Ves. Sr. 125, 157; 1 Lead. Cas. Eq., 4th Am. ed., 773, 809, 825; Wharton v. May, 5 Ves. 27; Curling v. Townshend, 19 Ves. 628; Fox v. Wright, 6 Madd. 111; Davis v. Duke of Marlborough, 2 Swanst. 174; Crowe v. Ballard, 3 Brown Ch. 117, 120; Gwynne v. Heaton, 1 Brown Ch. 1, 9; Earl of Aldborough v. Trye, 7 Clark & F. 436, 462, 464; Bernal v. Donegal, 3 Dow, 133; 1 Bligh, N. S., 594; In re Slater's Trusts, L. R. 11 Ch. Div. 227; Earl of Aylesford v. Morris, L. R. 8 Ch. 484; Pennell v. Millar, 23 Beav. 172; Benyon v. Fitch, 35 Beav. 570; Boynton v. Hubbard, 7 Mass. 112 (the opinion of Parsons, C. J., contains a full and admirable discussion of the doctrine concerning this class of contracts); and see Freme v. Brade, 2 De Gex & J. 532.

Where an expectant heir or successor, upon a present consideration, makes a secret agreement to convey or pay to the creditor a large but uncertain portion of the estate which he may inherit or succeed to in case he survives his parent or other ancestor, such contract is equally obnoxious to the equitable doctrine, and will be set aside: Boynton v. Hubbard, 7 Mass. 112; but an agreement by such an heir or successor, made with the consent of his ancestor, and for a fair consideration, to convey the property which may afterwards come to him by descent or succession, is valid: Fitch v. Fitch, 8 Pick. 480; as to fair and valid agreements among expectant heirs or successors to share the property which may come to them, see Hyde v. White, 5 Sim. 524; Wethered v. Wethered, 2 Sim. 183; Harwood v. Tooke, 2 Sim. 192; Beckley v. Newland, 2 P. Wms. 182; Trull v. Eastman, 3 Met. 121, 123; 37 Am. Dec. 126. How far the various classes of agreements described in the foregoing paragraphs may be ratified, confirmed, and thus made valid, is considered at the close of the next subdivision upon fiduciary relations.

(a) §§ 955 *et seq.* are cited in Keith v. Killam, 35 Fed. 243, 246.

stances under which the equitable principle now to be examined applies; otherwise the entire discussion of the doctrine will be confused and imperfect. In the various instances described in the preceding paragraphs there has been an *actual* undue influence consciously and designedly exerted upon a party who was peculiarly susceptible to external pressure on account of his mental weakness, old age, ignorance, necessitous condition, and the like. The existence of any fiduciary relation was unnecessary and immaterial. The undue influence being established *as a fact,* any contract obtained or other transaction accomplished by its means is voidable, and is set aside without the necessary aid of any presumption. The single circumstance now to be considered is the existence of some fiduciary relation, some relation of confidence subsisting between two parties. No mental weakness, old age, ignorance, pecuniary distress, and the like, is assumed as an element of the transaction; if any such fact be present, it is incidental, not necessary,— immaterial, not essential.[b] Nor does undue influence form a necessary part of the circumstances, except so far as undue influence, or rather the ability to exercise undue influence, is implied in the very conception of a fiduciary relation, in the position of superiority occupied by one of the parties over the other, contained in the very definition of that relation. This is a most important statement, not a mere verbal criticism. Nothing can tend more to produce confusion and inaccuracy in the discussion of the subject than the treatment of actual undue influence and fiduciary relations as though they constituted one and the same doctrine.[c]

(b) The text is quoted in Nichols v. McCarthy, 53 Conn. 299, 55 Am. Rep. 105, 23 Atl. 93.

(c) The text is quoted in Thomas v. Whitney, 186 Ill. 225, 57 N. E. 808; and cited in Cowen v. Adams, 78 Fed. 536, 552, 47 U. S. App. 676, (C. C. A.); Stringfellow v. Hanson, 25 Utah, 480, 71 Pac. 1052; Cheuvront v. Cheuvront, (W. Va.) 46 S. E. 233.

§ 956. **The General Principle.**— It was shown in the preceding section that if one person is placed in such a fiduciary relation towards another that the duty rests upon him to disclose, and he intentionally conceals a material fact with the purpose of inducing the other to enter into an agreement, such concealment is an actual fraud, and the agreement is voidable without the aid of any presumption. We are now to view fiduciary relations under an entirely different aspect; there is no intentional concealment, no misrepresentation, no actual fraud. The doctrine to be examined arises from the very conception and existence of a fiduciary relation. While equity does not deny the possibility of valid transactions between the two parties, yet because every fiduciary relation implies a condition of superiority held by one of the parties over the other, in every transaction between them by which the superior party obtains a possible benefit, equity raises a presumption against its validity, and casts upon that party the burden of proving affirmatively its compliance with equitable requisites, and of thereby overcoming the presumption.[a] One principle underlies the whole subject in all its applications; and this principle may be stated in a negative and in an affirmative form. Its negative aspect cannot be better expressed than in the following language of a most able judge in a recent decision: "The broad principle on which the court acts in cases of this description is, that wherever there exists such a confidence, of whatever character that confidence may be, as enables the person in whom confidence or trust is reposed to exert influ-

(a) The text is quoted in Noble's Adm'r v. Moses, 81 Ala. 530, 60 Am. Rep. 175, 1 South. 217: Odell v. Moss, 130 Cal. 352, 357, 62 Pac. 555; Crawford v. Crawford, 24 Nev. 410, 56 Pac. 94; Butler v. Prentiss, 158 N. Y. 49, 52 N. E. 652; cited, Shea's Appeal, 121 Pa. St. 302, 15 Atl. 629, 1 L. R. A. 422; Kyle v. Perdue, 95 Ala. 579, 10 South. 103; Cowen v. Adams, 78 Fed. 536, 552, 47 U. S. App. 676, (C. C. A.); Stringfellow v. Hanson, 25 Utah, 480, 71 Pac. 1052.

ence over the person trusting him, the court will not allow any transaction between the parties to stand, unless there has been the fullest and fairest explanation and communication of every particular resting in the breast of the one who seeks to establish a contract with the person so trusting him."[1] The principle was affirmatively stated with equal accuracy in the same case on appeal, as follows: "The jurisdiction exercised by courts of equity over the dealings of persons standing in certain fiduciary relations has always been regarded as one of a most salutary description. The principles applicable to the more familiar relations of this character have been long settled by many well-known decisions, but the courts have always been careful not to fetter this useful jurisdiction by defining the exact limits of its exercise. Wherever two persons stand in such a relation that, while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the other, and this confidence is abused, or the influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his position will not be permitted to retain the advantage, *although the transaction could not have been impeached if no such confidential relation had existed.*"[2b] Courts of equity have

1 Tate v. Williamson, L. R. 1 Eq. 528, 536, per Page Wood, V. C. (Lord Hatherley); and see Cowee v. Cornell, 75 N. Y. 91, 99, 100; 31 Am. Rep. 428, per Hand, J. In the passage last cited the learned judge has mingled up the doctrine concerning simple fiduciary relations with that concerning actual undue influence or oppression.

2 Tate v. Williamson, L. R. 2 Ch. 55, 60, 61, per Lord Chelmsford. In Rhodes v. Bate, L. R. 1 Ch. 252, 257, Turner, L. J., laid down some most important corollaries of the general principle, and distinguished it from the doctrine concerning undue influence exerted upon persons weak-minded, etc.: "I take it to be a well-established principle of this court that persons standing in confidential relation towards others cannot entitle themselves

(b) The text is quoted in Keith v. Kellam, 35 Fed. 243, 246; Cheuvront v. Cheuvront, (W. Va.) 46 S. E. 233; Stuart v. Hauser, (Idaho) 72 Pac. 719, 727.

carefully refrained from defining the particular instances of fiduciary relations in such a manner that other and perhaps new cases might be excluded. It is settled by an overwhelming weight of authority that the principle extends to every possible case in which a fiduciary relation exists *as a fact,* in which there is confidence reposed on one side, and the resulting superiority and influence on the other. The

to hold benefits which those others may have conferred upon them, unless they can show to the satisfaction of the court that the persons by whom the benefits have been conferred had competent and independent advice in conferring them. This, in my opinion, is a settled general principle of the court, and I do not think that either the age or the capacity of the person conferring the benefit, or the nature of the benefit conferred, affects the principle. Age and capacity are considerations which may be of great importance *in cases in which the principle does not apply;* but I think they are but of little, if any, importance in cases to which the principle is applicable. They may afford a sufficient protection in ordinary cases, but they can afford but little protection in cases of influence *founded upon confidence.* And, as to the nature of the benefit, the injury to the party by whom the benefit is conferred cannot depend upon its nature." Also, at p. 260: "I think that where a relation of confidence is once established, either some positive act or some complete case of abandonment must be shown in order to determine it. The *mere* fact that the relation is not called into action is not, I think, sufficient of itself to determine it, for this may well have arisen from there having been no occasion to resort to it." In Billage v. Southee, 9 Hare, 534, 540, it was said: "No part of the jurisdiction of the court is more useful than that which it exercises in watching and controlling transactions between persons standing in a relation of confidence to each other; and, in my opinion, this part of the jurisdiction of the court cannot be too freely applied, either as to the persons between whom, or the circumstances in which, it is applied. The jurisdiction is founded on the principle of correcting abuses of confidence, and I shall have no hesitation in saying it ought to be applied, whatever be the nature of the confidence reposed, or the relation of the parties between whom it has subsisted. I take the principle to be one of universal application, and the cases in which the jurisdiction has been exercised, — those of trustee and *cestui que trust,* guardian and ward, attorney and client, surgeon and patient,— to be merely instances of the application of the principle. . . . . It is said that the plaintiff intended to be liberal, and that this court would not prevent him from being so; and no doubt it would not if such were his intention. But intention imports knowledge, and liberality imports the absence of influence; and where a gift is set up between parties standing in a confidential relation, the *onus* of establishing it by proof rests upon the party who has received the gift." In the frequently quoted case of Hatch v. Hatch, 9 Ves. 292, Lord Eldon said: "This case proves the wisdom of the court in saying that it is almost impossible, in the course of the connection of guardian and ward,

relation and the duties involved in it need not be legal; it may be moral, social, domestic, or merely personal.[c]

§ 957. Two Classes of Cases.— There are two classes of cases to be considered, which are somewhat different in their external forms, and are governed by different special rules, and which still depend upon the single general principle. The first class includes all those instances in which the two parties consciously and intentionally deal and negotiate with each other, each knowingly taking a part in the transaction, and there results from their dealing some conveyance, or contract, or gift. To such cases the principle literally and directly applies. The transaction is not necessarily voidable, it *may* be valid; but a presumption of its invalidity arises, which can only be overcome, if at all, by clear evidence of good faith, of full knowledge, and of independent consent and action.[a] The second class includes all those instances in which one party, purporting to act in his fiduciary character, deals with himself in his private and personal character, without the knowledge of his beneficiary, as where a trustee or agent to sell sells the

attorney and client, trustee and *cestui que trust*, that a transaction shall stand, purporting to be bounty for the execution of an antecedent duty." In Smith v. Kay, 7 H. L. Cas. 750, Lord Kingsdowne said, the equitable principle applied in all transactions where "influence has been acquired and abused, in which confidence has been reposed and betrayed." Lord Cranworth also said that the familiar cases of parent and child, guardian and ward, attorney and client, are only instances of a broad and widely applicable principle. See also Bennett v. Austin, 81 N. Y. 308, 332, 333, per Rapallo, J.; Young v. Hughes, 32 N. J. Eq. 372; Emigrant Co. v. County of Wright, 97 U. S. 339; Huguenin v. Baseley, 14 Ves. 273; 2 Lead. Cas. Eq., 4th Am. ed., 1156, 1174, 1192.

(c) The text is quoted in Roby v. Colehour, 135 Ill. 300, 25 N. E. 777; Walker v. Shepard, 210 Ill. 100, 71 N. E. 422; Irwin v. Sample, (Ill.) 72 N. E. 687; and cited in Price's Adm'r v. Thompson, 84 Ky. 228; Rogers v. Rogers, 97 Md. 573, 55 Atl. 450; Tompkins v. Hollister, 60 Mich. 470, 27 N. W. 651 (fiduciary benefiting by mistake of law).

(a) The text is quoted in Nichols v. McCarthy, 53 Conn. 299, 55 Am. Rep. 105, 23 Atl. 93; cited, in Rogers v. Rogers, 97 Md. 573, 55 Atl. 450; Golson v. Dunlap, 73 Cal. 157, 160, 44 Pac. 576; Shea's Appeal, 121 Pa. St. 302, 15 Atl. 629, 1 L. R. A. 422.

property to himself. Such transactions are voidable at the suit of the beneficiary, and not merely presumptively or *prima facie* invalid.[b] Nevertheless this particular rule is only a necessary application of the single general principle. The circumstances show that there could not possibly be the good faith, knowledge, and free consent required by the principle, and therefore the result which is a rebuttable presumption in the first class of transactions becomes a conclusive presumption in the second. The transactions belonging to the first class may be gifts, or agreements and conveyances upon valuable consideration. The principle is applied with great emphasis and rigor to gifts, whether they are simple bounties, or purport to be the effects of liberality based upon antecedent favors and obligations.[1 c]

1 Huguenin v. Baseley, 14 Ves. 273; 2 Lead. Cas. Eq. 1156, 1174, 1192; Fulham v. McCarthy, 1 H. L. Cas. 703; Savery v. King, 5 H. L. Cas. 627; Prideaux v. Lonsdale, 1 De Gex, J. & S. 433; Wright v. Vanderplank, 8 De Gex, M. & G. 133; Hoghton v. Hoghton, 15 Beav. 278; Broun v. Kennedy, 33 Beav. 133; 4 De Gex, J. & S. 217; Tomson v. Judge, 3 Drew. 306; Morgan v. Minett, L. R. 6 Ch. Div. 638, and cases cited; Lyon v. Home, L. R. 6 Eq. 655; Everitt v. Everitt, L. R. 10 Eq. 405; Turner v. Collins, L. R. 7 Ch. 329; Rhodes v. Bate, L. R. 1 Ch. 252; Brock v. Barnes, 40 Barb. 521; Wistar's Appeal, 54 Pa. St. 60; Greenfield's Estate, 14 Pa. St. 489, 507; Todd v. Grove, 33 Md. 188; Turner v. Turner, 44 Mo. 535; Taylor v. Taylor, 8 How. 183; Jenkins v. Pye, 12 Pet. 241, 253; and see Falk v. Turner, 101 Mass. 494. Testamentary gifts stand upon a somewhat different footing; that is, they *may* be valid, while a gift *inter vivos* between the same parties might be void: Hindson v. Weatherill, 5 De Gex, M. & G. 301.[d]

(b) The text is quoted in Frink v. Roe, 70 Cal. 276, 312, 11 Pac. 820; cited in Price's Adm'r v. Thompson, 84 Ky. 228, 1 S. W. 408.

(c) The text is quoted in Nichols v. McCarthy, 53 Conn. 299, 55 Am. Rep. 105, 23 Atl. 93; cited, Davis v. Strange's Ex'r, 86 Va. 808, 11 S. E. 406, 8 L. R. A. 261. For the rule requiring *independent advice* to sustain a gift from beneficiary to trustee, see *post*, § 958; to sustain a gift from client to attorney, see *post*, § 960.

(d) The proponent of the will must exercise some active interference in the preparation or execution of the will in order to raise a presumption against it: Bancroft v. Otis, 91 Ala. 279, 24 Am. St. Rep. 904, 8 South. 286, overruling Moore v. Spier, 80 Ala. 129, and citing many cases; In re Smith's Will, 95 N. Y. 516, 523; Tyson v. Tyson, 37 Md. 583; Montague v. Allan's Ex'r, 78 Va. 592, 49 Am. Rep. 384; Parfit v. Lawless, L. R. 2 Pro. & D. 462; see Richmond's Appeal, 59 Conn. 226, 22 Atl. 82, 21 Am. St. Rep. 85, and cases collected in the note.

Contracts, executory or executed, made upon a valuable consideration are not, perhaps, scrutinized with quite so much severity as gifts, but they are subjected to the operation of the same principle, and must conform to its requirements.[2] Having thus explained the general nature and scope of the principle, I shall now describe its application to the most important and familiar forms of fiduciary relations, and its effects upon the rights and liabilities of the parties thereto.

§ 958. Trustee and Beneficiary.— As the general powers, duties, and liabilities of trustees will be more fully discussed in a subsequent chapter, I shall at present simply state in the briefest manner those rules growing out of the fiduciary relation which regulate their dealings with their beneficiaries.[1] In the first place, when the trustee deals with the trust property, but not directly with the *cestui que trust,* and without the latter's intervention: The rule is inflexibly established that where, in the management and performance of the trust, trust property of any description, real or personal property, or mercantile assets is sold, the trustee cannot, without the knowledge and consent of the *cestui que trust,* directly or indirectly become the purchaser. Such a purchase is always voidable, and will be set aside on behalf of the beneficiary, unless he has affirmed it, being *sui juris,* after obtaining full knowledge of all the facts. It is entirely immaterial to

2 Huguenin v. Baseley, 2 Lead. Cas. Eq. 1156, 1174, 1192; Fox v. Mackreth, 2 Brown Ch. 400; 2 Cox, 320; 1 Lead. Cas. Eq. 188, 212, 237; Gibson v. Jeyes, 6 Ves. 266; Hatch v. Hatch, 9 Ves. 292; Griffiths v. Robins, 3 Madd. 191; Revett v. Harvey, 1 Sim. & St. 502; Carey v. Carey, 2 Schoales & L. 173; Gresley v. Mousley, 4 De Gex & J. 78; 3 De Gex, F. & J. 433; Edwards v. Meyrick, 2 Hare, 60; Tate v. Williamson, L. R. 2 Ch. 55; 1 Eq. 528; Young v. Hughes, 32 N. J. Eq. 372; Kline v. Kline, 57 Pa. St. 120; 98 Am. Dec. 206; Norris v. Tayloe, 49 Ill. 17; 95 Am. Dec. 568; Rockafellow v. Newcomb, 57 Ill. 186; Turner v. Turner, 44 Mo. 535; Bayliss v. Williams, 6 Cold. 440; McCormick v. Malin, 5 Blackf. 509; Harkness v. Fraser, 12 Fla. 336, 341.

1 See Huguenin v. Baseley, 2 Lead. Cas. Eq. 1156, 1180, 1228; Fox v. Mackreth, 1 Lead. Cas. Eq., 4th Am. ed., 188, 212, 237.

the existence and operation of this rule that the sale is intrinsically a fair one, that no undue advantage is obtained, or that a full consideration is paid, or even that the price is the highest which could be obtained. The policy of equity is to remove every possible *temptation* from the trustee. The rule also applies alike where the sale is private, or at auction, where the purchase is made directly by the trustee himself, or indirectly through an agent, where the trustee acts simply as agent for another person, and where the purchase is made from a co-trustee. Finally, the rule extends with equal force to a purchase made under like circumstances by a trustee from himself. A trustee acting in his fiduciary character, and without the intervention of the beneficiary, cannot sell the trust property to himself, nor buy his own property from himself for the purposes of the trust.[2 a] In the second place,

2 Fox v. Mackreth, 1 Lead. Cas. Eq., 4th Am. ed., 188, 212, 237; Lewis v. Hillman, 3 H. L. Cas. 607; Hamilton v. Wright, 9 Clark & F. 111; Aberdeen R'y Co. v. Blaikie, 1 Macq. 461; In re Bloye's Trust, 1 Macn. & G. 488; Knight v. Majoribanks, 2 Macn. & G. 10; Parkinson v. Hanbury, 2 De Gex, J. & S. 450; Ingle v. Richards, 6 Jur., N. S., 1178; Ridley v. Ridley, 34 L. J. Ch. 462; Franks v. Bollans, 37 L. J. Ch. 148, 155; Grover v. Hugell, 3 Russ. 428; Gregory v. Gregory, Coop. 201; Baker v. Carter, 1 Younge & C. 250; Woodhouse v. Meredith, 1 Jacob & W. 204, 222; Ex parte Lacey, 6 Ves. 625; Ex parte James, 8 Ves. 337, 348; Ex parte Bennett, 10 Ves. 381, 394; Randall v. Errington, 10 Ves. 423; Attorney-General v. Earl of Clarendon, 17 Ves. 491, 500; Tracy v. Colby, 55 Cal. 67; Tracy v. Craig, 55 Cal. 91; Scott v. Umbarger, 41 Cal. 410; Union Slate Co. v. Tilton, 69 Me. 244; Connolly v. Hammond, 51 Tex. 635; Paine v. Irwin, 16 Hun, 390; Michoud v. Girod, 4 How. 503; Stephen v. Beall, 22 Wall. 329; Wormley v. Wormley, 8 Wheat. 421; Caldwell v. Taggart, 4 Pet. 190; Freeman v. Harwood, 44 Me. 195; Dyer v. Shurtleff, 112 Mass. 165; 17 Am. Rep. 77; Brown v. Cowell, 116 Mass. 461; Smith v. Frost, 70 N. Y. 65; Fulton v. Whitney, 66 N. Y. 548; Star Fire Ins. Co. v. Palmer, 41 N. Y. Sup. Ct. 267; Woodruff v. Boyden, 3 Abb. N. C. 29; De Caters v. Le Ray de Chaumont, 3 Paige, 178; Child v. Brace, 4 Paige, 309; Campbell v. Johnston, 1 Sand. Ch. 148; Cram v. Mitchell, 1 Sand. Ch. 251; Cumberland Coal Co. v. Sherman, 30 Barb. 553; Johnson v. Bennett, 39 Barb. 237; Romaine v. Hendrickson, 27 N. J. Eq. 162 (see this case for an accurate statement of the rule and its reasons); Wakeman v. Dodd, 27 N. J. Eq. 564; McGinn v.

(a) This portion of the text is cited in French v. Woodruff, 25 Colo. 339, 54 Pac. 1015; Elting v. First Nat. Bank, 173 Ill. 368, 50 N. E. 1095; Mallory v. Mallory-Wheeler Co., 61 Conn. 135, 23 Atl. 708.

where the trustee deals, with respect to the trust, directly with his beneficiary: A purchase by a trustee from his

Shaeffer, 7 Watts, 412; Mason v. Martin, 4 Md. 124; Wasson v. English, 13 Mo. 176; Ringgold v. Ringgold, 1 Har. & G. 11; Brothers v. Brothers, 7 Ired. Eq. 150; McCants v. Bee, 1 McCord Eq. 383; 16 Am. Dec. 610; James v. James, 55 Ala. 525; Narcissa v. Wathan, 2 B. Mon. 241; Higgins v. Curtiss, 82 Ill. 28; Bush v. Sherman, 80 Ill. 160; Munn v. Burges, 70 Ill. 604; Roberts v. Moseley, 64 Mo. 507; Schwarz v. Wendell, Walk. Ch. 267.[b] *Purchase at auction:* Adams v. Sworder, 2 De Gex, J. & S. 44; Grover v. Hugell, 3 Russ. 428; Lawrence v. Galsworthy, 3 Jur., N. S., 1049; Sanderson v. Walker, 13 Ves. 601; Ex parte Bennett, 10 Ves. 381, 393; Campbell v. Walker, 5 Ves. 678; Ex parte James, 8 Ves. 337, 348; Michoud v. Girod, 4 How. 503; Davoue v. Fanning, 2 Johns. Ch. 252; Bellamy v. Bellamy, 6 Fla. 62.[c] *At judicial sale:* Ex parte Bennett, 10 Ves. 381, 393; Roberts v. Moseley, 64 Mo. 507; Tracy v. Colby, 55 Cal. 67; Tracy v. Craig, 55 Cal. 91 (purchase by a probate judge by whom the sale had been ordered, and by whom the sale would in regular course of proceedings be confirmed,—a most extraordinary case); Jewett v. Miller, 10 N. Y. 402; 61 Am. Dec. 751; Van Epps v. Van Epps, 9 Paige, 237; Fisk v. Sarber, 6 Watts & S. 18.[d] *Purchase made indirectly through a third person:* Adams v.

(b) See, also, Creveling v. Fritts, 34 N. J. Eq. 134; Harrington v. Erie Co. Savings Bank, 101 N. Y. 257, 4 N. E. 346 (legal title acquired by subsequent *bona fide* purchaser, sale cannot be avoided). For certain modifications of the rule in Texas, as regards purchases by executors and administrators, see Erskine v. La Baum, 3 Tex. 417; Allen v. Gillette, 127 U. S. 596, 8 Sup. Ct. 1331; in South Carolina, see Anderson v. Butler, 31 S. C. 183, 9 S. E. 797, 5 L. R. A. 166.

(c) Broder v. Conklin, 121 Cal. 282, 53 Pac. 699. But where the trustee has an interest to protect by bidding at a sale of the trust property, and he makes special application to the court for permission to bid, which, upon the hearing of all the parties interested, is granted by the court, then he can make a purchase which is valid and binding upon all the parties interested, and under which he can obtain a perfect title: Scholle v. Scholle, 101 N. Y. 172, 4 N. E. 334 (citing De Caters v. Chaumont, 3 Paige, 178; Gallatin v. Cunningham, 8 Cow. 361; Davoue v. Fanning, 2 Johns. Ch. 251; Bergen v. Bennett, 1 Caines, 20; Chapin v. Weed, 1 Clark Ch. 469; Colgate v. Colgate, 23 N. J. Eq. 372; Froneberger v. Lewis, 79 N. C. 426; Faucett v. Faucett, 1 Bush, 511, 89 Am. Dec. 639; Michoud v. Girod, 4 How. 503; Campbell v. Walker, 5 Ves. Jr. 678; Farmer v. Dean, 32 Beav. 327).

(d) Powell v. Powell, 80 Ala. 11; Crawford v. Tribble, 69 Ga. 519; Price's Adm'r v. Thompson, 84 Ky. 219, 1 S. W. 408 (purchase by court commissioner at sale under execution in his favor); Martin v. Wyncoop, 12 Ind. 266, 74 Am. Dec. 209 (administrator cannot purchase on execution in his favor); Carson v. Marshall, 37 N. J. Eq. 213; Deegan v. Capner, 44 N. J. Eq. 339, 15 Atl. 819; Dodge v. Stevens, 94 N. Y. 215; Hamilton v. Dooly, 15 Utah, 280, 49 Pac. 769, and cases cited; Winans v. Winans, 22 W. Va. 678, 688 (purchase by commissioner appointed by decree to sell the land).

cestui que trust, even for a fair price and without any undue advantage, or any other transaction between them by

Sworder, 2 De Gex, J. & S. 44; Sanderson v. Walker, 13 Ves. 601; Scott v. Umbarger, 41 Cal. 410; James v. James, 55 Ala. 525; Higgins v. Curtiss, 82 Ill. 28; Davoue v. Fanning, 2 Johns. Ch. 252; Beeson v. Beeson, 9 Pa. St. 279; Dorsey v. Dorsey, 3 Har. & J. 410.[e] *Purchase by trustee as agent for a third person:* Ex parte Bennett, 10 Ves. 381; Gregory v. Gregory, Coop. 201, North Balt. etc. Ass'n v. Caldwell, 25 Md. 420; 90 Am. Dec. 67.[f] *Purchase from a co-trustee:* Whichcote v. Lawrence, 3 Ves. 740; Cumberland Coal Co. v. Sherman, 30 Barb. 653; Ringgold v. Ringgold, 1 Har. & G. 11. The rule is also settled, where not abrogated by statute, that an encumbrancer with a power of sale in selling under the power becomes a trustee for the sale, and, as such, cannot directly or through an agent purchase the property: Downes v. Grazebrook, 3 Mer. 200, per Lord Eldon; In re Bloye's Trust, 1 Macn. & G. 488, 494, 495; Waters v. Groom, 11 Clark & F. 684; Hyndman v. Hyndman, 19 Vt. 9; 46 Am. Dec. 171; Slee v. The Manhattan Co., 1 Paige, 48; Hendricks v. Robinson, 2 Johns. Ch. 283, 311; Dobson v. Racey, 3 Sand. Ch. 60; Campbell v. McLain, 51 Pa. St. 200; Tennant v. Trenchard, L. R. 4 Ch. 537.[g] Although the purchase be set aside, still, if it was fair, the court may

[e] See, also, McGaughey v. Brown, 46 Ark. 25 (purchase by agent of administrator); Scott v. Sierra Lumber Co., 67 Cal. 71, 7 Pac. 131; Broder v. Conklin, 121 Cal. 282, 53 Pac. 699 (purchase by attorney of assignee for creditors); French v. Woodruff, 25 Colo. 239, 54 Pac. 1015; Houston v. Bryan, 78 Ga. 181, 6 Am. St. Rep. 252, 1 S. E. 252; Miller v. Rich, 204 Ill. 444, 68 N. E. 488; Comegys v. Emerick, 134 Ind. 148, 39 Am. St. Rep. 245, 33 N. E. 899; Bassett v. Shoemaker, 46 N. J. Eq. 538, 19 Am. St. Rep. 435, 20 Atl. 52 (purchase for trustee's wife); People v. Open Board, etc., Co., 92 N. Y. 98 (such a transaction appearing in chain of title renders title defective); Scottish-American Mortg. Co. v. Clowney, (S. C.) 49 S. E. 569 (trustee's wife); Knight v. Watts, 26 W. Va. 175, 203; Winans v. Winans, 22 W. Va. 678, 688. The trustee is disabled from repurchasing from one to whom he has agreed to sell, so long as the legal title remains in himself: Wing & Evans v. Hartupee, 122 Fed. 897, (C. C. A.); Parker v. McKenna, L. R. 10 Ch. App. 96; Williams v. Scott, [1900] A. C. 499, 507; Delves v. Gray, [1902] 2 Ch. 606; Cook v. Berlin Woolen Co., 43 Wis. 433; O'Connor v. Flynn, 57 Cal. 293 (executor repurchases before sale is confirmed). For cases where, in the absence of fraud, repurchases by trustees who had sold the estate were upheld, see Welch v. McGrath, 59 Iowa, 519, 528, 529, 10 N. W. 810, 13 N. W. 639; Staples v. Staples, 24 Gratt. (Va.) 225; Wayland v. Crank's Ex'r, 79 Va. 602, 608; Foxworth v. White, 72 Ala. 224 (but such transaction will be closely scrutinized).

[f] See, also, Gibson v. Barber, 100 N. C. 192, 6 S. E. 766 (purchase at a sale under a power of sale in a mortgage, by an agent of the mortgagee, in behalf of a third party, voidable).

[g] Purchase by Mortgagee or Other Incumbrancer with Power of Sale.—See, also, Martinson v. Clowes, 21 Ch. D. 857 (secretary of mortgagee building society purchases for him-

which the trustee obtains a benefit, is generally voidable, and will be set aside on behalf of the beneficiary; it is at

allow the trustee for his payments and advances and improvements when he acted in good faith: Mulford v. Minch, 11 N. J. Eq. 16; 64 Am. Dec. 472; Mason v. Martin, 4 Md. 124; and see Paine v. Irwin, 16 Hun, 390.[h] After the trust has been completely ended, the former trustee may purchase: Munn v. Burges, 70 Ill. 604; Bush v. Sherman, 80 Ill. 160.[i]

self); Warner v. Jacob, 20 Ch. D. 220; Whitcomb v. Minchin, 5 Madd. 91; Hodson v. Deans, [1903] 3 Ch. 647; Farrar v. Farrars, Ltd, 40 Div. 409; Nutt v. Easton, [1899] 1 Ch. 873 (defining trust relationship of mortgagee with power of sale); McCall v. Mash, 89 Ala. 489, 18 Am. St. Rep. 147, 7 South. 770 (mortgagor's right to avoid the sale is not assignable); Martinez v. Lindsey, 91 Ala. 334, 8 South. 787 (assignee of the mortgage cannot purchase); Palmer v. Young, 96 Ga. 246, 51 Am. St. Rep. 136, 22 S. E. 928 (such purchase voidable but not void); Nichols v. Otto, 132 Ill. 91, 23 N. E. 411 (purchase by third person on behalf of mortgagee, voidable); Wetherell v. Johnson, (Ill.) 70 N. E. 229 (as to purchase by pledgee with power of sale): Houston v. National M. B. & L. Ass'n, 80 Miss. 31, 92 Am. St. Rep. 565, 31 South. 540 (right to avoid the sale is assignable), and note, 92 Am. St. Rep. 576–585; Very v. Russell, 65 N. H. 646, 23 Atl. 522, and cases cited; Dawkins v. Patterson, 87 N. C. 384 (mortgagor's right waived by agreement); Howell v. Pool, 92 N. C. 450: Gibson v. Barber, 100 N. C. 192, 6 S. E. 766 (purchase by mortgagee's agent in behalf of a third party, voidable); Shew v. Call, 119 N. C. 450, 56 Am. St. Rep. 678, 26 S. E. 33. In Texas the rule is repudiated: Bohn v. Davis, 75 Tex. 24, 12 S. W. 837; Howards v. Davis, 6 Tex. 183; Scott v. Mann, 33 Tex. 725. But authority to purchase may be expressly conferred in the mortgage upon the mortgagee: Knox v. Armistead, 87 Ala. 511, 13 Am. St. Rep. 65, 6 South. 311, 5 L. R. A. 297; Gamble v. Caldwell, 98 Ala. 577, 12 South. 424; Ward v. Ward, 108 Ala. 278, 19 South. 354; Matthews v. Daniels, (Ark.) 21 S. W. 469; Macy v. Southern, etc., Ass'n, 102 Ga. 812, 30 S. E. 430; Lathrop v. Tracy, 24 Colo. 382, 65 Am. St. Rep. 229, 51 Pac. 486; Galvin v. Newton, 19 R. I. 176, 36 Atl. 3. A *cestui que trust* under a trust deed to secure debts may purchase at the trustee's sale, there being in that case no such conflict of duty and interest as when a mortgagee purchases at his own sale: Smith v. Black, 115 U. S. 308, 6 Sup. Ct. 50; Easton v. German-American Bank, 127 U. S. 532, 8 Sup. Ct. 1297; Copsey v. Sacramento Bank, 133 Cal. 659, 85 Am. St. Rep. 238, 66 Pac. 7, 204 (though *cestui* was a bank of which the trustees were directors; a dangerous and indefensible precedent); Springfield, etc., Co. v. Donovan, 147 Mo. 622, 49 S. W. 500; Monroe v. Fuchtler, 121 N. C. 101, 28 S. E. 63.

(h) See, also, O'Connor v. Flynn, 57 Cal. 293.

(i) "Apart from any circumstances of doubt or suspicion, there is no rule of the Court that a person, who has ceased for twelve years to be a trustee of an instrument which contains a trust for sale, cannot become a purchaser of the trust property": In re Boles & Brit-

least *prima facie* voidable upon the mere facts thus stated.[3] There is, however, no imperative rule of equity that a transaction between the parties is necessarily, in every instance, voidable. It is possible for the trustee to overcome the presumption of invalidity. If the trustee can show, by unimpeachable and convincing evidence, that the beneficiary, being *sui juris*, had full information and complete understanding of all the facts concerning the property and the transaction itself, and the person with whom he was dealing, and gave a perfectly free consent, and that the price paid was fair and adequate, and that he made to the beneficiary a perfectly honest and complete

[3] In Ex parte Lacey, 6 Ves. 625, 627, Lord Eldon gave the practical reason for this stringent rule: "It is founded upon this, that though you may see in a particular case that the trustee has not made advantage, it is utterly impossible to examine, upon satisfactory evidence in the power of the court (by which I mean in the power of the parties), in ninety-nine cases out of a hundred, whether he has made advantage or not": Lloyd v. Attwood, 3 De Gex & J. 614; Campbell v. Walker, 5 Ves. 678, 682; 13 Ves. 601; Randall v. Errington, 10 Ves. 423; Hamilton v. Wright, 9 Clark & F. 111, 123, 125; Ingle v. Richards, 28 Beav. 361; Tatum v. McLellan, 50 Miss. 1; Clarke v. Deveaux, 1 S. C. 172, 184; Smith v. Townshend, 27 Md. 368; 92 Am. Dec. 637; Spencer and Newbold's Appeal, 80 Pa. St. 317, 332; Parshall's Appeal, 65 Pa. St. 224; Wistar's Appeal, 54 Pa. St. 60; Diller v. Brubacker, 52 Pa. St. 498; 91 Am. Dec. 177.

ish Land Co.'s Contract, [1902] 1 Ch. 244. And a sale is not voidable merely because, when entered upon, the purchaser had the power to become trustee of the property purchased, — as when he is an executor who has not proved the will which relates to the property, — when in fact he never does become trustee: Clark v. Clark, 9 App. Cas. (Priv. Coun.) 733; Bowden v. Pierce, 73 Cal. 459, 14 Pac. 302, 15 Pac. 64.

(j) The text is quoted in Nichols v. McCarthy, 53 Conn. 299, 55 Am. Rep. 105, 23 Atl. 93; Butman v. Whipple, (R. I.) 57 Atl. 379; cited, Golson v. Dunlap, 73 Cal. 157, 162, 14 Pac. 576; Cowen v. Adams, 78 Fed. 536, 552, 47 U. S. App. 676, (C. C. A.); Adams v. Cowen, 177 U. S. 471, 20 Sup. Ct. 668. See, also, Schneider v. Schneider, (Iowa) 98 N. W. 159; Hickman v. Stewart, 69 Tex. 255, 5 S. W. 833. As to adequacy of the price, see Golson v. Dunlap, 73 Cal. 157, 14 Pac. 576. Duty of complete disclosure by the trustee: See Dongan v. Macpherson, [1902] A. C. 197 (it makes no difference how the trustee obtained his information); Waldrop v. Leaman, 30 S. C. 428, 9 S. E. 466; Ludington v. Patton, 111 Wis. 208, 86 N. W. 571 (a very important case).

disclosure of all the knowledge or information concerning the property possessed by himself, or which he might, with reasonable diligence, have possessed, and that he has obtained no undue or inequitable advantage, and especially if it appears that the beneficiary acted in the transaction upon the independent information and advice of some intelligent third person, competent to give such advice, then the transaction will be sustained by a court of equity.[4] [k]

[4] The independent advice of a third person does not seem to be an essential feature in purchases for a fair consideration; but it does seem to be indispensable in transactions having the nature of gifts, whereby the trustee obtains some benefit, — as, for example, a release of claims against the trustee given by the *cestui que trust* as a bounty: Lloyd v. Attwood, 3 De Gex & J. 614. Some of the cases speak of "terminating the trust," "ceasing to be trustee," "shaking off the character of trustee," and the like. These expressions plainly do not mean that the trust relation should have been finally ended and dissolved. They are especially applicable to transactions in the nature of gifts, and then refer to the independent advice of a third person, upon which the beneficiary acts, so that the trustee is not *pro hac vice* dealing in his capacity of trustee. When applied to purchases, the expressions simply mean that the beneficiary must have complete information and unbiased judgment, and must give a free and full consent. The rule given in the text was well stated in the important case of Coles v. Trecothick, 9 Ves. 234, 246: "A trustee may buy from the *cestui que trust*, provided there is a clear and distinct contract, ascertained to be such after a jealous and scrupulous examination of all the circumstances, that the *cestui que trust* intended the trustee should buy; and there is no fraud, no concealment, no advantage taken by the trustee of information acquired by him in the character of trustee": Ex parte Bennett, 10 Ves. 381, 394; Ex parte Lacey, 6 Ves. 625; Ex parte James, 8 Ves. 337, 348; Morse v. Royal, 12 Ves. 355; Randall v. Errington, 10 Ves. 423; Downes v. Grazebrook, 3 Mer. 200, 208; Knight v. Majoribanks, 2 Macn. & G. 10; Luff v. Lord, 11 Jur., N. S., 50; Denton v. Donner, 23 Beav. 285; Ayliffe v. Murray, 2 Atk. 58; Clarke v. Swaile, 2 Eden, 134; Spencer and Newbold's Appeals, 80 Pa. St. 317; Villines v. Norfleet, 2 Dev. Eq. 167; Bryan v. Duncan, 11 Ga. 67; Kennedy v. Kennedy, 2 Ala. 571; Richardson v. Spencer, 18 B. Mon. 450; Marshall v. Stephens, 8 Humph. 159; 47 Am. Dec. 601; Sallee v. Chandler, 26 Mo. 124.

(k) The text is quoted in Nichols v. McCarthy, 53 Conn. 299, 55 Am. Rep. 105, 23 Atl. 93; Ludington v. Patton, 111 Wis. 208, 86 N. W. 571, 581. The transaction was upheld in Williams v. Powell, 66 Ala. 20, 41 Am. Rep. 742; Colton v. Stanford, 82 Cal. 351, 16 Am. St. Rep. 137, 23 Pac. 16 (an important case); Miggett's Appeal, 109 Pa. St. 520. The situation in Colton v. Stanford, *supra*, is thus summarized in the opinion of the court (82 Cal. 351, 16 Am. St. Rep. 150, 23 Pac. 16): "Here, therefore,

The doctrine is enforced with the utmost stringency when the transaction is in the nature of a bounty conferred upon the trustee,— a gift or benefit without full consideration. Such a transaction will not be sustained, unless the trust relation was for the time being completely suspended, and the beneficiary acted throughout upon independent advice, and upon the fullest information and knowledge.[1]

§ 959. **Principal and Agent.**— Equity regards and treats this relation in the same general manner, and with nearly

we have a case in which — assuming the existence of a fiduciary relation, and that the presumptions as to confidence and the burden of proof are as claimed by appellant — the undisputed facts show that there was absolutely no confidence reposed by the beneficiary, but that she acted exclusively upon the advice of several disinterested experts and professional friends, specially selected to investigate and counsel her, because of their ability and familiarity with the affairs of the trustees with whom she was dealing, and who acted towards her in the highest good faith. To hold that, under such circumstances, a contract entered into by the parties compromising and settling disputes of the most doubtful character and value cannot stand if it subsequently appear that the trustee did not impart to the *cestui que trust*, not only all the knowledge of the transactions of which he was possessed, but all that he might have acquired by diligent and careful search, would be to place an absolute embargo upon all settlements of disputed questions between parties holding trust relations, although equity favors the amicable adjustment of claims which, like those involved in this settlement, bid fair to become a fruitful source of litigation."

(1) The text is quoted in Nichols v. McCarthy, 53 Conn. 299, 55 Am. Rep. 105, 23 Atl. 93. The necessity of independent advice to the beneficiary is well illustrated in the important case of Allcard v. Skinner, 36 Ch. D. 145, the facts of which are summarized *post*, in note (c), § 963. Bowen, L. J., states (p. 189, ff) that the question is not one of the "rights of the donor," but of "the duties of the donee, and the obligations which are imposed upon the conscience of the donee by the principles of this Court." The duty of independent advice is "a fetter placed upon the conscience of the recipient of the gift, and one which arises out of public policy and fair play." In the recent case of Powell v. Powell, [1900] 1 Ch. 243, where a gift from a child just of age to his parent was involved, it was held that "it is not enough that he should have independent advice unless he acts upon that advice; it is the duty of a solicitor independently advising an intending settlor to protect him against himself, and not merely against the personal influences of the donee in the particular transaction; and if his advice is not accepted, he should decline to act further for the intending settlor." As to the necessity of independent advice to support a gift from client to attorney, see *post*, § 960 and notes.

the same strictness, as that of trustee and beneficiary. The underlying thought is, that an agent should not unite his personal and his representative characters in the same transaction; and equity will not permit him to be exposed to the temptation, or brought into a situation where his own personal interests conflict with the interests of his principal, and with the duties which he owes to his principal.[1] In dealings without the intervention of his principal, if an agent for the purpose of selling property of the principal purchases it himself, or an agent for the purpose of buying property for the principal buys it from himself, either directly or through the instrumentality of a third person, the sale or purchase is voidable; it will always be set aside at the option of the principal; the amount of consideration, the absence of undue advantage, and other similar features are wholly immaterial; nothing will defeat the principal's right of remedy except his own confirmation after full knowledge of all the facts.[2] Passing

[1] Neuendorff v. World etc. Ins. Co., 69 N. Y. 389; Wilbur v. Lynde, 49 Cal. 290; 19 Am. Rep. 645; Tynes v. Grimstead, 1 Tenn. Ch. 508; Dodd v. Wakeman, 26 N. J. Eq. 484; Krutz v. Fisher, 8 Kan. 90; Fisher v. Krutz, 9 Kan. 501; Grumley v. Webb, 44 Mo. 444; 100 Am. Dec. 304. For the same reason, an agent cannot, unless expressly authorized by both, act as such for two principals whose interests are conflicting; a contract thus made without the knowledge and consent of each would not be enforced, and might be canceled: New York Cent. Ins. Co. v. Nat. Protect. Ins. Co., 14 N. Y. 85; Greenwood v. Spring, 54 Barb. 375; Lloyd v. Colston, 5 Bush, 587; Draughon v. Quillen, 23 La. Ann. 237; Scribner v. Collar, 40 Mich. 375; 29 Am. Rep. 541.a

[2] As in the case of trustees, this rule applies alike to private sales, auction sales, and judicial sales: In re Bloye's Trust, 1 Macn. & G. 488, 495; Walsham v. Stainton, 1 De Gex, J. & S. 678; Kimber v. Barber, L. R. 8 Ch. 56; Lewis v. Hillman, 3 H. L. Cas. 607; Tyrrell v. Bank of London, 10 H. L. Cas. 26; Charter v. Trevelyan, 11 Clark & F. 714; Ex parte Gore, 6 Jur. 1118; 7 Jur. 136; Hichens v. Congreve, 4 Russ. 562, 577; Taylor v. Salmon, 4 Mylne & C. 134; Gillett v. Peppercorne, 3 Beav. 78; Lowther v. Lowther, 13 Ves. 95, 103; Murphy v. O'Shea, 2 Jones & L. 422; East

(a) See, also, Murray v. Beard, 102 N. Y. 508, 7 N. E. 553. The above passage of the text is quoted (without acknowledgment) in Mallory v. Mallory-Wheeler Co., 61 Conn. 135, 23 Atl. 708, by Andrews, C. J. (contract of corporation director).

to dealings connected with the principal's intervention, in any contract of purchase or sale with the principal, or other transaction by which the agent obtains a benefit, a presumption arises against its validity which the agent must overcome; although this presumption is undoubtedly

India Co. v. Henchman, 1 Ves. 287; Massey v. Davies, 2 Ves. 317; Bentley v. Craven, 18 Beav. 75; Barker v. Harrison, 2 Coll. C. C. 546; Lees v. Nuttal, 2 Mylne & K. 819; also, agent to settle a debt of his principal cannot purchase it, or any security of it, for his own benefit: Carter v. Palmer, 8 Clark & F. 657; 11 Bligh, N. S., 397; Cane v. Lord Allen, 2 Dow, 289, 294; Reed v. Norris, 2 Mylne & C. 361; Hobday v. Peters, 28 Beav. 349; Neuendorff v. World etc. Ins. Co., 69 N. Y. 389; Bain v. Brown, 56 N. Y. 285; Taussig v. Hart, 49 N. Y. 301; Bennett v. Austin, 81 N. Y. 308; Conkey v. Bond, 36 N. Y. 427; 34 Barb. 276; Gardner v. Ogden, 22 Barb. 327; 78 Am. Dec. 192 (subagent); Moore v. Moore, 5 Barb. 256; Dobson v. Racey, 8 Barb. 216 (ratified); Bank of Orleans v. Torrey, 7 Hill, 260; 9 Paige, 649, 662; Bridenbacker v. Lowell, 32 Barb. 9; Davoue v. Fanning, 2 Johns. Ch. 253; Van Epps v. Van Epps, 9 Paige, 237; Hughes v. Washington, 72 Ill. 84; Tewksbury v. Spruance, 75 Ill. 187; Eldridge v. Walker, 60 Ill. 230; Jeffries v. Wiester, 2 Saw. 135; Wilbur v. Lynde, 49 Cal. 290; 19 Am. Rep. 645; Rubidoex v. Parks, 48 Cal. 215; Hardenbergh v. Bacon, 33 Cal. 356, 377; Hunsacker v. Sturgis, 29 Cal. 142, 145; Armstrong v. Elliott, 29 Mich. 485; Ruckman v. Bergholz, 37 N. J. L. 437; Tynes v. Grimstead, 1 Tenn. Ch. 508; Barziza v. Story, 39 Tex. 354; Rogers v. Lockett, 28 Ark. 290; Grumley v. Webb, 44 Mo. 444; 100 Am. Dec. 304; Baker v. Whiting, 1 Story, 218, 241 (by a subagent); Caldwell v. Sigourney, 19 Conn. 37; Banks v. Judah, 8 Conn. 145; Marshall v. Joy, 17 Vt. 546; Ingle v. Hartman, 37 Iowa, 274; Scott v. Freeland, 7 Smedes & M. 409; 45 Am. Dec. 310;[b] and see many of the American cases cited under the preceding paragraph, concerning similar purchases by trustees. In Scott v. Mann, 36 Tex. 157, it seems to be held that an agent to sell property at auction may bid for it on behalf of a third person. This conclusion is directly opposed to the English decisions, and seems to be plainly opposed to the rule that a person cannot act as agent for two principals whose interests are antagonistic.

(b) See, also, Warren v. Burt, 58 Fed. 101, 3 C. C. A. 105, 12 U. S. App. 591; Gunn v. Black, 60 Fed. 151, 8 C. C. A. 534, 19 U. S. App. 477; Adams v. Sayre, 70 Ala. 318; De Mallagh v. De Mallagh, 77 Cal. 126, 19 Pac. 256; Reed v. Aubrey, 91 Ga. 435, 44 Am. St. Rep. 49, 17 S. E. 1022 (sale to agent's wife); Tyler v. Sanborn, 128 Ill. 136, 15 Am. St. Rep. 97, 21 N. E. 193, 4 L. R. A. 218 (same); Schneider v. Schneider, (Iowa) 98 N. W. 159; Fry v. Platt, 32 Kan. 62, 3 Pac. 781 (sale to agent's partner); Kimball v. Ranney, 122 Mich. 160, 80 Am. St. Rep. 548, 80 N. W. 992, 46 L. R. A. 403, and note, 80 Am. St. Rep. 555–568; Porter v. Woodruff, 36 N. J. Eq. 174; Green v. Hugo, 81 Tex. 452, 26 Am. St. Rep. 824, 17 S. W. 79.

not so weighty and strong as in the case of a trustee. The mere fact that a reasonable consideration is paid, and that no undue advantage is taken, is not of itself sufficient. Any unfairness, any underhanded dealing, any use of knowledge not communicated to the principal, any lack of the perfect good faith which equity requires, renders the transaction voidable, so that it will be set aside at the option of the principal.[3 c] If, on the other hand, the agent imparted all his own knowledge concerning the matter, and advised his

[3] Walsham v. Stainton, 1 De Gex, J. & S. 678; Haygarth v. Wearing, L. R. 12 Eq. 320; Donaldson v. Gillot, L. R. 3 Eq. 274; Panama etc. Tel. Co. v. India Rubber etc. Co., L. R. 10 Ch. 515, 526; Tyrrell v. Bank of London, 10 H. L. Cas. 26; Charter v. Trevelyan, 11 Clark & F. 714; Murphy v. O'Shea, 2 Jones & L. 422; Wilson v. Short, 6 Hare, 366, 383; Gillett v. Peppercorne, 3 Beav. 78; Clarke v. Tipping, 9 Beav. 282; Hobday v. Peters, 28 Beav. 349; Wentworth v. Lloyd, 32 Beav. 467; Byrd v. Hughes, 84 Ill. 174; 25 Am. Rep. 442; Jeffries v. Wiester, 2 Saw. 135; Wilbur v. Lynde, 49 Cal. 290; 19 Am. Rep. 645; Ingle v. Hartman, 37 Iowa, 274; Rubidoex v. Parks, 48 Cal. 215; Weeks v. Downing, 30 Mich. 4; Uhlich v. Muhlke, 61 Ill. 499; Wilson v. Wilson, 4 Abb. App. 621; Young v. Hughes, 32 N. J. Eq. 372; Condit v. Blackwell, 22 N. J. Eq. 481; Comstock v. Comstock, 57 Barb. 453; Norris v. Tayloe, 49 Ill. 17; 95 Am. Dec. 568; Green v. Winter, 1 Johns. Ch. 26, 60; 7 Am. Dec. 475; Brown v. Post, 1 Hun, 303; Cleveland Ins. Co. v. Reed, 1 Biss. 180; McMahon v. McGraw, 26 Wis. 614; White v. Ward, 26 Ark. 445; Gillenwaters v. Miller, 49 Miss. 150. In the recent case of Panama etc. Tel. Co. v. India Rubber etc. Co., L. R. 10 Ch. 515, James, L. J., laid down the following general rule: "I take it to be clear that any surreptitious dealing between one principal and the agent of the other principal is a fraud on such other principal, cognizable in this court. That I believe to be a clear proposition, and I take it to be equally clear that the defrauded principal, if he come in time, is entitled, at his option, to have the contract rescinded, or if he elects not to have it rescinded, to have such other adequate relief as the court may think right to give him."

(c) The text is quoted in Rochester v. Levering, 104 Ind. 562, 4 N. E. 203; Van Dusen v. Bigelow, (N. Dak.) 100 N. W. 723. See, also, Keith v. Kellam, 35 Fed. 243 (duty of full disclosure of facts bearing on the future value of the property); Hegenmyer v. Marks, 37 Minn. 6, 5 Am. St. Rep. 808, 32 N. W. 785 (agent authorized to sell at fixed price, and to take for his commission all that the property might bring above that price; it is his duty to disclose a fact, afterwards discovered, greatly enhancing the value of the property); Le Gendre v. Byrnes, 44 N. J. Eq. 372, 14 Atl. 621 (rule applies strictly to gift from parent to child acting as parent's agent); Darlington's Estate, 147 Pa. St. 624, 30 Am. St. Rep. 776, 23 Atl. 1046.

principal with candor and disinterestedness, as though he himself were a stranger to the bargain, and paid a fair price, and the principal on his side acted with full knowledge of the subject-matter of the transaction and of the person with whom he was dealing, and gave a full and free consent,— if all these are affirmatively proved, the presumption is overcome, and the transaction is valid.[4 d] These general doctrines are applied under every variety of circumstances, and to every kind of transaction. As illustrations, when an agent has, during his employment, discovered a defect in his principal's title, he cannot, after the agency is ended, use such knowledge for his own benefit; much less can he do so while the agency exists.[5] Nor is an agent employed to purchase or to sell, or in any other business, permitted to make profits for himself in the transaction, unless by the plain consent of his employer; for all such profits wrongfully made he must account to

[4] Lewis v. Hillman, 3 H. L. Cas. 607; Charter v. Trevelyan, 11 Clark & F. 714, 732; Rothschild v. Brookman, 5 Bligh, N. S., 165; Cane v. Lord Allen, 2 Dow, 289, 294; Lord Selsey v. Rhoades, 1 Bligh, N. S., 1; 2 Sim. & St. 41; Clarke v. Tipping, 9 Beav. 282; Dally v. Wonham, 33 Beav. 154; Lowther v. Lowther, 13 Ves. 95, 103; Woodhouse v. Meredith, 1 Jacob & W. 204; Watt v. Grove, 2 Schoales & L. 492; Molony v. Kernan, 2 Dru. & War. 31; Mulhallen v. Marum, 3 Dru. & War. 317; Murphy v. O'Shea, 2 Jones & L. 422, 425; Barker v. Harrison, 2 Coll. C. C. 546; In re Bloye's Trust, 1 Macn. & G. 488; Walker v. Carrington, 74 Ill. 446; Young v. Hughes, 32 N. J. Eq. 372; Wilson v. Wilson, 4 Abb. App. 621; Brown v. Post, 1 Hun, 303; Farnam v. Brooks, 9 Pick. 212; Marshall v. Joy, 17 Vt. 546; Moore v. Mandlebaum, 8 Mich. 433; Fisher's Appeal, 34 Pa. St. 29; and see cases in last preceding note.

[5] One of the most common instances of such conduct is the agent's acquiring a tax title to his principal's property for his own benefit; this proceeding is always invalid: Ringo v. Binns, 10 Pet. 269; Rogers v. Lockett, 28 Ark. 290; Krutz v. Fisher, 8 Kan. 90; Fisher v. Krutz, 9 Kan. 501; McMahon v. McGraw, 26 Wis. 614.e

(d) The text is quoted in Van Dusen v. Bigelow, (N. Dak.) 100 N. W. 723; quoted and followed in Rochester v. Levering, 104 Ind. 562, 4 N. E. 203. See, also, Kerby v. Kerby, 57 Md. 345.

(e) Day v. Davey, (Mich.) 93 N. W. 256. That an agent who was not responsible for a tax sale of the principal's property may acquire the tax title after his discharge, see Bemis v. Plato, 119 Iowa, 127, 93 N. W. 83.

his principal;[6] [f] and if he has taken the legal title to property in violation of his fiduciary duty, equity will treat him as a trustee thereof for his principal.[7] [g] A gift by a prin-

[6] De Bussche v. Alt, L. R. 8 Ch. Div. 286; Imperial etc. Association v. Coleman, L. R. 6 H. L. 189; Tyrrell v. Bank of London, 10 H. L. Cas. 26, 39; Walsham v. Stainton, 1 De Gex, J. & S. 678; East India Co. v. Henchman, 1 Ves. 287; Massey v. Davis, 2 Ves. 317; Ex parte Hughes, 6 Ves. 617; Benson v. Heathern, 1 Younge & C. 326, 342; Beck v. Kantorowicz, 3 Kay & J. 230; Bentley v. Craven, 18 Beav. 75; Maxwell v. Port Tenant etc. Co., 24 Beav. 495; Ritchie v. Couper, 28 Beav. 344; Moinett v. Days, 1 Baxt. 431; Dodd v. Wakeman, 26 N. J. Eq. 484; Coursin's Appeal, 79 Pa. St. 220; Wilson v. Wilson, 4 Abb. App. 621; Gillenwaters v. Miller, 49 Miss. 150; Taussig v. Hart, 49 N. Y. 301; Grumley v. Webb, 44 Mo. 444; 100 Am. Dec. 304; Leake v. Sutherland, 25 Ark. 219; Bunker v. Miles, 30 Me. 431; 50 Am. Dec. 632; Church v. Sterling, 16 Conn. 388; Reed v. Warner, 5 Paige, 650; Bruce v. Davenport, 36 Barb. 349; Gardner v. Ogden, 22 N. Y. 327; 78 Am. Dec. 192; Myer's Appeal, 2 Pa. St. 463; Keighler v. Savage Mfg. Co., 12 Md. 383; 71 Am. Dec. 600; Kanada v. North, 14 Mo. 615; Knabe v. Ternot, 16 La. Ann. 13.

[7] Reitz v. Reitz, 80 N. Y. 538; Bennett v. Austin, 81 N. Y. 308; Gardner v. Ogden, 22 N. Y. 327; 78 Am. Dec. 192; Smith v. Stephenson, 45 Iowa, 645; Barziza v. Story, 39 Tex. 354; Krutz v. Fisher, 8 Kan. 90; Fisher v. Krutz, 9 Kan. 501; McMahon v. McGraw, 26 Wis. 614; Matthews v. Light, 32 Me. 305; Pillsbury v. Pillsbury, 17 Me. 107; Church v. Sterling, 16 Conn. 388; Parkist v. Alexander, 1 Johns. Ch. 394; Burrell v. Bull, 3 Sand. Ch. 15; Blount v. Robeson, 3 Jones Eq. 73; Hargrave v. King, 5 Ired. Eq. 430; Wellford v. Chancellor, 5 Gratt. 39; McKinley v. Irvine, 13 Ala. 681; Moore v. Mandlebaum, 8 Mich. 433; Massie v. Watts, 6 Cranch, 148. See *post*, Constructive Trusts.

(f) See, also, Hegenmyer v. Marks, 37 Minn. 6, 5 Am. St. Rep. 808, 32 N. W. 785, *ante*, note (c); McKinley v. Williams, 74 Fed. 94, 20 C. C. A. 312, 36 U. S. App. 749.

(g) See *post*, § 1050; Davis v. Hamlin, 108 Ill. 39, 48 Am. Rep. 541 (confidential agent of a lessee obtains a renewal of the lease for himself); Stewart v. Duffy, 116 Ill. 47, 6 N. E. 424 (confidential agent cannot take a conveyance of outstanding interest in principal's property without a full disclosure to principal); Rose v. Hayden, 35 Kan. 106, 57 Am. Rep. 145, 10 Pac. 554, and cases cited (an agent to negotiate for the purchase of land, who buys the same with his own money, treated as trustee of the land for the principal); Bryan v. M'Naughton, 38 Kan. 98, 16 Pac. 57 (same); Brookings Land & Trust Co. v. Bertness, (S. Dak.) 96 N. W. 97 (same); Trice v. Comstock, 121 Fed. 620, 57 C. C. A. 646, 61 L. R. A. 176 (an agent of real estate brokers, employed to assist them in negotiating a sale of land owned by third parties, and deriving through such employment information as to the value of the land, cannot, after his employment has ceased, and while his former principals are still negotiating for the land, pur-

cipal to his agent may be valid and be sustained, if the absolute good faith, knowledge, and intent of both the parties is clearly established.[8] After the agency has been ended, and the fiduciary relation has ceased, the foregoing rules no longer operate; the parties may deal with each other in the same manner as any other persons.[9] [1]

§ 960. **Attorney and Client.**— The courts of England have uniformly watched all the dealings between attorneys or barristers and their clients with the closest scrutiny, and have established very rigorous rules concerning them. It must be conceded that this equitable doctrine has been to a considerable extent ignored, and these rules have been greatly modified in their application, by the courts in several of the American states. While the fact must be admitted, it cannot be too much deplored.[1] In regard to gifts,

[8] The equitable rule concerning gifts between principal and agent does not seem to be as stringent as that which regulates the similar dealings of trustees and their beneficiaries:[h] Hunter v. Atkins, 3 Mylne & K. 113; Nicol v. Vaughan, 1 Clark & F. 495; Hobday v. Peters, 28 Beav. 349.

[9] Scott v. Dunbar, 1 Molloy, 442; Trevelyan v. Charter, 4 L. J. Ch. 209; Bucher v. Bucher, 86 Ill. 377. Even then, however, a former agent is not permitted to use special knowledge, which he acquired by means of his agency, to benefit himself at the expense of the former principal: Carter v. Palmer, 8 Clark & F. 657; Holman v. Loynes, 4 De Gex, M. & G. 270.[j]

[1] I venture the suggestion that no single circumstance has done more to debase the practice of the law in the popular estimation, and even to lower the lofty standard of professional ethics and self-respect among members of the legal profession itself, in large portions of our country, than the nature of the transactions, often in the highest degree champertous, between attorney and client, which are permitted, and which have received judicial sanction. It sometimes would seem that the fiduciary relation

chase from the owners; such purchase renders him a constructive trustee for his principals); Winn v. Dillon, 27 Miss. 494. It is the rule in England, however, that where an agent employed by parol to purchase for his principal purchases in his own name and with his own money, no trust results to the principal: James v. Smith, [1891] 1 Ch. 384.

(h) See, to this effect, Ralston v. Turpin, 25 Fed. 7, 18, affirmed, 129 U. S. 663, 9 Sup. Ct. 420; also, Adair v. Craig, 135 Ala. 332, 33 South. 902.

(i) The text is cited to this effect in Burwell v. Burwell, (Va.) 49 S. E. 68. See, also, Brown v. Mercantile Trust Co., 87 Md. 377, 40 Atl. 256.

(j) See, to this effect, Trice v. Comstock, 121 Fed. 620, 57 C. C. A. 646, 61 L. R. A. 176; Robb v. Green, [1895] 2 Q. B. 315, 317–320; Luddy's Trustee v. Peard, 33 Ch. D. 500.

the rule is definitely settled, although it may not *always* have been followed by American courts, that no gift from a client to his attorney, made while the relation is still subsisting, is valid. In order that a gift from a client to his own attorney may be sustained, the donee must not only show *affirmatively* the perfect good faith of the transaction, the absence of any pressure or influence on his own part, the complete knowledge, intention, consent, and freedom of action on the donor's part, but it must also appear that, *pro hac re,*— that is, in all the dealings connected with the gift itself,— the relation of attorney and client between the two parties had been suspended, by means of independent advice furnished to the client by some disinterested and competent third person, through which the client was instructed and upon which he acted. Whatever may be the other circumstances, unless it be shown that the client, in conferring his bounty, had the benefit of such independent counsel and advice, the gift must fail.[2] In regard to pur-

and the opportunity for undue influence, instead of being the grounds for invalidating such agreements, are practically regarded rather as their excuse and justification.[a]

[2] The language, "the relation must have terminated," or "must have ceased to exist," etc., is found in some of the cases. This does not mean that the business connection between the donor and the donee must have been fully and finally ended, and the attorney discharged entirely from his employment. It simply means, as stated in the text, that in the dealing concerning the gift itself, the attorney must not be acting *as* attorney for the client, but some other attorney or competent adviser must be called in. The rule as given in the text is firmly established in England. The latest decision is Morgan v. Minett, L. R. 6 Ch. Div. 638. A client had given three releases and conveyances to Minett, who had long been his confidential attorney and friend. The evidence showed, beyond a question, that the donor fully knew and comprehended the nature of the transaction, and intended to confer the bounty. The donor, however, had no other adviser in the transaction, and counseled with no one except the donee, Minett. The gift was declared invalid and the instruments canceled. The court said (p. 645): "The law I take to be as plainly settled on the subject as any law existing in this country, that while the relation of solicitor and client subsists, the solicitor cannot take

(a) The above observations of the author are quoted with approval in Elmore v. Johnson, 143 Ill. 513, 525, 36 Am. St. Rep. 401, 404, 32 N. E. 413, 21 L. R. A. 366.

chases, sales, and other similar contracts between the attorney and client, the rule is not so stringent. Such species of contract made while the relation is still subsisting may be valid, and independent advice to the client from a third person is never essential, although very proper. (The pre-

a gift from his client. . . . . [p. 646:] It is not said that the relation prevents a client bestowing his bounty upon his solicitor, but what the law requires is, that, considering the enormous influence which a solicitor in many cases must have over his client, in order to give validity and effect to a donation from a client to his solicitor, that relation must be severed. The parties must be, as one of the cases says, at arms-length. The relation must have ceased to exist. If that can once be established, there is an end to the influence; whatever the influence may have been before need not be inquired into; the influence does not exist where that state of circumstances is brought about, and then the client may as well give to the solicitor as give to any other person. The degree of influence need not be inquired into. The fact of the influence is enough, if it be established. You cannot inquire how much influence there was; it is enough, in the contemplation of the law, that the influence existed, that there is a possibility that it may be abused; and the rule is not a hard one upon a solicitor. A client inclined to bestow bounty upon his solicitor is at perfect liberty to do it, and the solicitor is at perfect liberty to accept it, but both of them must act under circumstances which preclude the possibility of suspicion, for suspicion is enough." The court reviewed the prior cases, and especially the often quoted case of Hunter v. Atkins, 3 Mylne & K. 113, in which Lord Brougham argued that a gift to an attorney stood on the same footing as a purchase by him. These views of Lord Brougham were mere *dicta*, and had been often criticised and repudiated, and were opposed to the whole current of authority. The correctness of the rule laid down in Tomson v. Judge, 3 Drew. 306, was expressly affirmed. See also Broun v. Kennedy, 4 De Gex, J. & S. 217; Middleton v. Welles, 1 Cox, 112; 4 Brown Parl. C. 245; Hatch v. Hatch, 9 Ves. 292; Lady Ormond v. Hutchinson, 13 Ves. 47; Wright v. Proud, 13 Ves. 136; Montesquieu v. Sandys, 18 Ves. 302; In re Holmes's Estate, 3 Giff. 337, 345; Gibbs v. Daniel, 4 Giff. 1; O'Brien v. Lewis, 4 Giff. 221; Wood v. Downes, 18 Ves. 120; Goddard v. Carlisle, 9 Price, 169; Greenfield's Estate, 14 Pa. St. 489, 506; and see Berrien v. McLane, 1 Hoff. Ch. 421; Brock v. Barnes, 40 Barb. 521.[b] In Nesbit v. Lockman, 34 N. Y. 167,

(b) See, also, Willis v. Barron, [1902] A. C. 271, affirming [1900] 2 Ch. 121 (benefit conferred by client upon near relative of solicitor); Wright v. Carter, [1903] 1 Ch. 27, reviewing many cases; Liles v. Terry, [1895] 2 Q. B. 679 (gift to solicitor in trust for client during life, and thereafter in trust for solicitor's wife, who was the client's niece, to her separate use, voidable; requisite of independent advice is a "hard and fast rule of equity"). In Holman v. Loynes, 4 De Gex, M. & G. 270, it is stated that "gifts from clients to their attorneys can be maintained only, when not only the relation has ceased, but the influence may ration-

sumption always arises against the validity of a purchase or sale between the client and attorney made during the existence of the relation. The attorney must remove that presumption by showing affirmatively the most perfect good faith, the absence of undue influence, a fair price, knowledge, intention, and freedom of action by the client, and also that he gave his client full information and disinterested advice; in the language of Lord Eldon, "the attorney must prove that his diligence to do the best for his vendor has been as great as if he was only an attorney dealing for that vendor with a stranger."[3] If all these circumstances are proved, the contract will stand; if not, it will be defeated or set aside.[4] [d] In the conduct of his employment,

while the general rule was admitted, a gift to a managing clerk of the donor's attorney was sustained upon the particular circumstances. A distinction exists between gifts *inter vivos* and testamentary gifts. A bequest to the testator's attorney will be held valid, even where the attorney himself drew up the will, if the testator's capacity and freedom of action and intent be shown: Hindson v. Weatherill, 5 De Gex, M. & G. 301; Walker v. Smith, 29 Beav. 394; Raworth v. Marriott, 1 Mylne & K. 643.[e]

[3] Gibson v. Jeyes, 6 Ves. 266, 271.

[4] In Edwards v. Meyrick, 2 Hare, 60, the doctrine was fully discussed in all its bearings by Wigram, V. C., and a purchase by an attorney was sus-

ally be supposed to have ceased also." In the recent case of Wright v. Carter, [1903] 1 Ch. 27, the duty of the solicitor who is called in to give independent advice was considered, and this rule laid down: "The solicitor does not discharge his duty by satisfying himself simply that the donor understands and wishes to carry out the particular transaction. He must also satisfy himself that the gift is one that it is right and proper for the donor to make under all the circumstances; and if he is not so satisfied, his duty is to advise his client not to go on with the transaction, and to refuse to act further for him if he persists." See, also, on the adviser's duty, note (l), § 958, ante.

(c) It has been held that the mere fact that the testator's attorney is a beneficiary under the will gives rise to no presumption against the bequest, unless he took an active part in procuring the will to be made: See Matter of the Will of Smith, 95 N. Y. 516; Post v. Mason, 91 N. Y. 539, 43 Am. Rep. 689 (citing Coffin v. Coffin, 23 N. Y. 9, 80 Am. Dec. 235; Nexsen v. Nexsen, 2 Keyes, 229; Barry v. Butlin, 1 Curteis' Ecc. 637); and see *ante*, note to § 957.

(d) The text is quoted in Elmore v. Johnson, 143 Ill. 513, 36 Am. St. Rep. 401, 32 N. E. 413, 21 L. R. A. 366; Cooper v. Lee, 75 Tex. 114, 12 S. W. 483; cited, Stubinger v. Frey, 116 Ga. 396, 42 S. E. 713.

the attorney must consult his client's interests in preference to his own. He is not permitted, therefore, to make any

tained, although it turned out to be much more profitable than was anticipated. The following recent English decisions furnish striking illustrations of the rule: *Cases in which the transaction was held invalid:* Holman v. Loynes, 4 De Gex, M. & G. 270; Hesse v. Briant, 6 De Gex, M. & G. 623; Broun v. Kennedy, 4 De Gex, J. & S. 217; Gresley v. Mousley, 4 De Gex & J. 78, 91, 94, 95, 98, 99; 3 De Gex, F. & J. 433 (a very remarkable case; a purchase set aside after death of both parties, on ground of under-value, and by application of the presumption, there being no affirmative evidence to sustain the validity); Lyddon v. Moss, 4 De Gex & J. 104; Baker v. Loader, L. R. 16 Eq. 49; Prees v. Coke, L. R. 6 Ch. 645 (conveyance by a mortgagor to the mortgagee, who was also his attorney, set aside merely from absence of evidence overcoming the presumption); Lee v. Angas, L. R. 7 Ch. 79, note.e *Transactions held valid:* Moss v. Bainbrigge, 6 De Gex, M. & G. 292; Johnson v. Fesemeyer, 3 De Gex & J. 13, 22 (the doctrine does not apply when the attorney is in the hostile attitude of an urgent creditor seeking payment or security); Lyddon v. Moss, 4 De Gex & J. 104 (delay and acquiescence); Blagrave v. Routh, 2 Kay & J. 509; Clanricarde v. Henning, 30 Beav. 175. See also, on the general rule, Gibson v. Jeyes, 6 Ves. 266, 277; Montesquieu v. Sandys, 18 Ves. 302; Newman v. Payne, 2 Ves. 200; Hatch v. Hatch, 9 Ves. 292; Walmesley v. Booth, 2 Atk. 25; Welles v. Middleton, 1 Cox, 112; Savery v. King, 5 H. L. Cas. 627; Cane v. Lord Allen, 2 Dow, 289; Morgan v. Lewes, 4 Dow, 29, 47; Uppington v. Bullen, 2 Dru. & War. 185; Higgins v. Joyce, 2 Jones & L. 282; Spencer v. Topham, 22 Beav. 573; Pearson v. Benson, 28 Beav. 598; Adams v. Sworder, 2 De Gex, J. & S. 44. The American cases do not exhibit so much uniformity. While all recognize the general rule, theoretically at least, and while some apply it with firmness and rigor, others have virtually emasculated it in its application. Transactions have been sustained which an English court would hardly suffer to be discussed, and would visit the attorneys engaged in them with the severest censure. *Cases applying the rules:* Ryan v. Ashton, 42 Iowa, 365; Broyles v. Arnold, 11 Heisk. 484; Baker v. Humphrey, 101 U. S. 494; Polson v. Young, 37 Iowa, 196; Dunn v. Record, 63 Me. 17 (rule fully adopted); Roman v. Mali, 42 Md. 513 (ditto); Kisling v. Shaw, 33 Cal. 425; 91 Am. Dec. 644 (ditto); Haight v. Moore, 37 N. Y. Sup. Ct. 161; McMahan v. Smith, 6 Heisk. 167; Trotter v. Smith, 59 Ill. 240; Mason v. Ring, 3 Abb. App. 210; Zeigler v. Hughes, 55 Ill. 288; Payne v. Avery, 21 Mich. 524; White v. Whaley, 3 Lans. 327; 40 How. Pr. 353; Mott v. Harrington, 12 Vt. 199; Merritt v. Lambert, 10 Paige, 352; 2 Denio,

(e) See, also, Wright v. Carter, [1903] 1 Ch. 27, where the opinion was expressed that independent advice, as distinguished from the advice of the purchasing solicitor, was not always necessary in the case of a purchase. In Luddy's Trustee v. Peard, 33 Ch. D. 500, 520, it was held that the obligations resting on a solicitor dealing with his client extend to the case of a dealing between a solicitor and the trustee in bankruptcy of his client.

profit out of the employment, other than his due compensation, except with the knowledge and consent of his client; for all such profits he must account, and if necessary, will be treated as a trustee.[5] When an attorney has the charge

607; Howell v. Ransom, 11 Paige, 538; Wendell v. Van Rensselaer, 1 Johns. Ch. 344; Brock v. Barnes, 49 Barb. 521; Smith v. Brotherline, 62 Pa. St. 461; Miles v. Ervin, 1 McCord Eq. 524; 16 Am. Dec. 623; Brown v. Bulkley, 14 N. J. Eq. 451.[f] *Transactions held valid:* Porter v. Parmly, 39 N. Y. Sup. Ct. 219; Marsh v. Whitmore, 21 Wall. 178 (delay of twelve years); Jenkins v. Einstein, 3 Biss. 128 (to set aside a conveyance by a person pecuniarily embarrassed to his attorney, it must be shown that the latter had been consulted in regard to the transaction, or was in a position to take an unfair advantage). This seems to reverse the presumption.[g]

[5] This general rule is recognized by all the cases, but there is some difference of decision as to what acts, such as purchases, of the attorney are prohibited by it. It results from the same general doctrine that in contested matters the same attorney cannot act on behalf of two opposing parties; and even when he may thus act for two parties in uncontested matters, his conduct is most carefully watched, and must exhibit the most perfect good faith; he cannot prejudice one client for the benefit of another; the injured client will be relieved by setting aside such a transaction. *As to making a*

(f) See, also, Dunn v. Dunn, 42 N. J. Eq. 431, 7 Atl. 842; Merryman v. Euler, 59 Md. 588, 43 Am. Rep. 564; Stubinger v. Frey, 116 Ga. 396, 42 S. E. 713; Elmore v. Johnson, 143 Ill. 513, 36 Am. St. Rep. 401, 32 N. E. 413, 21 L. R. A. 366; Ross v. Payson, 160 Ill. 358, 43 N. E. 399; Shirk v. Neible, 156 Ind. 66, 83 Am. St. Rep. 150, 59 N. E. 281, and cases cited; Klein v. Borchert, 89 Minn. 377, 95 N. W. 215; Barrett v. Ball, 101 Mo. App. 288, 73 S. W. 865. In Elmore v. Johnson, 143 Ill. 513, 527–529, 36 Am. St. Rep. 401, 406, 407, 32 N. E. 413, 21 L. R. A. 366, Magruder, J., relying on Berrien v. McLane, 1 Hoff. Ch. 421, and citing many other cases, takes the ground that an agreement, made during the pendency of a litigation, for the conveyance or transfer by the client to the attorney of a part of the property involved in the litigation as a compensation for his legal services therein is voidable at the option of the client. "The value of the property in litigation depends upon the result of the litigation, and, being unable to understand the legal aspects of the case, he [the client] is unable to foresee what such result will be. He must rely, not upon his own judgment, but upon the judgment and statements of his attorney. Moreover he is unable to judge as to the value of his attorney's services, because he cannot know what legal steps are necessary to be taken in the conduct of the case. The advantage is overwhelmingly on the side of the attorney where such a contract is made."

(g) See, also, Kidd v. Williams, 132 Ala. 140, 31 South. 458, 56 L. R. A. 879, citing the text; Morrison v. Smith, 130 Ill. 304, 23 N. E. 241; Tancre v. Reynolds, 35 Minn. 476, 29 N. W. 171.

of or is employed to conduct a judicial sale of property, he cannot become the purchaser without full explanation and information given to his client of his intention.[6] The Eng-

profit, etc., see Tyrrell v. Bank of London, 10 H. L. Cas. 26, 44; Rhodes v. Beauvoir, 6 Bligh, 195; Lawless v. Mansfield, 1 Dru. & War. 557, 631; Wood v. Downes, 18 Ves. 120; Proctor v. Robinson, 35 Beav. 329, 335; O'Brien v. Lewis, 4 Giff. 221; Gott v. Brigham, 41 Mich. 227; McDowell v. Milroy, 69 Ill. 498; Wheeler v. Willard, 44 Vt. 640; Harper v. Perry, 28 Iowa, 57; Hatch v. Fogerty, 10 Abb. Pr., N. S., 147; 40 How. Pr. 492 (using information afterwards); Davis v. Smith, 43 Vt. 269.[h] Making profits by purchasing property of client, or in which client is interested; purchase generally held voidable, or in trust for the client: Smith v. Brotherline, 62 Pa. St. 461; Wheeler v. Willard, 44 Vt. 640; Porter v. Peckham, 44 Cal. 204 (purchase held valid); In re Taylor Orphan Asylum, 36 Wis. 534; Bowers v. Virden, 56 Miss. 595 (valid); Wright v. Walker, 30 Ark. 44.[i] Acting for two parties, and making a contract in violation of his duty to one of them:[j] Hesse v. Briant, 6 De Gex, M. & G. 623; Lee v. Angas, L. R. 7 Ch. 79, note; Baker v. Humphrey, 101 U. S. 494. Acting for opposing litigants:[k] Wallace v. Furber, 62 Ind. 103; De Celis v. Brunson, 53 Cal. 372; Orr v. Tanner, 12 R. I. 94; MacDonald v. Wagner, 5 Mo. App. 56.

[6] This rule seems to be settled by the English decisions, and is followed by some, but not by all, of the American cases: In re Bloye's Trust, 1 Macn. & G. 488; Watt v. Grove, 2 Schoales & L. 492; Lowther v. Lowther, 13 Ves. 95; Oliver v. Court, 8 Price, 127; Manning v. Hayden, 5 Saw. 360; Bowers v. Virden, 56 Miss. 595; Pacific R. R. v. Ketchum, 101 U. S. 289; Page v. Stubbs, 39 Iowa, 537; Barrett v. Bamber, 9 Phila. 202; In re Taylor Orphan

(h) See, also, Stanwood v. Wishard, 128 Fed. 499; Byington v. Moore, 62 Iowa, 470, 17 N. W. 644; Taylor v. Barker, 30 S. C. 238, 9 S. E. 115; Luddy's Trustee v. Peard, 33 Ch. D. 500 (making use of information gained as solicitor to make a purchase to former client's disadvantage); compare In re Haslam & Hier-Evans, [1902] 1 Ch. 765.

(i) See, also, Luddy's Trustee v. Peard, 33 Ch. Div. 500, 519 (attorney commissioned to purchase for his client secretly purchases on his own behalf); Lewis v. Hillman, 3 H. L. Cas. 607, 630; McPherson v. Watt, 3 App. Cas. 254, 266, 270; Vallette v. Tedens, 122 Ill. 607, 3 Am. St. Rep. 502, 14 N. E. 52 (a person employed to search title of land which his client desired to purchase, bought the land for himself: held to be a constructive trustee for the client); Byington v. Moore, 62 Iowa, 470, 17 N. W. 644; Broder v. Conklin, 77 Cal. 331, 19 Pac. 513; Eoff v. Irvine, 108 Mo. 378, 32 Am. St. Rep. 609, 18 S. W. 907 (attorney, although his employment has ceased, who has been consulted about a title to land, and purchases an outstanding title in opposition to his client, holds it in trust for his client); Security Sav. Soc. v. Cohalan, 31 Wash. 266, 71 Pac. 1020; Carson v. Fogg, (Wash.) 76 Pac. 112.

(j) Compare In re Haslam & Hier-Evans, [1902] 1 Ch. 765.

(k) See, also, Klabunde v. Byron-Reed Co., (Nebr.) 98 N. W. 182, citing the author's note.

lish rules concerning compensation, and agreements with respect to payment or security of compensation, are exceedingly strict, but they have been relaxed in many if not all of the American states.[7] All of the foregoing rules apply not only to those who are technically attorneys, but also to all who *de facto* act as professional or legal advisers.[8]

Asylum, 36 Wis. 534; Taylor v. Boardman, 24 Mich. 287; Warren v. Hawkins, 49 Mo. 137: Banks v. Judah, 8 Conn. 145, 146, 147; Phillips v. Belding, 2 Edw. Ch. 15: Reed v. Warner, 5 Paige, 650; Casey v. Casey, 14 Ill. 412; Sypher v. McHenry, 18 Iowa, 232; Church v. Marine Ins. Co., 1 Mason, 341, 344; Baker v. Whiting, 3 Sum. 475.[l]

[7] An attorney who advances money to his client and takes security for it must have some evidence of the fact more than the security itself and any acknowledgment of payment contained in it: Gresley v. Mousley, 3 De Gex, F. & J. 433; Morgan v. Lewes, 4 Dow, 29, 46; Morgan v. Evans, 3 Clark & F. 159, 195; Lawless v. Mansfield, 1 Dru. & War. 557. An agreement to pay a gross sum for past services *may* be valid, although the clearest proof of good faith will be required: Morgan v. Higgins, 1 Giff. 270, 277; Welles v. Middleton, 1 Cox, 112, 125; Cheslyn v. Dalby, 2 Younge & C. 170; but an agreement to pay a gross sum for future services, and security given for the compensation with respect to future services, or money to be advanced in future, were entirely invalid prior to a recent statute of Parliament: In re Newman, 30 Beav. 196; Jones v. Tripp, Jacob, 322; Uppington v. Bullen, 2 Dru. & War. 184. The cases are numerous in which settlements, payments, and securities have been set aside at the suit of the client because the attorney's bills of costs were not properly taxed, or examined, or dealt with as required by law. In the United States, attorneys and clients are generally permitted to make what agreements they please concerning compensation for future or past services, even though the agreement would be void at common law for champerty. The courts will, of course, scrutinize such transactions, to see that there was no actual undue influence; that the client acted with knowledge, and intentionally; but these facts being established, the transaction will rarely be impeached on account of its subject-matter and provisions: Ryan v. Ashton, 42 Iowa, 365; Ballard v. Carr, 48 Cal. 74; Hoffman v. Vallejo, 45 Cal. 564.[m]

[8] To counsel or barristers as distinct from attorneys: Broun v. Kennedy, 4 De Gex, J. & S. 217; 33 Beav. 133; Carter v. Palmer, 8 Clark & F. 657,

(l) See, also, Taylor v. Young, 56 Mich. 285, 22 N. W. 799; Olson v. Lamb, 56 Nebr. 104, 71 Am. St. Rep. 670, 76 N. W. 433.

(m) Agreements concerning compensation were set aside in Robinson v. Sharp, 201 Ill. 86, 66 N. E. 299; Willin v. Burdett, 130 Ill. 304, 49 N. E. 1000; Shirk v. Neible, 156 Ind 66, 83 Am. St. Rep. 150, 59 N. E. 281. In Kidd v. Williams, 132 Ala. 140, 31 South. 458, 56 L. R. A. 879, citing the text, it was held that independent advice is not necessary to enable a competent client to effect a binding settlement with his attorney

§ 961. Guardian and Ward.—The equitable rules concerning dealings between guardian and ward are very stringent. The relation is so intimate, the dependence so complete, the influence so great, that any transactions between the two parties, or by the guardian alone, through which the guardian obtains a benefit, entered into while the relation exists, are in the highest degree suspicious; the presumption against them is so strong that it is hardly possible for them to be sustained. Indeed, many authorities lay down the positive rule that the parties are wholly incapacitated from contracting, and that any such transaction between them is necessarily voidable. This statement is perhaps too broad.[1]

concerning services already rendered, where the client is in a position to form an entirely free and unfettered judgment independent altogether of any sort of control.

(n) Abstractors of titles occupy a relation of confidence to those employing them, analogous to that of attorney and client: Vallette v. Tedens, 122 Ill. 607, 3 Am. St. Rep. 502, 14 N. E. 52. The fact that one of the parties to a contract is an attorney, and that he prepares the necessary writings without charge, does not establish the relation of attorney and client: Stout v. Smith, 98 N. Y. 25, 50 Am. Rep. 632.

707; MacCabe v. Hussey, 5 Bligh, N. S., 715; Purcell v. McNamara, 14 Ves. 91; to a clerk of an attorney: Hobday v. Peters, 28 Beav. 349; Nesbitt v. Berridge, 32 Beav. 282; Nesbit v. Lockman, 34 N. Y. 167; Poillon v. Martin, 1 Sand. Ch. 569; and even to a friend who has assumed to advise in legal matters, and thus to take the place of an attorney: Tate v. Williamson, L. R. 1 Eq. 528; 2 Ch. 55.[n] There are many other rules of law regulating the relation of attorney and client, but the foregoing are all of the most important ones which can come within the cognizance of equity; courts of equity can generally deal only with contracts and similar transactions between an attorney and client.

[1] Hylton v. Hylton, 2 Ves. Sr. 548, 549; Hatch v. Hatch, 9 Ves. 292; Dawson v. Massey, 1 Ball & B. 219, 226; Mulhallen v. Marum, 3 Dru. & War. 317; Beasley v. Magrath, 2 Schoales & L. 35; Archer v. Hudson, 15 L. J. Ch. 211; Everitt v. Everitt, L. R. 10 Eq. 405; Walker v. Walker, 101 Mass. 169; Gallatian v. Cunningham, 8 Cow. 361; Gallatian v. Erwin, 1 Hopk. Ch. 48; White v. Parker, 8 Barb. 48; Henrioid v. Neusbaumer, 69 Mo. 96; Scott v. Freeland, 7 Smedes & M. 409; 45 Am. Dec. 310; Sullivan v. Blackwell, 28 Miss. 737; Meek v. Perry, 36 Miss. 190; Wright v. Arnold, 14 B. Mon. 638; 61 Am. Dec. 172; Hanna v. Spotts, 5 B. Mon. 362; 43 Am. Dec. 132; Blackmore v. Shelby, 8 Humph. 439; Williams v. Powell, 1 Ired. Eq. 460; Love v. Lea, 2 Ired. Eq. 627; Waller v. Armistead, 2 Leigh, 11; 21 Am. Dec. 594; and see Smith v. Davis, 49 Md. 470. The

A will by the ward in his guardian's favor is not viewed so strictly; the presumption against it may be overcome, and the will sustained.[2] The general doctrine of equity applies to the parties after the legal condition of guardianship has ended, and as long as the dependence on one side and influence on the other presumptively or in fact continue. This influence is presumed to last while the guardian's functions are to any extent still performed, while the property is still at all under his control, and until the accounts have been finally settled. It follows, therefore, that any conveyance, purchase, sale, contract, and especially gift, by which the guardian derives a benefit, made after the termination of the legal relation, but while the influence lasts, is presumed to be invalid and voidable. The burden rests heavily upon the guardian to prove all the circumstances of knowledge, free consent, good faith, absence of influence, which alone can overcome the presumption.[3 b] If the legal relation has

doctrine applies to purchase made by guardians of ward's property, when sold by order of court, or at other judicial or public sales; such purchases are generally held voidable, and are clearly so in principle: Redd v. Jones, 30 Gratt. 123; Sanders v. Forgasson, 59 Tenn. 249; Green v. Green, 14 N. Y. Sup. Ct. 492; Walker v. Walker, 101 Mass. 169; Bland v. Lloyd, 24 La. Ann. 603; but see Doe v. Hassell, 68 N. C. 213; Lee v. Howell, 69 N. C. 200; Small v. Small, 74 N. C. 16.[a]

2 Daniel v. Hill, 52 Ala. 430 (a very instructive case, in which the equitable doctrine was well stated, and the will was held valid); Garvin's Adm'r v. Williams, 50 Mo. 206; Meek v. Perry, 36 Miss. 190.

3 Hylton v. Hylton, 2 Ves. Sr. 548, 549; Hatch v. Hatch, 9 Ves. 292; Pierce v. Waring, 1 P. Wms. 121, note; Dawson v. Massey, 1 Ball & B. 219; Cary v. Cary, 2 Schoales & L. 173; Revett v. Harvey, 1 Sim. & St. 502; Mellish v. Mellish, 1 Sim. & St. 138; Maitland v. Backhouse, 16 Sim.

(a) See, also, Hindman v. O'Connor, 54 Ark. 627, 16 S. W. 1052, 13 L. R. A. 490, and cases cited; Willey v. Tindal, 5 Del. Ch. 194; Frazier v. Jeakins, 64 Kan. 615, 68 Pac. 24, 57 L. R. A. 575 (sale to guardian's husband); Webb v. Branner, 59 Kan. 190, 52 Pac. 429; O'Donoghue v. Boies, 159 N. Y. 87, 53 N. E. 537; Town of Thornton v. Gilman, 67 N. H. 392, 39 Atl. 900 (purchase at tax sale); Dormitzer v. German Savings & Loan Soc., 23 Wash. 132, 62 Pac. 862, 891; see, however, as to purchase by guardian "in socage," Boyer v. East, 161 N. Y. 580, 76 Am. St. Rep. 290, 56 N. E. 114.

(b) The text is quoted in Gillett v. Wiley, 126 Ill. 310, 9 Am. St. Rep. 587, 19 N. E. 287; cited in Carter v. Tice, 120 Ill. 277, 11 N. E. 529; Ashton v. Thompson, 32 Minn. 25, 41,

ended, and all these circumstances of good faith, full knowledge, and free consent are clearly shown, a settlement, conveyance, contract, or even gift from the former ward to his recent guardian will be as valid and as effective as the same transactions between any other competent persons.[4 d] It is not essential that a *legal* guardianship should exist; the doctrine applies wherever the relation subsists in fact.[5]

58; Maitland v. Irving, 15 Sim. 437; Wedderburn v. Wedderburn, 4 Mylne & C. 41; Espey v. Lake, 19 Hare, 260; Matthew v. Brise, 14 Beav. 341, 345; Wright v. Vanderplank, 8 De Gex, M. & G. 133; 2 Kay & J. 1; Wickiser v. Cook, 85 Ill. 68; Tucke v. Bucholz, 43 Iowa, 415; Ranken v. Patton, 65 Mo. 378; Somes v. Skinner, 16 Mass. 348; Fish v. Miller, 1 Hoff. Ch. 267; Rapalje v. Norsworthy, 1 Sand. Ch. 399; Gale v. Wells, 12 Barb. 84; Eberts v. Eberts, 55 Pa. St. 110; Hawkins's Appeal, 32 Pa. St. 263; Wills's Appeal, 22 Pa. St. 325, 332; Sherry v. Sansberry, 3 Ind. 320; Waller v. Armistead, 2 Leigh, 11; 21 Am. Dec. 594; Williams v. Powell, 1 Ired. Eq. 460; Womack v. Austin, 1 S. C. 421; Andrews v. Jones, 10 Ala. 400; Johnson v. Johnson, 5 Ala. 90; Richardson v. Linney, 7 B. Mon. 571; Wright v. Arnold, 14 B. Mon. 513; Sullivan v. Blackwell, 28 Miss. 737. The rule applies with especial force to settlements by the guardian with his ward. The guardian must prove not only an absence of undue influence, and perfect fairness and good faith, but that the ward had full opportunity to examine the accounts, either by himself if he was able to understand them, or by the aid of some competent adviser or attorney: Fish v. Miller, 1 Hoff. Ch. 267; In re Van Horne, 7 Paige, 46; Stanley's Appeal, 8 Pa. St. 431; Say v. Barnes, 4 Serg. & R. 112; 8 Am. Dec. 679; Waller v. Armistead, 2 Leigh, 11; Garvin v. Williams, 44 Mo. 465; 100 Am. Dec. 314.e

4 Hylton v. Hylton, 2 Ves. Sr. 548; Hatch v. Hatch, 9 Ves. 292, 297; Kirby v. Taylor, 6 Johns. Ch. 242, 248; Kirby v. Turner, 1 Hopk. Ch. 309; Hawkins's Appeal, 32 Pa. St. 263, 265; Cowan's Appeal, 74 Pa. St. 329; Myer v. Rives, 11 Ala. 760; Meek v. Perry, 36 Miss. 190; Sherry v. Sansberry, 3 Ind. 320.

5 For example, wherever a young person has actually been brought up in the family and under the care of a relative or friend:e Revett v. Harvey,

42, 18 N. W. 918 (gift). See, also, Noble's Adm'r v. Moses, 81 Ala. 530, 1 South. 217, 60 Am. Rep. 175; McConkey v. Cockey, 69 Md. 286, 14 Atl. 465; Williams v. Davison's Estate, (Mich.) 94 N. W. 1048 (gift); Hart v. Cannon, 133 N. C. 10, 45 S. E. 351; Wade v. Pulsifer, 54 Vt. 45 (gift).

(c) See, also, Ralston v. Turpin, 25 Fed. 18, 129 U. S. 663, 9 Sup. Ct. 420; Voltz v. Voltz, 75 Ala. 555; Webb v. Branner, 59 Kan. 190, 53 Pac. 429; Gregory v. Orr, 61 Miss. 307.

(d) This paragraph of the text was quoted and adopted by the court in Ralston v. Turpin, 25 Fed. 7, 18; affirmed, 129 U. S. 663, 9 Sup. Ct. 420. See, also, Bickerstaff v. Marlin, 60 Miss. 509, 45 Am. Rep. 418.

(e) See, also, Brown v. Burbank, 64 Cal. 99, 27 Pac. 940; Butler v. Hy

§ 962. **Parent and Child.**— "Transactions between parent and child may proceed upon arrangements between them for the settlement of property or of their rights in property in which they are interested. In such cases courts of equity regard the transactions with favor. They do not minutely weigh the considerations on one side or the other. Even ignorance of rights, if equal on both sides, may not avail to impeach the transaction.[1] On the other hand, the transaction may be one of bounty from the child to the parent, soon after the child has attained twenty-one. In such cases the court views the transaction with jealousy, and anxiously interposes its protection to guard the child from the exercise of parental influence."[2] "The law on this subject is well settled. A child makes a gift to a parent, and such a gift is good if it is not tainted by parental influence. A child is presumed to be under the exercise of parental influence as long as the dominion of the parent lasts. Whilst that dominion lasts it lies on the parent maintaining the gift to disprove the exercise of parental influence, by showing that the child had independent advice, or in some other way. When the parental influence is disproved, or that influence has ceased, a gift from a child stands on the same footing as any other gift; and the question to be determined is, whether there was a deliberate,

1 Sim. & St. 502; Allfrey v. Allfrey, 1 Macn. & G. 87, 98: Espey v. Lake, 10 Hare, 260, 262; Beasley v. Magrath, 2 Schoales & L. 31; Mulhallen v. Marum, 3 Dru. & War. 317; Wiltman's Appeal, 28 Pa. St. 376; Hanna v. Spotts, 5 B. Mon. 362; 43 Am. Dec. 132.

1 Baker v. Bradley, 7 De Gex, M. & G. 597, 620, per Turner, L. J.; Tweddell v. Tweddell, Turn. & R. 1; Bellamy v. Sabine, 2 Phill. Ch. 425; Jenner v. Jenner, 2 De Gex, F. & J. 359; Williams v. Williams, L. R. 2 Ch. 294; Potts v. Surr, 34 Beav. 543; Hoghton v. Hoghton, 15 Beav. 278, 305; Dimsdale v. Dimsdale, 3 Drew. 556; Cooke v. Burtchaell, 2 Dru. & War. 165; Wallace v. Wallace, 2 Dru. & War. 452.

2 Baker v. Bradley, 7 De Gex, M. & G. 597.

land, 89 Cal. 575, 26 Pac. 1108; Worrall's Appeal, 110 Pa. St. 349, 1 Atl. 380. Purchase by guardian *de son tort* of ward's land, voidable: Town of Thornton v. Gilman, 67 N. H. 392, 39 Atl. 900.

unbiased intention on the part of the child to give to the parent."[3a] Where the positions of the two parties are

[3] Wright v. Vanderplank, 8 De Gex, M. & G. 133, 146, per Turner, L. J. In the same case the grounds of the doctrine were stated in a very forcible manner by Knight Bruce, L. J. A daughter, soon after coming of age, made a conveyance by way of gift to her father; the daughter marrying and afterwards dying, her husband brought this suit to set aside the conveyance. The lord justice proceeds to inquire on what grounds the deed can be impeached. After saying that the grounds were, not because the amount was immoderate; nor because she was induced by any fraud, or deceit, or coercion; nor because she acted under any mistake or misapprehension; nor because she did not intend to do what she did; nor on the ground that the defendant acted dishonestly (p. 137); "but upon the ground of the close attention, the strictness, and the jealousy with which, upon principles of natural justice, and upon considerations important to the interests of society, the law of this country examines, scrutinizes, and, if I may borrow an old expression, weighs in golden scales, every transaction between a guardian and his ward, or between a parent and his child, which, including or consisting of a gift from the younger to the elder, takes place so soon after the termination of the legal authority, as that the ward or child may, in consequence, probably be not, in the largest and amplest sense of the term, — not in mind as well as person, — an entirely free agent."

It has sometimes been said that a different rule prevails in the United States; it has been asserted that Jenkins v. Pye, 12 Pet. 241, 253, 254, and Taylor v. Taylor, 8 How. 183, 201, establish another doctrine. It must be admitted that the opinions in these two cases *do* maintain that a gift from a child to his father made under the circumstances above described is not *prima facie* voidable; that no presumption arises against its validity, but on the contrary, the presumption is that the transaction was entered into for the purpose of promoting the interests of the child; but nevertheless all such dealings should be carefully scrutinized by the courts. In regard to this theory I would remark, — 1. That most of these expressions of opinion were entirely *obiter;* 2. They are in direct conflict with the overwhelming weight of authority; 3. They are in equally direct conflict with principle. The theory makes the gift of a child to his parent to be impeachable only on the ground of *actual* undue influence exerted by the parent, and throws upon the party contesting the validity the burden of proving the undue influence. This position is simply a denial that the relation of parent and child is in fact a fiduciary one; that it is a relation of dependence on the one side and authority on the other; since if the relation *is* in fact fiduciary, which is universally admitted, then, on the plainest principle, the presumption of invalidity *must* arise; and if it be not fiduciary, then there is certainly no reason whatever why dealings between the parties should be carefully scrutinized; 4. The theory and the reasoning by which it is supported

(a) The text is quoted in Baldock v. Johnson, 14 Oreg. 542, 13 Pac. 434; and cited in Carter v. Tice, 120 Ill. 277, 11 N. E. 529; Ashton v. Thompson, 32 Minn. 25, 41, 42, 18 N. W. 918.

reversed, where the parent is aged, infirm, or otherwise in a condition of dependence upon his own child, and the child occupies a corresponding relation of authority, conveyances conferring benefits upon the child may be set aside. Cases of this kind plainly turn upon the exercise of actual undue

are in conflict with the common experience of mankind. To say that when a gift of property is made by a daughter to her father, just after she comes of age, — perhaps for the purpose of paying his debts, — it must be presumed to have been made for the purpose of promoting *her* interests, — to be the effect of parental affection anxious for the welfare of a child, — is so opposed to universal experience and to common probability that it is entitled to no weight whatever as a legal argument. Finally, the peculiar views of these two cases have not been generally adopted by the American courts. Most of the recent American cases hereafter cited in this note have plainly followed the equitable doctrine as first settled in England. The following cases are illustrations of the doctrine: Baker v. Bradley, 7 De Gex, M. & G. 597, 620; Wright v. Vanderplank, 8 De Gex, M. & G. 133; 2 Kay & J. 1 (remedy barred by delay); Turner v. Collins, L. R. 7 Ch. 329; Kempson v. Ashbee, L. R. 10 Ch. 15; Savery v. King, 5 H. L. Cas. 627, 655; Davies v. Davies, 4 Giff. 417; Hannah v. Hodgson, 30 Beav. 19; Casborne v. Barsham, 2 Beav. 76; Hoghton v. Hoghton, 15 Beav. 278; Hartopp v. Hartopp, 21 Beav. 259; Bury v. Oppenheim, 26 Beav. 594; Berdoe v. Dawson, 34 Beav. 603; Chambers v. Crabbe, 34 Beav. 457; Potts v. Surr, 34 Beav. 543; Heron v. Heron, 2 Atk. 161; Young v. Peachy, 2 Atk. 254; Carpenter v. Heriot, 1 Eden, 338; Farrant v. Blanchford, 1 De Gex, J. & S. 107 (a request by a sick father near his death that a son many years past his majority would execute a release of certain claims in the son's favor against the father and another person, held not to be undue influence which would avoid the release); Miller v. Simonds, 5 Mo. App. 33 (by a daughter to her father); Davis v. Dunne, 46 Iowa, 684 (step-daughter to step-mother and her son); Bailey v. Woodbury, 50 Vt. 166 (daughter to father); Ross v. Ross, 6 Hun, 80 (child to parent); Bergen v. Udall, 31 Barb. 9; Slocum v. Marshall, 2 Wash. C. C. 397; Jenkins v. Pye, 12 Pet. 241, 253; Taylor v. Taylor, 8 How. 183, 201.[b]

(b) See, also, De Witte v. Addison, [1899] 80 Law T. (N. S.) 207; Noble's Adm'r v. Moser, 81 Ala. 530, 1 South. 217, 60 Am. Rep. 175 (adult daughter pays father's debts; in the very instructive opinion of Stone, C. J., the author's comment on Jenkins v. Pye is expressly approved); Carter v. Tice, 120 Ill. 277, 11 N. E. 529 (citing the text); Knox v. Singmaster, 75 Iowa, 64, 39 N. W. 183 (gift upheld); Williams v. Williams, 63 Md. 371; Whitridge v. Whitridge, 76 Md. 54, 24 Atl. 645; Ashton v. Thompson, 32 Minn. 25 (citing the text); Bickerstaff v. Marlin, 60 Miss. 509, 45 Am. Rep. 418 (gift upheld); Miskey's Appeal, 107 Pa. St. 611; In re Coleman's Estate, 193 Pa. St. 605, 42 Atl. 1085 (deed sustained); Davis v. Strange's Executor, 86 Va. 808, 11 S. E. 406, 8 L. R. A. 261 (gift). As to the necessity of independent advice to the child, and the character of such advice that is required to sustain the gift, see Powell v. Powell, [1900] 1 Ch. 243; *ante*, § 958, note (1).

influence, and not upon any presumption of invalidity; a gift from parent to child is certainly not presumed to be invalid.[4] [c]

§ 963. Other Relations.—The equitable doctrine applies with strictness to executors and administrators who, in common with all trustees, are prohibited from purchasing the property of the estate when sold in course of administration, and from making any personal profits by their dealings with it.[1] The same general principle extends, with more or less force, to dealings between a physician and

[4] Dalton v. Dalton, 14 Nev. 419; Mulock v. Mulock, 31 N. J. Eq. 594; Martin v. Martin, 1 Heisk. 644; Highberger v. Stiffler, 21 Md. 338; 83 Am. Dec. 593; Todd v. Grove, 33 Md. 188; Comstock v. Comstock, 57 Barb. 453; Whelan v. Whelan, 3 Cow. 537; Deem v. Phillips, 5 W. Va. 188; Liddel's Ex'r v. Starr, 20 N. J. Eq. 274. The general doctrine of the text is applied to transactions between other near relations, as gifts from a sister to brother: [d] Thornton v. Ogden, 32 N. J. Eq. 723; Hewitt v. Crane, 6 N. J. Eq. 159, 631; Sears v. Shafter, 6 N. Y. 268; Boney v. Hollingsworth, 23 Ala. 690. It has been held, however, that there is no fiduciary relation *ipso facto* between a son-in-law and mother-in-law: Fish v. Cleland, 33 Ill. 238; Cleland v. Fish, 43 Ill. 282.

[1] Scott v. Umbarger, 41 Cal. 410; Green v. Sargeant, 23 Vt. 466; 56 Am. Dec. 88; Ives v. Ashley, 97 Mass. 198; Hawley v. Mancius, 7 Johns. Ch. 174; Wortman v. Skinner, 12 N. J. Eq. 358; Obert v. Obert, 10 N. J. Eq. 98;

In Pusey v. Gardner, 21 W. Va. 469, the rule in Jenkins v. Pye was approved; but the plaintiff's remedy would probably have been lost by laches under any rule. That the parent will not be suffered to retain an unconscientious advantage obtained by reason of confidence reposed by the child, see Wood v. Rabe, 96 N. Y. 414, 48 Am. Rep. 640; *post*, § 1056, end of note.

(c) The text is quoted in Burwell v. Burwell, (Va.) 49 S. E. 68; cited in Orr v. Pennington, 93 Va. 268, 24 S. E. 928. See, also, Mackall v. Mackall, 135 U. S. 167, 172, 173, 10 Sup. Ct. 705; Towson v. Moore, 173 U. S. 17, 19 Sup. Ct. 332; Sawyer v. White, 122 Fed. 223 (C. C. A.); Oliphant v. Liversidge, 142 Ill. 160, 30 N. E. 334; Prescott v. Johnson, (Minn.) 97 N. W. 891; Wessell v. Rathjohn, 89 N. C. 377, 45 Am. Rep. 696; Yeakel v. McAtee, 156 Pa. St. 600, 27 Atl. 277; Clark v. Clark, 174 Pa. St. 309, 34 Atl. 610, 619; Saufley v. Jackson, 16 Tex. 579; Haynes v. Harriman, 117 Wis. 132, 92 N. W. 1100; Vance v. Davis, 118 Wis. 548, 95 N. W. 939.

(d) See, also, Reeves v. Howard, 118 Iowa, 121, 91 N. W. 896 (no presumption against gift from brother to sister, when no relation of dependence); Gillespie v. Holland, 40 Ark. 28, 48 Am. Rep. 1 (gift from sister to brother who stood *in loco parentis* set aside); Million v. Taylor, 38 Ark. 428; Odell v. Moss, 130 Cal. 352, 62 Pac. 555 (gift to sister from dependent brother set aside).

patient,[2 b] a spiritual adviser and penitent,[3] vendor and

Kruse v. Steffens, 47 Ill. 112; Audenreid's Appeal, 89 Pa. St. 114; 33 Am. Rep. 731.[a]

2 Billage v. Southee, 9 Hare, 594; Dent v. Bennett, 4 Mylne & C. 269; Aherne v. Hogan, 1 Dru. 310; Crispell v. Dubois, 4 Barb. 393; Ingersoll v. Roe, 65 Barb. 346; Cadwallader v. West, 48 Mo. 483. Cases presenting the same question arising on the probate of wills are not uncommon.

3 The religious belief or connection is immaterial: Lyon v. Home, L. R. 6 Eq. 655; Nottidge v. Prince, 2 Giff. 246; Leighton v. Orr, 44 Iowa, 679; Greenfield's Estate, 24 Pa. St. 332; Nachtrieb v. Harmony Settlement, 3 Wall. Jr. 66.[c]

(a) The majority of the American cases cited *ante*, under § 958, are of this character. The text is quoted in Elting v. First Nat. Bank, 173 Ill. 368, 50 N. E. 1095.

(b) See, also, Unruh v. Lukens, 166 Pa. St. 324, 31 Atl. 110; Norfleet v. Beall, (Miss.) 34 South. 328.

(c) A leading case is Allcard v. Skinner, 36 Ch. D. 145. This was an action to set aside large gifts by A., a member of a Protestant "sisterhood," to S., the "lady superior" of the sisterhood, made for its charitable purposes. The rules of the sisterhood required members to give up all their property (though not necessarily to the sisterhood); to "regard the voice of her superior as the voice of God;" and especially not to seek advice of any extern without the superior's leave. There was no proof of actual unfair conduct, coercion, etc., on the part of the defendant. The Court of Appeal admitted that the case was one "of great importance and difficulty" (Lindley, L. J., p. 180; Bowen, L. J., p. 189), and that it did not come within the group of cases where "the position of the donor to the donee has been such that it has been the duty of the donee to advise the donor, or even to manage his property for him." It was held by the Court of Appeal that the absence of independent advice rendered the gifts voidable as being made to a person in a position to exercise undue influence; but in the opinion of a majority of the court the plaintiff's remedy was lost by acquiescence. See, also, Morley v. Loughnan, [1893] 1 Ch. 736, where, however, the undue influence was actual rather than constructive. In Pironi v. Corrigan, 47 N. J. Eq. 135, 20 Atl. 218, the importance of independent advice in a business dealing between penitent and spiritual adviser, whereby the latter obtained an advantage, was dwelt upon in the opinion of Pitney, V. C. The lack of independent advice to the donor was also decisive in Caspari v. First German Church, 12 Mo. App. 293 (Thompson, J.), where a gift, disproportioned to her means, made by an aged widow, to a church, at the solicitation of the pastor thereof, who was also the donor's spiritual and business adviser, upon the parol condition, subsequently repudiated by the church, that she was to receive interest on the money during her life, was set aside. See, also, Dowie v. Driscoll, 203 Ill. 480, 68 N. E. 56. Compare the somewhat similar case of Longenecker v. Zion Evangelical Lutheran Church, 200 Pa. St. 567, 50 Atl. 244, where the gift was sustained. In Connor v. Stanley, 72 Cal. 556, 1 Am. St. Rep. 84, 14 Pac. 306, it was held that the relation between a person who is a firm believer in spiritualism, and the medium upon whose spiritual manifestations he habitually relies, is one of personal

vendee of land,[4 d] husbands and wives, and persons occupying their position,[5 e] partners,[6 f] and indeed all persons who

[4] Baker v. Monk, 4 De Gex, J. & S. 388; Clark v. Malpas, 4 De Gex, F. & J. 401.

[5] Corley v. Lord Stafford, 1 De Gex & J. 238; Nelson v. Stocker, 4 De Gex & J. 458; Turner v. Turner, 44 Mo. 535; Coulson v. Allison, 2 De Gex, F. & J. 521 (husband and wife's sister); Bivins v. Jarnigan, 3 Baxt. 282 (conveyance by a man to his mistress).

[6] Bayne v. Ferguson, 5 Dow, 151; Rawlins v. Wickham, 3 De Gex & J.

confidence, casting the burden of proof upon the medium as to the fairness of contracts by which the latter gains an advantage.

(d) The text is cited in Liskey v. Snyder, (W. Va.) 49 S. E. 515.

(e) The text is cited in Hadden v. Larned, 87 Ga. 634, 13 S. E. 806 (deed of gift from wife to husband not *prima facie* void); Rogers v. Rogers, 97 Md. 573, 55 Atl. 450. See, also, Holt v. Agnew, 67 Ala. 360 (transfer of insurance policy to pay husband's debt, sustained); Harraway v. Harraway, 136 Ala. 499, 34 South. 836 (in suit by wife to set aside exchange of land, burden on defendant to show it to be just, fair, and equitable); White v. Warren, 120 Cal. 322, 49 Pac. 129, 52 Pac. 723; Sims v. Sims, 101 Mo. App. 407, 74 S. W. 449; Dimond v. Sanderson, 103 Cal. 97, 37 Pac. 189; Paulus v. Reed, (Iowa) 96 N. W. 757 (conveyance by husband to wife who had controlling influence); Greene v. Greene, 42 Nebr. 634, 47 Am. St. Rep. 724, 60 N. W. 937; Hovorka v. Havlik, (Nebr.) 93 N. W. 990; Hall v. Otterson, 52 N. J. Eq. 522, 28 Atl. 907, and cases cited; Farmer v. Farmer, 39 N. J. Eq. 211; Crawford v. Crawford, 24 Nev. 410, 56 Pac. 94 (no presumption against conveyance from husband to wife); Darlington's Appeal, 86 Pa. St. 512, 27 Am. Rep. 726; Shea's Appeal, 121 Pa. St. 302, 15 Atl. 629 (release of dower made shortly before marriage); Cheuvront v. Cheuvront, (W. Va.) 46 S. E. 233; Disch v. Timm, 101 Wis. 179, 191, 192, 77 N. W. 196 (presumption against conveyance from husband to wife who had controlling influence). An important application of the principle is seen in the group of cases where one spouse receives a conveyance from the other on a parol agreement to reconvey, and is held to be a constructive trustee by virtue of the confidential relation; while in the absence of such relation, and of actual fraud on the grantee's part, the statute of frauds would generally prevent a trust from attaching to the property: See Brison v. Brison, 75 Cal. 525, 7 Am. St. Rep. 189, 17 Pac. 689, and other cases *post*, § 1056, end of note. As to the fiduciary relation between a man and the woman to whom he is engaged to be married, see Hallett v. Fish, 120 Fed. 986; Russell v. Russell, 129 Fed. 434; Gilmore v. Burch, 7 Oreg. 374, 33 Am. Rep. 710.

Presumption of undue influence on conveyance by a man to a woman with whom he was sustaining illicit sexual relations: Shipman v. Furniss, 69 Ala. 555, 44 Am. Rep. 528 (relying on Leighton v. Orr, 44 Iowa, 679; Hanna v. Wilcox, 53 Iowa, 547, 5 N. W. 717; Dean v. Negley, 41 Pa. St. 312, 80 Am. Dec. 620; Bivins v. Jarnigan, *supra;* Kessinger v. Kessinger, 37 Ind. 341; Coulson v. Allison, *supra*).

(f) See, also, Bowman v. Patrick,

occupy a position of trust and confidence, of influence and dependence, in fact, although not perhaps in law.[7] There remain to be mentioned two other important relations which are partially fiduciary, and to which the principle applies with limitations,— that of surety and creditor and principal debtor,[8] and that subsisting between promoters and directors or trustees of corporations and the corporation

304; McLure v. Ripley, 2 Macn. & G. 274; Clegg v. Edmondson, 8 De Gex, M. & G. 787, 807; Clements v. Hall, 2 De Gex & J. 173; Perens v. Johnson, 3 Smale & G. 419; Blisset v. Daniel, 10 Hare, 493, 538; Chambers v. Howell, 11 Beav. 6; Bentley v. Craven, 18 Beav. 75; Maddeford v. Austwick, 2 Mylne & K. 279; 1 Sim. 89; Burton v. Wookey, 6 Madd. 367; Short v. Stevenson, 63 Pa. St. 95; Simons v. Vulcan Oil Co., 61 Pa. St. 202; 100 Am. Dec. 628; Flagg v. Mann, 2 Sum. 487; Wheeler v. Sage, 1 Wall. 518.

[7] A person consulting an elder and distant relative, or a confidential friend: Tate v. Williamson, L. R. 2 Ch. 55; 1 Eq. 528; Taylor v. Obee, 3 Price, 83; attorney of mortgagee and mortgagor: James v. Rumsey, L. R. 11 Ch. Div. 398; and see Giddings v. Giddings, 3 Russ. 241; Tanner v. Elworthy, 4 Beav. 487; Waters v. Bailey, 2 Younge & C. Ch. 219; Wakeman v. Dodd, 27 N. J. Eq. 564.

[8] See *ante*, § 907.

36 Fed. 138 (fraudulent concealment in purchase by managing from nonresident partner); Colton v. Stanford, 82 Cal. 351, 16 Am. St. Rep. 137, 23 Pac. 16 (relation between several persons associated for the purpose of organizing, controlling and operating railroad and other corporations is fiduciary; but compromise agreement with the widow of one of the associates sustained).

(g) See, also, Tribou v. Tribou, 96 Me. 305, 52 Atl. 795, citing the text (uncle and dependent niece); Kyle v. Perdue, 95 Ala. 579, 10 South. 103, citing the text (conveyance to confidential adviser); Cannon v. Gilmer, 135 Ala. 302, 33 South. 659 (same); Hawk v. Everett, 71 Ga. 675 (confidential adviser of plaintiff purchases land from her vendee, to her disadvantage); Allen v. Jackson, 121 Ill. 567, 13 N. E. 840 (grantor corporation having orally promised to protect rights of grantee, and having thus assumed a confidential relation, its director is disabled from purchasing the land at judicial sale); Storrs v. Scougale, 48 Mich. 387, 400, 12 N. W. 502 (burden of proof is on confidential adviser); Snyder v. Snyder, 131 Mich. 658, 92 N. W. 353; King v. Remington, 36 Minn. 15, 29 N. W. 352 (R., being in confidential relation with K., cannot purchase for his own benefit from K.'s assignee in bankruptcy); Fisher v. Bishop, 108 N. Y. 25, 2 Am. St. Rep. 357, 15 N. E. 331 (conveyance extorted by confidential adviser); Tappan v. Aylesworth, 13 R. I. 582 (deed from confidential adviser to plaintiff adjudged to be a mortgage).

itself and the stockholders.[9 h] These subjects are more fully examined in a subsequent chapter.

§ 964. Confirmation or Ratification.— Where a party originally had a right of defense or of action to defeat or set aside a transaction on the ground of actual or constructive fraud, he *may* lose such remedial right by a subsequent confirmation, by acquiescence, and even by mere delay or laches. Wherever a confirmation would itself be subject to the same objections and disabilities as the original act, a transaction cannot be confirmed and made binding; for confirmation assumes some positive, distinct action or language, which, taken together with the original transaction, amounts to a valid and binding agreement. In general, contracts which are void from illegality cannot be ratified and confirmed; contracts which are merely voidable because contrary to good conscience or equity may be ratified, and thus established.[1] If the party originally possessing the

[9] See *ante*, § 881. Directors and managers of corporations are in many respects trustees, and are governed by the rules applicable to trustees generally. They are prohibited from making contracts with themselves individually, from purchasing property from themselves, or selling to themselves, from making a personal profit out of their dealings with the corporation affairs, and the like: Macon v. Huff, 60 Ga. 221; Barnes v. Brown, 80 N. Y. 527.[i]

[1] Thus contracts illegal because opposed to statute, or to public policy, or to good morals, cannot be ratified, because the ratification itself would be equally opposed to statute, good morals, or public policy. Contracts obtained

(h) The text is cited in Oliver v. Oliver, (Ga.) 45 S. E. 232 (director purchasing shares from stockholder is under obligation to make full disclosure of facts affecting their value).

(i) See *post*, § 1077. As to corporation directors and managers, see, also, New River Mineral Co. v. Seeley, 120 Fed. 193; Millsaps v. Chapman, 76 Miss. 942, 71 Am. St. Rep. 547, 20 South. 369; Munson v. Syracuse, G. & C. Ry. Co., 103 N. Y. 58, 8 N. E. 355; Singer v. Salt Lake Copper Mfg. Co., 17 Utah, 143, 70 Am. St. Rep. 773, 53 Pac. 1024. Important recent cases on the fiduciary relation of promoters to the corporation are In re Leeds & Hanley Theatres of Varieties, Lim., [1902] 2 Ch. 809; Yale Gas Stove Co. v. Wilcox, 64 Conn. 101, 42 Am. St. Rep. 159, 29 Atl. 303, 25 L. R. A. 90; Fountain Spring Park Co. v. Roberts, 92 Wis. 345, 53 Am. St. Rep. 917, 66 N. W. 399; Dickerman v. Northern Trust Co., 176 U. S. 181, 20 Sup. Ct. 311.

remedial right has obtained full knowledge of all the material facts involved in the transaction, has become fully aware of its imperfection and of his own rights to impeach it, or ought, and might, with reasonable diligence, have become so aware, and all undue influence is wholly removed so that he can give a perfectly free consent, and he acts deliberately, and with the intention of ratifying the voidable transaction, then his confirmation is binding, and his remedial right, defensive or affirmative, is destroyed.[2] [a] If, on the other hand, the original undue influence still remains, or if the act is simply a continuation of the former transaction, or if the party wrongly supposes that the original contract or transaction is binding, or if he has not full knowledge of all the material facts and of his own rights, no act of confirmation, however formal, is effectual; the voidable nature of the transaction is unaltered.[3] [b]

by actual fraud, by undue influence, by breach of fiduciary duty, and the like, may be confirmed, because *the parties alone are concerned;* the state or society has no special interest, as it has in those opposed to statute, public policy, or good morals.

2 Chesterfield v. Janssen, 2 Ves. Sr. 125; 1 Atk. 314; Cole v. Gibson, 1 Ves. Sr. 503, 506; Crowe v. Ballard, 3 Brown Ch. 117, 119; Cole v. Gibbons, 3 P. Wms. 290, 293; Cann v. Cann, 1 P. Wms. 723; Dobson v. Racey, 8 N. Y. 216; Pearsoll v. Chapin, 44 Pa. St. 9; Cumberland Coal Co. v. Sherman, 20 Md. 117; and see cases in next following note.

3 Chesterfield v. Janssen, 2 Ves. Sr. 125; Crowe v. Ballard, 3 Brown Ch. 117, 119; 2 Cox, 253; Cann v. Cann, 1 P. Wms. 723, 727; Wood v. Downes, 18 Ves. 120, 123, 128; Morse v. Royal, 12 Ves. 355, 373; Purcell v. McNamara, 14 Ves. 91; Gowland v. De Faria, 17 Ves. 20; Say v. Barwick, 1 Ves. & B. 195; Walker v. Symonds, 3 Swanst. 1; Savery v. King, 5 H. L. Cas. 627; Smith v. Kay, 7 H. L. Cas. 750; Wall v. Cockerell, 10 H. L. Cas. 229; De Montmorency v. Devereux, 7 Clark & F. 188; Athenæum Life Soc. v. Pooley, 3 De Gex & J. 294, 299; Stump v. Gaby, 2 De Gex, M. & G. 623; Salmon v. Cutts, 4 De Gex & S. 125, 132; Roberts v. Tunstall, 4 Hare, 257; Wedderburn v. Wedderburn, 2 Keen, 722; Potts v. Surr, 34 Beav. 543; Waters v. Thorn, 22 Beav. 547; Cockell v. Taylor, 15 Beav. 103, 125; Cockerell v. Cholmeley, 1

(a) The text is cited in Crooks v. Nippolt, 44 Minn. 239, 46 N. W. 349. See, also, § 916; Kerby v. Kerby, 57 Md. 345 (voluntary dismissal of action to set aside a deed amounting to confirmation thereof).

(b) The text is cited to this effect in Kyle v. Perdue, 95 Ala. 579, 10 South. 103; Dunn v. Dunn, 42 N. J. Eq. 431, 7 Atl. 842. See, also, Olson v. Lamb, 56 Nebr. 104, 71 Am. St. Rep. 670, 76 N. W. 433.

§ 965. Acquiescence and Lapse of Time.— A second mode by which the remedial right may be destroyed, and the transaction rendered unimpeachable, is acquiescence. The term "acquiescence" is sometimes used improperly. It differs from confirmation on the one side, and from mere delay on the other. While confirmation implies a deliberate act, intended to renew and ratify a transaction known to be voidable, acquiescence is some act, not deliberately intended to ratify a former transaction known to be voidable, but recognizing the transaction as existing, and intended, in some extent at least, to carry it into effect, and to obtain or claim the benefits resulting from it. The theory of the doctrine is, that a party, having thus recognized a contract as existing, and having done something to carry it into effect and to obtain or claim its benefits, although perhaps only to a partial extent, and having thus taken his chances, cannot afterwards be suffered to repudiate the transaction and allege its voidable nature. It follows that *mere* delay, mere suffering time to elapse without doing anything, is not acquiescence, although it may be, and often is, strong evidence of an acquiescence; and it may be, and often is, a distinct ground for refusing equitable relief, either affirmative or

Russ. & M. 418, 425; Murray v. Palmer, 2 Schoales & L. 474, 486; Roche v. O'Brien, 1 Ball & B. 330, 338, 340, 353; Dunbar v. Tredennick, 2 Ball & B. 304, 316, 317; Mulhallen v. Marum, 3 Dru. & War. 317; Dobson v. Racey, 8 N. Y. 216; Comstock v. Ames, 3 Keyes, 357; Cumberland Coal Co. v. Sherman, 30 Barb. 553; 20 Md. 117; Hoffman etc. Co. v. Cumberland Coal Co., 16 Md. 456; Boyd v. Hawkins, 2 Dev. Eq. 195; Butler v. Haskell, 4 Desaus. Eq. 651; McCormick v. Malin, 5 Blackf. 509; Williams v. Reed, 3 Mason, 405. The same rules apply to a release: Lloyd v. Attwood, 3 De Gex & J. 614; Farrant v. Blanchford, 1 De Gex, J. & S. 107, 119; Aveline v. Melhuish, 2 De Gex, J. & S. 288; Eyre v. Burmester, 10 H. L. Cas. 90, 106; Duke of Leeds v. Amherst, 2 Phill. Ch. 117; Wedderburn v. Wedderburn, 4 Mylne & C. 41; 2 Keen, 722, 728; Parker v. Bloxam, 20 Beav. 295; Millar v. Craig, 6 Beav. 433; Bowles v. Stewart, 1 Schoales & L. 209; Skilbeck v. Hilton, L. R. 2 Eq. 587; Heron v. Heron, 2 Atk. 161; Steadman v. Palling, 3 Atk. 423; Pusey v. Desbouvrie, 3 P. Wms. 315; Broderick v. Broderick, 1 P. Wms. 239; Salkeld v. Vernon, 1 Eden, 64; Bradley v. Chase, 22 Me. 511; Parsons v. Hughes, 9 Paige, 591; Michoud v. Girod, 4 How. 503.

defensive.[1][a] As acquiescence is thus a recognition of and consent to the contract or other transaction as existing, the requisites to its being effective as a bar are, knowledge or notice of the transaction itself, knowledge of the party's own rights, absence of all undue influence or restraint, and consequent freedom of action; a conscious intention to

[1] See Duke of Leeds v. Amherst, 2 Phill. Ch. 117, 123. The true nature and effect of acquiescence were admirably stated by Thesiger, L. J., in delivering the opinion of the court of appeal in the very recent case of De Bussche v. Alt, L. R. 8 Ch. Div. 286, 314. The suit was brought to set aside a sale made by an agent to himself in violation of his fiduciary duty. The lord justice said: "It still remains to be considered whether, short of such ratification or adoption, the plaintiff can be held to have by his conduct in any way precluded himself from taking the present proceedings. The term 'acquiescence,' which has been applied to his conduct, is one which was said by Lord Cottenham, in Duke of Leeds v. Amherst, *supra*, ought not to be used; in other words, it does not accurately express any known legal defense, but if used at all it must have attached to it a very different signification, according to whether the acquiescence alleged occurs while the act acquiesced in is in progress or only after it has been completed. If a person having a right, and seeing another person about to commit, or in the course of committing, an act infringing upon that right, stands by in such a manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to its being committed, he cannot afterwards be heard to complain of the act. This, as Lord Cottenham said in the case already cited, is the proper sense of the term 'acquiescence,' and in that sense may be defined as quiescence under such circumstances as that assent may be reasonably inferred from it,[b] and is no more than an instance of the law of estoppel by words or conduct. But when once the act is completed, without any knowledge or assent upon the part of the person whose right is infringed, the matter is to be determined on very different legal considerations. A right of action has then vested in him which, at all

(a) In Woodruff v. North Bloomfield Gravel Mining Co., 18 Fed. 790, the court, citing this section of the text, quote and adopt this definition from the author's brief as counsel for the complainant in that case: "Acquiescence is conduct recognizing the existence of a transaction, and intended, in some extent at least, to carry the transaction, or permit it to be carried, into effect. Acquiescence must necessarily exist while the transaction is going on from which a right of action would otherwise arise, and its operation necessarily is to prevent a right of action from thus arising, and not to defeat the right after it has arisen. Mere delay, therefore — mere suffering time to elapse,— without doing anything, is not acquiescence, although it may be evidence, and sometimes strong evidence, of acquiescence."

(b) The text and note are cited, and this definition quoted, in Lowndes v. Wicks, 69 Conn. 15, 36 Atl. 1072, per Baldwin, J.

ratify the transaction, however, is not an essential element. When a party with full knowledge, or at least with sufficient notice or means of knowledge, of his rights, and of all the material facts, freely does what amounts to a recognition of the transaction as existing, or acts in a manner inconsistent with its repudiation, or lies by for a considerable time and knowingly permits the other party to deal with the subject-matter under the belief that the transaction has been recognized, or freely abstains for a considerable length of time from impeaching it, so that the other party is thereby reasonably induced to suppose that it is recognized, there is acquiescence, and the transaction, although originally impeachable, becomes unimpeachable in equity.[2] [c]

events as a general rule, cannot be divested without accord and satisfaction, or release under seal. *Mere submission* to the injury, for any time short of the period limited by statute for the enforcement of the right of action, cannot take away such right, although under the name of *laches* it may afford a ground for refusing relief under some peculiar circumstances; and it is clear that even an express promise by the person injured, that he would not take any legal proceedings to redress the injury done to him, could not by itself constitute a bar to such proceedings, for the promise would be without consideration, and therefore not binding." In pursuance of this principle so admirably explained, the doctrine of "acquiescence" properly belongs to and is hereinbefore discussed in connection with equitable estoppel, *ante*, §§ 816–821. See also 2 Lead. Cas. Eq., 4th Am. ed., 1263; Kerr on Fraud, 298–303.

2 Kerr on Fraud, 301, 302; Randall v. Errington, 10 Ves. 423, 426, 428; Cholmondeley v. Clinton, 2 Mer. 171, 361; Honner v. Morton, 3 Russ. 65; Selsey v. Rhoades, 1 Bligh, N. S., 1; Vigers v. Pike, 8 Clark & F. 562, 650; Charter v. Trevelyan, 11 Clark & F. 714; Bernal v. Lord Donegal, 3 Dow, 133; Bayne v. Ferguson, 5 Dow, 151; Arehbold v. Scully, 9 H. L. Cas. 360; Bullock v. Downes, 9 H. L. Cas. 1; Wall v. Cockerell, 10 H. L. Cas. 229;

(c) The text is quoted and followed in Dugan v. O'Donnell, 68 Fed. 983, 992; Raht v. Sevier Mining & Milling Co., 18 Utah, 290, 54 Pac. 889; Kilpatrick v. Hinson, 81 Ala. 464, 1 South. 188; quoted, in substance, in Dent v. Long, 90 Ala. 172, 7 South. 640. This paragraph of the text is cited, generally, in Holt v. Parsons, (Ga.) 45 S. E. 690; Frost v. Walls, 93 Me. 405, 45 Atl. 287; Orr v. Pennington, 93 Va. 268, 24 S. E. 928; Bausman v. Kelley, 38 Minn. 197, 36 N. W. 333, 8 Am. St. Rep. 661. See, also, Wade v. Pulsifer, 54 Vt. 45; and the important English case of Allcard v. Skinner, 36 Ch. Div. 145, 187 (lapse of six years showing an election to confirm a voidable gift; if plaintiff was ignorant of her rights, the ignorance was the "result of deliberate choice." But see p. 173, dissenting opinion of Cotton, L. J.).

Even where there has been no act nor language properly amounting to an acquiescence, a mere delay, a mere suffering time to elapse unreasonably, may of itself be a reason why courts of equity refuse to exercise their jurisdiction in cases of actual and constructive fraud, as well as in other instances. It has always been a principle of equity to discourage stale demands; *laches* are often a defense wholly independent of the statute of limitation. Promptness in

Loader v. Clarke, 2 Macn. & G. 387; Wright v. Vanderplank, 8 De Gex, M. & G. 133; Stone v. Godfrey, 5 De Gex, M. & G. 76; Wall v. Cockerell, 3 De Gex, F. & J. 737, 742; Skottowe v. Williams, 3 De Gex, F. & J. 535; Graham v. Birkenhead etc. R'y, 2 Macn. & G. 146; Coles v. Sims, 5 De Gex, M. & G. 1; Life Ass'n of Scotland v. Siddal, 3 De Gex, F. & J. 58, 74; Great Western R'y v. Oxford etc. R'y, 3 De Gex, M. & G. 341; Ormes v. Beadel, 2 De Gex, F. & J. 333; Edwards v. Meyrick, 2 Hare, 60, 75; Tanner v. Smith, 10 Sim. 410; Dimsdale v. Dimsdale, 3 Drew. 556; Bellew v. Russell, 1 Ball & B. 96; Blennerhassett v. Day, 2 Ball & B. 104; Nagle v. Baylor, 3 Dru. & War. 60; Odlin v. Gove, 41 N. H. 465; 77 Am. Dec. 773; Bassett v. Salisbury etc. Co., 47 N. H. 426, 439; Peabody v. Flint, 6 Allen, 52; Fuller v. Melrose, 1 Allen, 166; Tash v. Adams, 10 Cush. 252; Briggs v. Smith, 5 R. I. 213; Schiffer v. Dietz, 83 N. Y. 300, 307, 308; Cobb v. Hatfield, 46 N. Y. 533; Tompkins v. Hyatt, 28 N. Y. 347; Lawrence v. Dale, 3 Johns. Ch. 23; More v. Smedburgh, 8 Paige, 600; Masson v. Bovet, 1 Denio, 69; 43 Am. Dec. 651; Gale v. Nixon, 6 Cow. 444; Crosier v. Acer, 7 Paige, 137; Moffat v. Winslow, 7 Paige, 124; Saratoga etc. R. R. Co. v. Rowe, 24 Wend. 74; 35 Am. Dec. 598; Bruce v. Davenport, 3 Keyes, 472; Doughty v. Doughty, 7 N. J. Eq. 227; Gray v. Ohio etc. R. R., 1 Grant Cas. 412; Little v. Price, 1 Md. Ch. 182; Moore v. Reed, 2 Ired. Eq. 580; Burden v. Stein, 27 Ala. 104; 62 Am. Dec. 758; Pillow v. Thompson, 20 Tex. 206; Edwards v. Roberts, 7 Smedes & M. 544; Ayres v. Mitchell, 3 Smedes & M. 683; McNaughton v. Partridge, 11 Ohio, 223; 38 Am. Dec. 731; Borland v. Thornton, 12 Cal. 440; Phelps v. Peabody, 7 Cal. 50; Marsh v. Whitmore, 21 Wall. 178. The following cases are remarkable instances of relief given after a considerable lapse of time: Gresley v. Mousley, 4 De Gex & J. 78; Baker v. Bradley, 7 De Gex, M. & G. 597; Michoud v. Girod, 4 How. 503, 561.

The doctrine concerning acquiescence from conduct and from lapse of time is applied with special strictness in mercantile contracts, such as dealings with stock, and subscriptions for shares, and in agreements of a speculative nature: See *ante*, § 881; Ashley's Case, L. R. 9 Eq. 263; In re Estates Investment Co., L. R. 10 Eq. 503; Smallcombe's Case, L. R. 3 Eq. 769; Kent v. Freehold etc. Co., L. R. 3 Ch. 493; Sharpley v. Louth etc. R'y, L. R. 2 Ch. Div. 663; Ayerst v. Jenkins, L. R. 16 Eq. 275; Heymann v. European etc. R'y, L. R. 7 Eq. 154; Denton v. MacNeil, L. R. 2 Eq. 352; Taite's Case, L. R. 3 Eq. 795; Jennings v. Broughton, 5 De Gex, M. & G. 126, 140; Clegg v. Edmondson, 8 De Gex, M. & G. 787; Clements v. Hall, 2 De Gex & J. 173; Whalley v. Whalley, 2 De Gex, F. & J. 310; Prendergast v. Turton, 1 Younge

asserting a remedial right against fraud is sometimes required; but no delay will prejudice a defrauded party as long as he was ignorant of the fraud.[d] Each case involving the defense of delay or lapse of time must, to a great extent, depend upon its own circumstances.[3]

§ 966. Third. Frauds against Third Persons Who are not Parties to the Transaction.—As a general rule, in the cases which come within this group, and, strictly speaking, none others should belong to it, the transaction is not fraudulent as to the immediate parties,— the grantor and the grantee, and the like; at least, neither of them is permitted, as against the other, to set aside the conveyance, or to defeat the enforcement of the contract if it be executory. The transaction is of such a nature that it defrauds or invades the rights of third persons, who are not its immediate parties; and they alone are, in general, entitled to impeach it and to obtain affirmative relief against it.[1] [a] The only cases to be considered under this division are secret bargains in fraud of compositions with creditors, transfers in fraud of creditors, and transfers in fraud of subsequent purchasers.[2]

& C. Ch. 98; Lovell v. Hicks, 2 Younge & C. 46; Attwood v. Small, 6 Clark & F. 232, 359; Ashurst's Appeal, 60 Pa. St. 290; Watts's Appeal, 78 Pa. St. 371; Evans's Appeal, 81 Pa. St. 278.

It follows from the doctrine as to acquiescence that a vendee of real estate must surrender up possession acquired under the contract before he can maintain an action for its cancellation: See More v. Smedburgh, 8 Paige, 600; Gale v. Nixon, 6 Cow. 444; Tompkins v. Hyatt, 28 N. Y. 347.

3 See *ante*, § 917; vol. 1, §§ 418, 419; Kerr on Fraud, 303–312; Diman v. Providence etc. R. R., 5 R. I. 130; Lloyd v. Brewster, 4 Paige, 537; 27 Am. Dec. 88; Thomas v. Bartow, 48 N. Y. 193, 200; Saratoga etc. R. R. v. Row, 24 Wend. 74; 35 Am. Dec. 598; Brown v. County of Buena Vista, 95 U. S. 157, 160; Sullivan v. Portland etc. R. R., 94 U. S. 806; Grymes v. Sanders, 93 U. S. 55, 62.

1 This is the general rule; there is, however, one important exception, mentioned in the next paragraph.

2 Other particular instances, including sales by expectants, *post obit* con-

(d) The text is quoted in Butler v. Prentiss, 158 N. Y. 49, 52 N. E. 652; and cited to this effect in Brush v. Manhattan Ry. Co., 13 N. Y. Suppl. 908.

(a) See, also, Bradtfelt v. Cooke, 27 Oreg. 194, 40 Pac. 1, 50 Am. St. Rep. 701.

§ 967. Secret Bargains in Fraud of Compositions with Creditors.— Where a composition is made by a debtor with his creditors upon the basis of his payment to all who join in the transaction the same proportionate share of their claims, and of being therefore discharged by them from all further liability, a secret agreement by the debtor with one of these creditors, expressly or impliedly as a condition for the latter's joining in the composition, whereby the debtor pays or secures to the favored creditor a further sum of money or amount of property, or greater advantage than that received and shared alike by all the other creditors, is a fraud upon such other creditors, and is voidable. The agreement, if executory, cannot be enforced against the debtor in equity or at law; the security may be set aside by a court of equity, and the amount paid by the debtor in pursuance of the contract may be recovered back by him. The relief, defensive or affirmative, thus given to the debtor does not rest upon any consideration of favor due and shown to him, but wholly upon motives of policy, to protect the rights of the other creditors and to secure them against such frauds.[1] [a] It would seem, on principle, that a secret bargain

tracts, etc., which are placed in the group by some writers, have already been examined in previous paragraphs. In most of them, whatever be the grounds of the invalidity, the transaction may be impeached by one of its immediate parties.

[1] Cullingworth v. Lloyd, 2 Beav. 385; Wood v. Barker, L. R. 1 Eq. 139; In re Lenzberg, L. R. 7 Ch. Div. 650; Mare v. Sandford, 1 Giff. 288; Mare v. Walker, 3 Giff. 100; Pendlebury v. Walker, 4 Younge & C. 424, 434; Jackman v. Mitchell, 13 Ves. 581; Ex parte Sadler, 15 Ves. 52; Mackenzie v. Mackenzie, 16 Ves. 372; Mawson v. Stock, 6 Ves. 301; Eastabrook v. Scott, 3 Ves. 456; Child v. Danbridge, 2 Vern. 71; Small v. Brackley, 2 Vern. 602; Middleton v. Lord Onslow, 1 P. Wms. 768; Spurret v. Spiller, 1 Atk. 105; Duffy v. Orr, 1 Clark & F. 253; 5 Bligh, N. S., 620; Lee v. Lockhart, 3 Mylne & C. 302; Harvey v. Hunt, 119 Mass. 279; Case v. Gerrish, 15 Pick. 49; Ramsdell v. Edgarton, 8 Met. 227; 41 Am. Dec. 503; Lothrop v. King, 8 Cush. 382; Doughty v. Savage, 28 Conn. 146; Solinger v. Earle, 82 N. Y.

(a) The text is cited in Guggenheimer v. Groeschel, 23 S. C. 274, 55 Am. Rep. 20. See, also, In re McHenry, [1899] 3 Ch. 365; Kallman v. Greenebaum, 92 Cal. 403, 27 Am. St. Rep. 150, 28 Pac. 674 (composi-

by the debtor, giving or securing an advantage to one creditor, should also avoid the composition agreement, at the option of the other creditors who are parties to it, and enable them to recover the full amount of their demands against the debtor, notwithstanding the discharge contained in the composition. In no other manner can the defrauded creditors obtain relief from an agreement, confessedly obtained by a fraud upon their rights. This result is sustained by at least a portion of the decisions.[b]

§ 968. **Conveyances in Fraud of Creditors.**— Dealings by a person with his property with intent to defraud his creditors were voidable at the common law;[1] but the existing

393; Van Bokkelen v. Taylor, 62 N. Y. 105; Lawrence v. Clark, 36 N. Y. 128; Solinger v. Earle, 45 N. Y. Sup. Ct. 80, 604; Breck v. Cole, 4 Sand. 79; Feldman v. Gamble, 26 N. J. Eq. 494; Loucheim Brothers' Appeal, 67 Pa. St. 49; Patterson v. Boehm, 4 Pa. St. 507; Mann v. Darlington, 15 Pa. St. 310; Lanes v. Squyres, 45 Tex. 382; Clarke v. White, 12 Pet. 178. In Loney v. Bailey, 43 Md. 10, the rule is laid down as follows: In a composition agreement a debtor professes to deal with all creditors entering it on terms of perfect equality, and a secret agreement giving a creditor an undue advantage vitiates the agreement as being a fraud upon the other creditors, who may sue for and recover the full amount of their original indebtedness, less the amount they have received under the composition, and it is not essential that the composition agreement should first be rescinded, and the money recovered under it returned. This would seem to be the just and equitable effect of such a secret bargain upon the rights of the composition creditors. Argall v. Cook, 43 Conn. 160, holds that the fact of a debtor intending to pay certain of the creditors joining in a composition deed, in full, out of his future earnings, does not invalidate the composition as to other creditors, if there is no *agreement* tending to defraud them; and see Elfelt v. Snow, 2 Saw. 94. Other secret agreements made by an insolvent with his assignee, or otherwise, tending to secure benefits for himself or family by withdrawing his property from his creditors, are fraudulent as against the creditors: See McNeil v. Cahill, 2 Bligh, 228; Miller v. Sauerbier, 30 N. J. Eq. 71; In re Jacobs, 18 Bank. Reg. 48; In re Blumenthal, 18 Bank. Reg. 555.

[1] Cadogan v. Kennett, Cowp. 432; Copis v. Middleton, 2 Madd. 410, 428; Barton v. Vanheythuysen, 11 Hare, 126, 131, 132; Clark v. Douglass, 62 Pa. St. 408; Clements v. Moore, 6 Wall. 299, 312.

tion vitiated, though the excess payment is to be made by a friend of the debtor and not out of his assets); Woodruff v. Saul, 70 Ga. 271; Willis v. Morris, 63 Tex. 458, 51 Am. Rep. 655.

(b) The text is cited to this effect in Guggenheimer v. Groeschel, 23 S. C. 274, 55 Am. Rep. 20.

rules on the subject both in England and in this country are founded upon statute.[2] The operative statute in England, which is also the basis of all legislation and judicial decision in the United States, is the celebrated act 13 Eliz., c. 5. It enacts that all conveyances, etc., of any lands, goods, or chattels, had or made of purpose to delay or defraud creditors and others of their actions or debts, shall be taken only as against such persons and their representatives as shall or might be so delayed or defrauded, to be utterly void; provided that the act shall not extend to any conveyance or assurance made on good consideration and *bona fide* to a person not having notice of such fraud.[3] I purpose merely to state, as far as possible, the general and fundamental principles and doctrines which have been established in the judicial construction of this legislation, and the most important classes of cases to which it is applied.[4]

2 The earlier statutes were 50 Edw. III., c. 6; 3 Hen. VII., c. 4.

3 All the substantial provisions of this statute have been adopted by the American legislation; still the statutes in many or most of the states employ quite different language, and contain important modifications and additions. Some of them insert a general clause, in terms applying to all the other provisions, to the effect that the fraudulent intent shall always be a question of fact; in some this clause is confined to a portion only of the provisions; while in some it is entirely omitted. There is a great diversity of external form, at least, in the American legislation on this subject. The exact terms of the statute 13 Elizabeth, describing what dealings are thus void, are as follows: "All feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments, and executions contrived of malice, fraud, covin, or collusion, to delay, hinder, or defraud creditors or others of their just and lawful actions, suits, debts, accounts, damages," etc.

4 Since these fraudulent transfers are void at law as well as in equity, so that the jurisdiction of equity is merely supplementary to that of the law courts, and since the details of the American statutes are so varied, and since the subject in all its applications is so very extensive, it would be impossible within the limits of such a treatise as this to enter upon any discussion of specific rules, or to do more than give the general doctrines. The practical application of these principles, the instances in which the equitable jurisdiction is exercised, and the reliefs which are given, will be described in a subsequent chapter which treats of "creditors' suits" and other remedies granted to creditors. A full discussion of the statute both in law and in equity will be found in the editorial notes to Twyne's Case, 1 Smith's Lead. Cas. 33; Sexton v. Wheaton, 1 Am. Lead. Cas. 17; and Kerr on Fraud, 196–215.

§ 969. **The Consideration.**— It should be observed that the statute, by its generality of expression, being without any such limitation, applies to both existing and subsequent creditors, and to both conveyances made upon a valuable consideration and those without any consideration. It does not declare voluntary conveyances void; it only pronounces *fraudulent* conveyances void, whether they are voluntary or made upon a consideration. The validity of a conveyance, as against creditors, is made in the proviso to depend "upon its being upon a good consideration and *bona fide*"; either is not sufficient; consideration without good faith plainly does not displace the operation of the statute; and good faith without consideration does not necessarily protect a conveyance. A deed made upon a valuable consideration, but not *bona fide*,— that is, with a fraudulent intent,— is void against creditors of the grantor as though it were voluntary.[1] Although the statute speaks of a "good consideration," yet it is fully settled that a *valuable* consideration is intended,— a consideration pecuniary in contemplation of law, of which kind marriage is an instance. The "good" consideration of love and affection does not meet the demands of the statute, and does not of itself validate a conveyance.[2] Voluntary conveyances are perfectly valid and binding as between the immediate parties and all persons claiming under them in privity of estate;[3] but they may be

1 For example, a conveyance made by a defendant, for full value, but with intent to defraud the plaintiff by placing the property beyond the reach of an expected judgment: Blenkinsopp v. Blenkinsopp, 1 De Gex, M. & G. 495; Twyne's Case, 3 Coke, 80; Cadogan v. Kennett, Cowp. 432, 434; Holmes v. Penney, 3 Kay & J. 90, 99; Bott v. Smith, 21 Beav. 511, 516; Harman v. Richards, 10 Hare, 81, 89; Clements v. Moore, 6 Wall. 299; Robinson v. Holt, 39 N. H. 557; 75 Am. Dec. 233; Root v. Reynolds, 32 Vt. 139; Wadsworth v. Williams, 100 Mass. 126; Gragg v. Martin, 12 Allen, 498; 90 Am. Dec. 164; Haymaker's Appeal, 53 Pa. St. 306; Pulliam v. Newberry, 41 Ala. 168.

2 Copis v. Middleton, 2 Madd. 410, 430, Taylor v. Jones, 2 Atk. 600, Goldsmith v. Russell, 5 De Gex, M. & G. 547, and all the cases arising out of voluntary conveyances, are authorities.

3 If they are impeachable by such successors as assignees in bankruptcy, insolvency, and others in like position, it is because such persons are rep-

void as against creditors, and will be void so far as they delay or defraud creditors. A voluntary conveyance may be a strong indication of a fraudulent intent, and may sometimes raise a presumption of such intent; still the fact that a conveyance is voluntary, under the general course of legislation and decision in this country, is material only in connection with the fraudulent intent, only as it shows or tends to show the existence of such intent.[4] A voluntary conveyance *as such* is not necessarily void even against existing creditors.

§ 970. The Fraudulent Intent.— The essential element required by the statute, in order to render a transfer voidable, is the fraudulent intent. There *must* be an intent to hinder, delay, or defraud creditors. All other considerations are subordinate and ancillary to the establishment of this indispensable feature. The discussion which has arisen under the statute, and the special rules which have been formulated, are chiefly concerned with the question, when, how, and by what means may this intent be sustained?[1] There

resentatives of creditors more than of the parties from whom they immediately derive title.

[4] This conclusion may seem to be inconsistent with the statement that the statute requires both a valuable consideration and good faith, and that good faith without such consideration is not sufficient. The conclusion, however, is certainly sustained by the course of legislation and the current of modern decision in the United States. It is firmly settled, as the general doctrine, that a voluntary conveyance, made by a party indebted, and largely indebted, is not necessarily void; its voidable nature depends upon the intent; but the circumstances may be such that the intent is inferred as an irresistible conclusion: See cases cited subsequently on voluntary conveyances.

[1] At an early day the intent was inferred as a *conclusive* presumption of law from many particular circumstances; as, for example, from the fact that the vendor retained possession of the property conveyed: See the discussions in Twyne's Case. Later, the tendency has been to abandon the notion of conclusive presumptions, and to infer the intent as a *rebuttable* presumption of law from a variety of circumstances; and this doctrine still prevails in England and in many of the states, at least in its application to some circumstances. Finally, in consequence of a statutory provision, the view has been adopted *theoretically* in several of the states that the intent must always be inferred as an argumentative conclusion of fact, without

are three general modes in which the intent might possibly be ascertained. Certain circumstances appearing, it might (1) be inferred therefrom as a conclusive presumption of law, or (2) as a *prima facie* or rebuttable presumption of law, or (3) as an argumentative conclusion of fact. With respect to these modes, the intent may be *express* or *actual*, which simply means that it is proved by means of ordinary evidence, either direct or circumstantial, tending to show its existence, or it may be *implied* or inferred as a presumption from certain circumstances connected with or forming a part of the transaction.[2] In relation to the mode of ascertaining the fraudulent intent, when, how, and from what it may be inferred, there is a great diversity and even conflict of judicial opinion, and to some extent antagonistic rules are settled in different states. Any attempt to reconcile this discrepancy would be unavailing. I shall merely formulate those general doctrines which are sustained by the consent of the highest authority, as well as by principle, and which constitute a part of the equity jurisprudence; and it will be the most convenient to state them in their connection with and relations to the most important classes of cases which occur in the actual transactions of men.

§ 971. **Mode of Ascertaining the Intent.**— In the first place, where a conveyance is made upon a valuable consideration, and is alleged to be fraudulent against the grantor's creditors, an actual and express intent to hinder, delay, or defraud is necessary to be proved. The reason for this is

the aid of any legal presumptions. I describe this view as prevailing *theoretically*, because it will be found that the courts of those states, in the decision of cases, do practically have recourse to *prima facie* presumptions in determining the existence of the fraudulent intent.

[2] Among these circumstances, the most common and important are the insolvency of the grantor, or the extent of his indebtedness compared with the amount of his property, especially where the conveyance is voluntary, and the fact that the grantor or vendor retains possession of the property conveyed or sold. This last circumstance applies equally where the conveyance is voluntary or upon a valuable consideration. It seems impossible to decide all cases arising under the statute without having recourse, practically if not avowedly, to the doctrine of legal presumptions.

obvious. The transaction has one of the requisites prescribed by the statute; the voluntary character is wanting from which an inference of fraudulent intent *might* arise. On the contrary, the other requisite — the good faith — would rather be presumed. It is necessary, therefore, to overcome this presumption by *proving* the absence of good faith. In other words, the actual and express fraudulent intent must be proved by evidence tending to show its existence, and from which it legitimately results as a conclusion of fact drawn by a court or jury without the aid of any legal presumptions.[1] In the second place, where a conveyance is voluntary, and is alleged to be fraudulent as against *existing* creditors, while an express actual intent to defraud may be present, it is not necessary. The fraudulent intent which will avoid the conveyance as against existing creditors may be inferred from circumstances connected with the transaction, such as the grantor's insolvency, great indebtedness compared with the amount of his property, and the like; complete insolvency, however, is clearly not a *requisite.* In this case of a voluntary deed and existing creditors, the decisions show unmistakably that the intent is more easily inferred than in any other.[2] In the third place,

[1] Freeman v. Pope, L. R. 5 Ch. 538, 544, per Giffard, L. J.; Holmes v. Penney, 3 Kay & J. 90; Lloyd v. Attwood, 3 De Gex & J. 614; Bott v. Smith, 21 Beav. 511, 516; Harman v. Richards, 10 Hare, 81, 89 (the vice-chancellor said: "Those who undertake to impeach for *mala fides* a deed which has been executed for a valuable consideration have, I think, a task of great difficulty to discharge"); Clements v. Moore, 6 Wall. 299; Robinson v. Holt, 39 N. H. 557; 75 Am. Dec. 233; Root v. Reynolds, 32 Vt. 139; Wadsworth v. Williams, 100 Mass. 126; Gragg v. Martin, 12 Allen, 498; 90 Am. Dec. 164; Haymaker's Appeal, 53 Pa. St. 306; Pulliam v. Newberry, 41 Ala. 168.

[2] In the important case of Spirett v. Willows, 3 De Gex, J. & S. 293, 302, Lord Westbury said: "If the debt of the creditor by whom the voluntary conveyance is impeached existed at the date of the conveyance, and it is shown that the remedy of the creditor *is* defeated or delayed by the existence of the conveyance, it is immaterial whether the debtor was or was not solvent after making the conveyance." This is true, but is not the whole truth. It is susceptible of the interpretation that if the debtor is not insolvent, then an express actual intent to defraud is necessary. This meaning would be contrary to the well-settled doctrine. In the subsequent case

where a conveyance is voluntary, and is alleged to be fraudulent as against *subsequent* creditors, the intent to defeat or defraud is not so easily inferred as in the case of existing creditors; stronger evidence is then required to establish the intent. "If a voluntary conveyance or deed of gift be impeached by subsequent creditors whose debts had not been contracted at its date, then it is necessary to show either that the grantor made the conveyance with express intent to delay, hinder, or defraud creditors, or that after the conveyance the grantor had no sufficient means or reasonable expectation of being able to pay his then existing debts,— that is to say, was reduced to a state of insolvency,— in which case the law infers that the conveyance was made

of Freeman v. Pope, L. R. 5 Ch. 538, decided by the court of appeal, Lord Hatherley commented upon this language of Lord Westbury, and said (p. 543): "It is expressed in very large terms, probably too large. It seems to me that the difficulty felt by the vice-chancellor [in the decision appealed from] arose from his thinking that it was necessary to prove an actual intention to delay creditors, where the facts are such as to show that the necessary consequence of what was done was to delay them." Lord Hatherley goes on to show by many examples that such an intent is not necessary. In the same case, Lord Justice Giffard said (p. 544): "The vice-chancellor seems to have considered that, in order to defeat a voluntary conveyance, there must be proof of an actual express intent to defeat creditors. That, however, is not so. There is one class of cases, no doubt, in which an actual express intent is necessary to be proved; that is, where the instruments sought to be set aside were founded on valuable consideration. But where the conveyance is voluntary, *then the intent may be inferred in a variety of ways.* For instance, if, after deducting the property which is the subject of the voluntary conveyance, sufficient available assets are not left for the payment of the grantor's debts, then the law infers intent; and it would be the duty of a judge, in leaving the case to the jury, to tell the jury that they must presume that such was the intent. Again, if at the date of the conveyance the person making it was not in a position actually to pay his creditors, the law would infer that he intended, by making the voluntary conveyance, to defeat and delay them." On the other hand, in the important case of Skarf v. Soulby, 1 Macn. & G. 364, 374, Lord Cottenham held that, although it was not necessary to show insolvency, the mere fact that the grantor then owed some debts was not sufficient to invalidate a voluntary conveyance against existing creditors; citing Townsend v. Westacott, 2 Beav. 340, per Lord Langdale; and Richardson v. Smallwood, Jacob, 552, per Sir Thomas Plumer. This is beyond question the settled rule. For further cases, see *post*, § 972, and note.

with intent to delay, hinder, or defraud creditors, and is therefore fraudulent and void."[3] This proposition is clearly correct, but it contains one *apparent* limitation which hardly seems to be sustained by the weight of American authority: it is not essential that the voluntary grantor should be "reduced to a state of insolvency," or in other words, that he should be left absolutely unable to pay his then existing debts. The following seems to be the true rule: If the amount of property after the voluntary conveyance was so small in comparison with the existing indebtedness that the grantor could not reasonably have contemplated his ability to perform his obligations, or in other words, he could reasonably have contemplated his inability to perform them, then an intent to defeat his creditors generally will be inferred, and the conveyance will be fraudulent against subsequent as well as against existing creditors.[4] Having thus ascertained the general rules concern-

[3] Spirett v. Willows, 3 De Gex, J. & S. 293, 302, 303, per Lord Westbury. The lord chancellor adds: "It is obvious that the fact of a voluntary grantor retaining money enough to pay the debts which he owes at the time of making the conveyance, *but not actually paying them*, cannot give a different character to the conveyance or take it out of the statute. It still remains a voluntary alienation or deed of gift, whereby, in the event, the remedies of creditors are delayed, hindered, or defrauded." This proposition is certainly opposed to the current of American authority, and it seems to be equally contrary to the English decisions: See Kent v. Riley, L. R. 14 Eq. 190, 194. If the voluntary grantor retains property sufficient to pay all his existing debts, but for any reason fails to pay them, and finally becomes insolvent, this fact might be a circumstance to be considered in determining upon the existence of a fraudulent intent, but it certainly would not of itself render the conveyance invalid: See Carr v. Breese, 81 N. Y. 584, 588, 590, 591; Dunlap v. Hawkins, 59 N. Y. 342; Jencks v. Alexander, 11 Paige, 619, 623; and see *post*, § 973, and notes.

[4] In Carr v. Breese, 81 N. Y. 584, 588, 590, Mr. Justice Miller said: "A review of the cases shows that none of them have any application to the present, where there is no evidence to show a fraudulent purpose, and a considerable amount of property, amply sufficient to meet present debts and future liabilities in the prosecution of the business in which the grantor was engaged, was retained for that purpose. An existing indebtedness alone does not render a voluntary conveyance absolutely fraudulent and void as against creditors, unless there is an express intent to defraud": Van Wyck v. Seward, 6 Paige, 62. This is especially the case where it is shown that

ing the manner of establishing or inferring the fraudulent intent, I shall apply these rules very briefly to the two classes of creditors, existing and subsequent.

§ 972. Existing Creditors.— Conveyances made upon a valuable consideration are not presumed to be fraudulent against existing creditors, and the extent of the grantor's indebtedness is wholly immaterial.[1] Conveyances upon a valuable and even full consideration are void against existing and subsequent creditors, if made with an actual express intent to hinder, delay, or defraud them; but the intent cannot be inferred by presumptions, and must be proved by evidence legitimately tending to show its existence. Each case must necessarily depend upon its own circumstances.[2] A voluntary conveyance, gift, or transfer, without any valuable consideration, creates a *prima facie* presumption of an intent to defraud existing creditors, unless statutes have declared that no such presumption ever arises, and that the intent is always a conclusion of fact. This presumption

the residue of the property was amply sufficient to pay all debts: Jackson v. Post, 15 Wend. 588; Phillips v. Wooster, 36 N. Y. 412; Bank of United States v. Housman, 6 Paige, 526; Dunlap v. Hawkins, 59 N. Y. 342. In the case last cited the conveyance for the benefit of the wife was upheld, and Allen, J., who delivered the opinion of the court, says: "By proving the pecuniary circumstances of the grantor, his business, and its risks and contingencies, his liabilities and obligations, absolute and contingent, and his resources and means of meeting and solving his obligations, and showing that he was neither insolvent nor contemplated insolvency, *and that an inability to meet his obligations was not and could not reasonably be supposed to have been in the mind of the party,* is the only way in which the presumption of fraud, arising from the fact that the conveyance is without a valuable consideration, can be repelled and overcome": Carpenter v. Roe, 10 N. Y. 227; Savage v. Murphy, 34 N. Y. 508; 90 Am. Dec. 733; and see *post,* § 973.

[1] If the conveyance were upon a full as well as valuable consideration, no presumption could arise even though the grantor were wholly insolvent, since it would be merely changing the form of his assets. An antenuptial settlement on his wife by an insolvent trader, not unreasonable in amount, is valid: Ex parte McBurnie, 1 De Gex, M. & G. 441; Kevan v. Crawford, L. R. 6 Ch. Div. 29.

[2] Blumer v. Hunter, L. R. 8 Eq. 46 (antenuptial settlement on wife void, because made with actual intent to defraud creditors, the wife being a participant); and see cases cited *ante,* under § 969.

may be overcome. The mere fact that a grantor is indebted at the time he makes a voluntary conveyance does not necessarily render such conveyance fraudulent against the existing creditors.[3] On the other hand, since the *prima facie* presumption arises in such case, it is never necessary to show by affirmative evidence an actual express intent to defraud, in order to render a voluntary conveyance fraudulent and void as against existing creditors. The intent will be inferred when the grantor was or is left insolvent, or if the conveyance deprives him of the means of paying his debts, or if he was so largely indebted that it would be reasonable to suppose that he contemplated his inability to pay his debts, or, as many cases hold, if he was so largely indebted that the conveyance would materially interfere with his ability to meet his obligations.[4]

[3] The contrary doctrine was laid down by Chancellor Kent in the celebrated case of Reade v. Livingston, 3 Johns. Ch. 481; 8 Am. Dec. 520. The modern English decisions have shown that the early authorities upon which Chancellor Kent relied — among others, Lord Hardwicke's opinion in Lord Townshend v. Windham, 2 Ves. Sr. 1; Russell v. Hammond, 1 Atk. 13; and Walker v. Burrows, 1 Atk. 93 — do not admit of the interpretation which he put upon them. The rule given in the text is now well established in England, and generally in this country. Reade v. Livingston has been repeatedly overruled: Skarf v. Soulby, 1 Macn. & G. 364; Townsend v. Westacott, 2 Beav. 340; Kent v. Riley, L. R. 14 Eq. 190; Freeman v. Pope, L. R. 5 Ch. 538; Van Wyck v. Seward, 6 Paige, 62; Bank of United States v. Housman, 6 Paige, 526; Jackson v. Post, 15 Wend. 588; Phillips v. Wooster, 36 N. Y. 412; Dunlap v. Hawkins, 59 N. Y. 342.

The prevailing doctrine in this country is, that indebtedness, at the time of a voluntary conveyance, creates only a *prima facie* presumption of fraud, and that each case must largely depend upon its own circumstances, the amount of the indebtedness, the condition of the grantor's business affairs, etc.: Sexton v. Wheaton, 8 Wheat. 229, 230; Hinde v. Longworth, 11 Wheat. 199; Brackett v. Waite, 4 Vt. 389; Lerow v. Wilmarth, 9 Allen, 382, 386; 83 Am. Dec. 701; Thacher v. Phinney, 7 Allen, 146; Beal v. Warren, 2 Gray, 447; Norton v. Norton, 5 Cush. 524; Salmon v. Bennett, 1 Conn. 525, 528–551; 7 Am. Dec. 237; Bank of U. S. v. Housman, 6 Paige, 526; Seward v. Jackson, 8 Cow. 406, 423, 434, 438; Verplank v. Sterry, 12 Johns. 536, 559; 7 Am. Dec. 348; Posten v. Posten, 4 Whart. 26; Chambers v. Spencer, 5 Watts, 404.

[4] These instances, of course, include the conditions, spoken of in some decisions, of the voluntary conveyance covering all the debtor's property, or covering so large a part of it that sufficient is not left to meet his existing

§ 973. **Subsequent Creditors.**— Where a person, whether indebted or not, makes a conveyance, either upon a valuable consideration or voluntary, with the express and actual intent of defrauding future creditors, it is, of course, fraudulent and void as against such future creditors. For this reason, if a person, in contemplation of a future indebtedness which he expects to accrue, makes a conveyance for the purpose of placing his property beyond the liability for such

indebtedness. In Smith v. Cherrill, L. R. 4 Eq. 390, 395, Malins, V. C., said: "The doctrine of the court well established is this: if a person makes a voluntary settlement, and is, at the time, indebted to the extent of insolvency, or if the effect of the settlement is to deprive him of the means of paying, the settlement is void as against creditors." This is clearly correct. In Parkman v. Welch, 19 Pick. 231, 235, Dewey, J., said: "All that is necessary to entitle a creditor to impeach a deed as fraudulent, when made without a valuable consideration, *is, that the grantor be deeply indebted.*" This rule appears to be very simple; the practical difficulty in applying it would consist in determining when a person is "deeply indebted." Deep indebtedness is merely a relative, not an absolute, term. The amount of the indebtedness must always be compared with the debtor's reasonable ability to pay, based upon the amount of his available property. Here we are thrown back upon the circumstances of each case; and no more definite rule for inferring the fraudulent intent in general can be given than that laid down above in the text. The following cases are simply cited as illustrations of the doctrine: Spirett v. Willows, 3 De Gex, J. & S. 293; French v. French, 6 De Gex, M. & G. 95; Goldsmith v. Russell, 5 De Gex, M. & G. 547; Reese River etc. Co. v. Atwell, L. R. 7 Eq. 347; Cornish v. Clark, L. R. 14 Eq. 184; Freeman v. Pope, L. R. 5 Ch. 538; Taylor v. Coenen, L. R. 1 Ch. Div. 636; Jenkyn v. Vaughan, 3 Drew. 419; Barlow v. Vanheythuysen, 11 Hare, 126; Thompson v. Webster, 4 Drew. 628; Church v. Chapin, 35 Vt. 223; Pomeroy v. Bailey, 43 N. H. 118; Coolidge v. Melvin, 42 N. H. 510, 531; Norton v. Norton, 5 Cush. 524; Freeman v. Burnham, 36 Conn. 469; Babcock v. Eckler, 24 N. Y. 623; Van Wyck v. Seward, 6 Paige, 62; 18 Wend. 375; Loeschigk v. Hatfield, 5 Robt. (N. Y.) 26; Chambers v. Spencer, 5 Watts, 406; Wilson v. Howser, 12 Pa. St. 109; Ellinger v. Crowl, 17 Md. 361; Kuhn v. Stansfield, 28 Md. 210; 92 Am. Dec. 681; Wilson v. Buchanan, 7 Gratt. 334; Hunters v. Waite, 3 Gratt. 26; Crambaugh v. Kugler, 3 Ohio St. 544; Enders v. Williams, 1 Met. (Ky.) 346; Mitchell v. Berry, 1 Met. 602; Lowry v. Fisher, 2 Bush, 70; 92 Am. Dec. 475; Gridley v. Watson, 53 Ill. 186; Stewart v. Rogers, 25 Iowa, 395; 95 Am. Dec. 794; Filley v. Register, 4 Minn. 391; 77 Am. Dec. 522; Doughty v. King, 10 N. J. Eq. 396; Emery v. Vinall, 26 Me. 295; Koster v. Hiller, 4 Ill. App. 21; Lill v. Brant, 6 Ill. App. 366; Fellows v. Smith, 40 Mich. 689; Crawford v. Kirksey, 55 Ala. 282; 28 Am. Rep. 704; Lockhard v. Beckley, 10 W. Va. 87; Rose v. Brown, 11 W. Va. 122; Cowen v. Alsop, 51 Miss. 158; Offutt v. King, 1 MacAr. 312; Haston v. Castner, 31 N. J. Eq. 697; Dewey v. Moyer, 72 N. Y. 70.

anticipated indebtedness, the transfer is fraudulent as against the future creditor when his claim arises.[1] A voluntary conveyance by one who is at the time free from debt is not presumptively fraudulent and void as against subsequent creditors; there being no *prima facie* presumption against its validity, the burden of proof rests upon the subsequent creditor who impeaches it, of showing either an actual fraudulent intent, or circumstances from which such intent may be inferred.[2] If a person, not at the time indebted, being about to engage in a new and hazardous business, makes a voluntary settlement or conveyance, whereby he places his property or a considerable portion of it beyond the reach of his creditors, such settlement or conveyance is fraudulent and void as against the subsequent creditors of the grantor.[3] Finally, it may be laid down as a doctrine generally accepted, that if a person, being at the time indebted, makes a voluntary conveyance of his property to

1 Carpenter v. Carpenter, 25 N. J. Eq. 194; Mattingly v. Wulke, 2 Ill. App. 169.

2 Carhart v. Harshaw, 45 Wis. 340; 30 Am. Rep. 752; Mattingly v. Nye, 8 Wall. 370.

3 Mackay v. Douglas, L. R. 14 Eq. 106, 118–121; Case v. Phelps, 39 N. Y. 164; Carr v. Breese, 81 N. Y. 584, 588–591; Mullen v. Wilson, 44 Pa. St. 413; 84 Am. Dec. 461; Monroe v. Smith, 79 Pa. St. 459. In Mackay v. Douglas, *supra*, Malins, V. C., after a careful review of the authorities, holds that a voluntary settlement, whereby the settlor takes the bulk of his property out of the reach of his creditors, shortly before engaging in trade of a hazardous character, may be set aside in a suit on behalf of creditors who became such after the settlement, though there were no creditors whose debts arose before the date of the settlement, and though when the settlement was made it was doubtful whether the arrangements under which the settlor was to engage in the business would take effect. When a voluntary settlement is made on the eve of the settlor's engaging in trade, the burden rests upon him of showing that he was in a position to make it. In order to set aside such a settlement, it is not necessary to show that the settlor contemplated becoming actually indebted; it is enough if he contemplated a state of things which might result in insolvency or bankruptcy. The reason for this particular rule is, that the person being about to engage in a hazardous business must be considered as contemplating the probability of becoming unsuccessful and indebted, and as attempting to secure his property against such possible or probable loss; it is in fact an attempt to throw all the hazard of his business upon his expected creditors.

such an extent that he is left actually insolvent, or wholly unable to pay his existing debts, or that it is reasonable to suppose he contemplated his consequent inability to pay, or even that it is reasonably doubtful whether he is able to meet his obligations, then the conveyance will be fraudulent and void as against his subsequent as well as his existing creditors. The inference of a fraudulent intent must always depend upon there being an amount of property remaining after the voluntary conveyance, reasonably sufficient to defray all of the grantor's existing liabilities; and each case must therefore stand upon its own particular circumstances.[4 a] As a direct result from this doctrine, the rule has

[4] Spirett v. Willows, 3 De Gex, J. & S. 293; Ware v. Gardner, L. R. 7 Eq. 317; Crossley v. Elworthy, L. R. 12 Eq. 158; Shand v. Hanley, 71 N. Y. 319; Savage v. Murphy, 34 N. Y. 508; 90 Am. Dec. 733; Phillips v. Wooster, 36 N. Y. 412; Dunlap v. Hawkins, 59 N. Y. 342; Carr v. Breese, 81 N. Y. 584; Jencks v. Alexander, 11 Paige, 619, 623; Bank of United States v. Housman, 6 Paige, 526; Kirksey v. Snedecor, 60 Ala. 192; Lockhard v. Beckley, 10 W. Va. 87; Rose v. Brown, 11 W. Va. 122; Claflin v. Mess, 30 N. J. Eq. 211; Kane v. Roberts, 40 Md. 590; Monroe v. Smith, 79 Pa. St. 459; Ammon's Appeal, 63 Pa. St. 284; Conley v. Bentley, 87 Pa. St. 40; Nichol v. Nichol, 4 Baxt. 145; Churchill v. Wells, 7 Cold. 364. If an express actual intent to hinder or defraud creditors generally is shown, subsequent as well as existing creditors are entitled to impeach the conveyance: Clark v. French, 23 Me. 221; 39 Am. Dec. 618; Marston v. Marston, 54 Me. 476; Wyman v. Brown, 50 Me. 139, 148; Carter v. Grimshaw, 49 N. H. 100; Coolidge v. Melvin, 42 N. H. 510, 533, 534; Smyth v. Carlisle, 17 N. H. 417; 16 N. H. 464; McConihe v. Sawyer, 12 N. H. 396, 403; McLane v. Johnson, 43 Vt. 48; Winchester v. Charter, 102 Mass. 272; 97 Mass. 140; 12 Allen, 606, 610; Livermore v. Boutelle, 11 Gray, 217; 71 Am. Dec. 708; Savage v. Murphy, 8 Bosw. 75; Cramer v. Reford, 17 N. J. Eq. 367; 90 Am. Dec. 594; Mullen v. Wilson, 44 Pa. St. 413; 84 Am. Dec. 461; Moore v. Blondheim, 19 Md. 172; Lowry v. Fisher, 2 Bush, 70; 92 Am. Dec. 475; Nicholas v. Ward, 1 Head, 323; 73 Am. Dec. 177; Horn v. Volcano etc. Co., 13 Cal. 62; 73 Am. Dec. 569; Dewey v. Moyer, 72 N. Y. 70, 76; Day v. Cooley, 118 Mass. 524.

On the other hand, if there is no actual intent to defraud, the mere fact that a voluntary conveyance may be presumptively fraudulent against existing creditors does not render it fraudulent as against subsequent creditors. While a *prima facie* presumption against the validity of the voluntary deed may arise in favor of the grantor's existing creditors, no such presumption

(a) This paragraph of the text is cited in Rudy v. Austin, 56 Ark, 73, 35 Am. St. Rep. 85, 19 S. W. 111.

been well established that a post-nuptial settlement upon a wife or children, even when the settlor is entirely free from debt, must be reasonable in its amount and not disproportioned to his whole property. If the settlement is, as originally it must have been, in the form of property conveyed to trustees for the wife's separate use, courts of equity will not aid her in enforcing it when unreasonably large. If the legal title is conveyed directly to her, there is still danger lest the husband should obtain credit upon his apparent or supposed ownership.[5]

§ 974. **Conveyances in Fraud of Subsequent Purchasers.**— By the statute 27 Eliz., c. 4, made perpetual by 39 Eliz., c. 18, sec. 31, all conveyances of hereditaments for the intent and purpose to deceive purchasers are made void as against them; and the same provisions have been substantially enacted in the United States.[1] The true meaning and inter-

exists on behalf of his subsequent creditors. These latter cannot impeach such a transfer merely because the former can: Howe v. Ward, 4 Greenl. 195; Kendall v. Fitts, 22 N. H. 1, 6; Smith v. Smith, 11 N. H. 80; Parsons v. McKnight, 8 N. H. 35, 37; Carlisle v. Rich, 8 N. H. 44, 50; Converse v. Hartley, 31 Conn. 372, 380; Babcock v. Eckler, 24 N. Y. 623; Baker v. Gilman, 52 Barb. 26; Ward v. Hollins, 14 Md. 158; Enders v. Williams, 1 Met. (Ky.) 346; Todd v. Hartley, 2 Met. (Ky.) 206; Hurdt v. Courtenay, 4 Met. (Ky.) 139; Nicholas v. Ward, 1 Head, 323; 73 Am. Dec. 177; Webb v. Roff, 9 Ohio St. 430; Lyman v. Cessford, 15 Iowa, 229; Fifield v. Gaston, 12 Iowa, 218; Whitescarver v. Bonney, 9 Iowa, 480.

[5] When the deed of gift to the wife is immediately put on record, this is, of course, a fact tending to show good faith; failure to record is a plain badge of fraudulent intent: Carr v. Breese, 81 N. Y. 584, 591 (one half of the husband's property not unreasonable); Babcock v. Ecklor, 24 N. Y. 623 (more than half held not unreasonable); Carpenter v. Roe, 10 N. Y. 227; Wickes v. Clark, 8 Paige, 161; Mellon v. Mulvey, 23 N. J. Eq. 198; Ammon's Appeal, 63 Pa. St. 284.

[1] The English statute provides that all fraudulent, feigned, and covinous conveyances, gifts, grants, charges, uses, and estates of lands, tenements, or hereditaments, made for the purpose to defraud and deceive such persons or bodies as have purchased or shall afterwards purchase, in fee-simple, fee-tail, for life, lives, or years the same estates, or to defraud and deceive such as have purchased or shall purchase any rent, profit, or commodity out of the same, or any part thereof, shall be deemed (only as against the defrauded purchaser having purchased for money or other good consideration, his heirs, administrators, and assigns) to be utterly void.

pretation of this statute were for a considerable period of time unsettled by the English courts. The doubt was, whether it extended to all voluntary conveyances, or whether it avoided only those which are made with a fraudulent intent, and therefore furnished protection only to subsequent *bona fide* purchasers without notice. The rule was finally settled, and still prevails in England, that the statute applies to and avoids all voluntary conveyances as against subsequent purchasers for a valuable consideration, even though such conveyances were made in good faith without any actual fraudulent intent, and though the subsequent purchasers for value had notice thereof.[2] The same interpretation of the statute and the same general doctrine have been accepted by a portion of the American decisions.[3] The current of American authority, however, is opposed to this broad construction, and limits the operation of the statute to prior voluntary conveyances made with a fraudulent intent, and its protection to subsequent purchasers for a valuable consideration and without notice. The doctrine which may properly be called American is as follows: Conveyances are not void under the statute merely because they are voluntary, but because they are fraudulent, and the fraudulent intent may be inferred in the same manner and under the same circumstances as against subsequent creditors. A voluntary gift of property is valid as against sub-

This statute only declared and aided a jurisdiction of equity which existed before it, and which has not been displaced by it: See Perry Herrick v. Attwood, 2 De Gex & J. 21.

2 The English theory is, that the statute conclusively presumes a fraudulent intent when the prior conveyance is voluntary: Pulvertoft v. Pulvertoft, 18 Ves. 84, 86; Buckle v. Mitchell, 18 Ves. 100, 111; Kelson v. Kelson, 10 Hare, 385; Daking v. Whimper, 26 Beav. 568; Perry Herrick v. Attwood, 2 De Gex & J. 21; Doe v. Manning, 9 East, 59; and see Bayspoole v. Collins, L. R. 6 Ch. 228, 232. The subsequent purchaser must be one for a real valuable consideration, and *bona fide*, although notice does not destroy his rights under the statute.

3 Sterry v. Arden, 1 Johns. Ch. 261, 270; 12 Johns. 536; Sexton v. Wheaton, 1 Am. Lead. Cas. 50, 51.

sequent purchasers and all other persons, unless it was fraudulent when executed; and a subsequent conveyance for value is evidence of fraud committed in the former voluntary conveyance, but not conclusive evidence. It results that a voluntary gift made when the grantor is not indebted, in good faith, and without intent to defraud subsequent creditors or purchasers, is valid as against a subsequent purchaser for a valuable consideration with notice.[4] What constitutes a purchase for value without notice, and what is a valuable consideration, in cases arising under this statute, are determined by the rules contained in the preceding section upon that subject. In order that the statute may apply and uphold a subsequent conveyance for value against a prior voluntary conveyance, it is necessary that both the conveyances should come from the same grantor. An heir or devisee cannot, therefore, by a conveyance for value, defeat a voluntary settlement made by his ancestor or testator.[5] What creditors, purchasers, and their representatives are entitled to equitable relief, and what remedies may be obtained by them, are questions which belong to subsequent chapters treating of remedies.

[4] Beal v. Warren, 2 Gray, 447; Sanger v. Eastwood, 19 Wend. 514; Wickes v. Clarke, 8 Paige, 161; Foster v. Walton, 5 Watts, 378; Dougherty v. Jack, 5 Watts, 456; 30 Am. Dec. 335; Lancaster v. Dolan, 1 Rawle, 231; 18 Am. Dec. 625; Mayor v. Williams, 6 Md. 235; Tate v. Liggatt, 2 Leigh, 84; Footman v. Pendergrass, 3 Rich. Eq. 33; Brown v. Burke, 22 Ga. 574; Gardner v. Boothe, 31 Ala. 186; Corprew v. Arthur, 15 Ala. 525; Coppage v. Barnett, 34 Miss. 621; Wells v. Treadwell, 28 Miss. 717; Enders v. Williams, 1 Met. (Ky.) 346; Aiken v. Bruen, 21 Ind. 137; Chaffin v. Kimball, 23 Ill. 36; Gardner v. Cole, 21 Iowa, 205; Prestidge v. Cooper, 54 Miss. 74; Pence v. Croan, 51 Ind. 336; Sexton v. Wheaton, 1 Am. Lead. Cas. 17.

[5] Parker v. Carter, 4 Hare, 400, 409; Lewis v. Rees, 3 Kay & J. 132; and see Sterry v. Arden, 1 Johns. Ch. 261; Anderson v. Green, 7 J. J. Marsh. 448; 23 Am. Dec. 417. For the same reason a *bona fide* purchaser for value and without notice from the prior voluntary grantee would have a title superior to that of a subsequent purchaser from the original grantor.

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